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JUDICIAL EXAMINATION OF DEREGULATION: EXPLORING THE BOUNDARIES OF EXECUTIVE DISCRETION

The American system of government emerged from the conflict between proponents of a strong central government (the Federalists),¹ and advocates of a decentralized system (the Anti-Federalists).² This philosophical debate, which began at the

¹ See THE FEDERALIST No. 11, at 69 (A. Hamilton) (J. Cooke ed. 1961); *id.* No. 78, at 523; W. MURPHY, THE TRIUMPH OF NATIONALISM: STATE SOVEREIGNTY, THE FOUNDING FATHERS AND THE MAKING OF THE CONSTITUTION 14 (1967).

² See W. MURPHY, *supra* note 1, at 14. The Anti-Federalists believed that "democratic" ideals could be better preserved in a decentralized form of government. See L. BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 107 (1978) (protection of individual liberties); C. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 52 (1953) (centralized government grave danger to liberty); ANTI-FEDERALISTS VERSUS FEDERALISTS, SELECTED DOCUMENTS 21-22 (J. Lewis ed. 1961) (central government would result in emergence of ruling class with president as King).

The Federalists and the Anti-Federalists were sharply divided over the degree of sovereignty that the states should surrender to the federal government, and the United States Constitution emerged as the result of a highly complex compromise between these two schools of thought. See C. WARREN, THE MAKING OF THE CONSTITUTION 744-80 (1928); Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism—Past and Present*, 35 VAND. L. REV. 161, 166-69 (1982). It was apparent at the Constitutional Convention of 1787 that the Articles of Confederation provided an inadequate mechanism for governing the nation. See W. GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS 61-64 (1964); Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, in AMERICAN CONSTITUTIONAL HISTORY 1516 (1970). The Federalists asserted that a supreme central government with strong executive and judicial branches was indispensable if the United States was to attain credibility with other nations and protect the individual liberties of its citizens. See W. MURPHY, *supra* note 1, at 14; THE FEDERALIST No. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961); *id.* No. 78, at 523. The Federalists feared that a weak, decentralized government would permanently debilitate the colonies. See W. MURPHY, *supra* note 1, at 31. It was argued that if individual states were allowed substantial dominion over domestic and foreign policy, the peace and security of the nation would be threatened. See THE FEDERALIST No. 11, at 69 (A. Hamilton) (J. Cooke ed. 1961); W. MURPHY, *supra* note 1, at 31; Malone, *Jefferson and the Rights of Man*, in 2 JEFFERSON AND HIS TIME 161 (1951).

The Anti-Federalists, on the other hand, asserted that "democratic" ideals could be best preserved by concentrating governmental power in small communities, thereby making the governing body more accountable for its actions and more responsive to the needs of the populace. See W. MURPHY, *supra* note 1, at 14. There was great concern that a highly centralized government would necessarily lead to an omnipotent ruling class that would inevitably force states to relinquish their sovereignty. See Anonymous, *Essay of an Old Whig*, in 3

Constitutional Convention of 1787,³ has continued to the present.⁴ Indeed, concern over the loss of state autonomy has been expressed by both courts and commentators,⁵ and, during the last two decades, four presidents have attempted to transfer power and responsibility back to state and local governments.⁶

THE COMPLETE ANTI-FEDERALIST 32 (J. Storing ed. 1981); Anonymous, "A Confederation for Purposes Merely National . . ." in 4 THE COMPLETE ANTI-FEDERALIST 6 (J. Storing ed. 1981); *Speeches of Patrick Henry in the Virginia State Ratifying Convention*, in 5 THE COMPLETE ANTI-FEDERALIST 222-224 (J. Storing ed. 1981).

³ See generally D. SMITH, *THE CONVENTION AND THE CONSTITUTION: THE POLITICAL IDEAS OF THE FOUNDING FATHERS* 36-37 (1965) (Federalists enjoyed widespread support at Convention until vigorous backlash of anti-federalist sentiment surfaced resulting in the Connecticut Compromise); 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 449 (M. Farrand ed. 1966) (weakened central government proposed to protect individual states' commercial interest).

⁴ See D. SMITH, *supra* note 3, at 53. The controversy between the Federalist and Anti-Federalist positions was not resolved by the compromise reached in 1787, and clashes between the proponents of national power and the defenders of state sovereignty continue to occur. Compare *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (federal interference with "integral governmental functions" of a state will not be tolerated) with *Cousins v. Wigoda*, 419 U.S. 477, 491-92 (1975) (Rehnquist, J., concurring) (state interest in preserving integrity of its elections outweighed by national interest in assuring equitable nominating process).

⁵ See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (federal government must not usurp integral state functions); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979) (ability of federal government to preserve state sovereignty is questionable); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1700-01 (1981) (courts should set more appropriate standards for limiting purview of national power). The recent re-evaluation of the role of the federal government has been prompted by a belief that the federal bureaucracy has usurped areas that can be managed more efficiently on a local level. See, e.g., Freilich, Frye, & Carpenter, *The New Federalism—American Urban Policy in the 1980s: Trends and Directions in Urban, State and Local Government Law*, 15 URB. LAW. 159, 162-63 (1983) (proposals to transfer funding and decisionmaking authority to states based on the fact that federal programs and regulations impede services and stifle creativity at local level); Renz, *The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?*, 43 MONT. L. REV. 197, 207-16 (1982) (federal environmental legislation has resulted in usurpation of traditional state police powers).

⁶ See S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 45 (1983); Amyx, *New Federalism: How is it Working?*, 15 WASHBURN L.J. 229, 229-31 (1976); Lamb, "New Federalism" and *Civil Rights*, 9 U. TOL. L. REV. 816, 819-20 (1978); see also Susskind, *Revenue Sharing and the Lessons of the New Federalism*, 8 URB. L. ANN. 33, 33 (1974) (discussing recent efforts by Congress to grant minimally restricted aid to states and localities). The Nixon Administration initiated a "New Federalism" program in 1972 that was designed to decentralize the decisionmaking process for domestic assistance programs. See Amyx, *supra*, at 229, 231; Susskind, *supra*, at 33. President Ford sought to continue the general revenue sharing program implemented by President Nixon past its termination date of December 31, 1976. Amyx, *supra*, at 236. Strong opposition from Democrats in Congress and various civil rights and low income groups, however, forestalled the continuation of the program. *Id.* In addition, Presidents Nixon and Ford both attempted to encourage better

President Ronald Reagan, the most vigorous presidential proponent of this trend, has pledged to restore state autonomy under a program labeled "New Federalism,"⁷ and in so doing has reiterated many of the arguments advanced during the original constitutional debates by the advocates of state autonomy.⁸ President Reagan's New Federalism is aimed at making the states as self-

working relationships with state and local governments through the use of Federal Regional Councils (FRCs). See Lamb, *supra*, at 819-20. The FRCs worked closely with various state agencies to ensure that services and financial assistance would be allocated to the most deserving areas. See *id.* at 820-21. The Carter Administration took yet a different approach to deregulation. See S. TOLCHIN & M. TOLCHIN, *supra*, at 45; see also *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981) (President Carter's supervision of administrative agencies deemed perfectly in accord with intent of framers). See generally O'Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VAND. L. REV. 509, 515-16 (1984) (discussion of Carter Administration's deregulatory activities). For a discussion of the Reagan Administration's approach to deregulation, see *infra* notes 7-21 and accompanying text.

⁷ See President Reagan's Inaugural Address, PUB. PAPERS 1 (Jan. 20, 1981) [hereinafter cited as Inaugural Address]. In his Inaugural Address, President Reagan emphasized that the purview of federal power had become too extensive. See *id.* at 2.

President Reagan articulated some of the elements of his New Federalism program in his State of the Union Message on January 26, 1982. See N.Y. Times, Jan. 27, 1982, at A18, col. 1. Under this program, the federal government was to assume full responsibility for the cost of the Medicaid program and the states were to bear the entire expense of funding "more than 40" programs, including the Aid to Families with Dependent Children (AFDC) and food stamp programs. See *id.* At first, the state costs for these programs were to be satisfied by existing federal excise taxes deposited in a "grassroots trust fund." See N.Y. Times, Jan. 29, 1982, at A18, col. 1. The states could then elect to receive federal grants from these trust funds to subsidize state expenditures for education, transportation, and social services between 1984 and 1988. See *id.* Moreover, any state could choose to abstain from participation in federal grant programs and still retain the right to obtain trust fund accumulations for state use. See *id.* at col. 3. Starting in fiscal year 1988, the federal excise taxes were to be reduced by 25% a year for a period of 4 years. See *id.* When these excise taxes were eventually terminated, the states could either levy taxes to make up for the lost federal contributions or abort the programs altogether. *Id.* President Reagan was unable to implement this policy, however, due to vigorous state opposition to the shift in fiscal responsibility for Medicaid and AFDC programs. See N.Y. Times, August 10, 1982, at B7, col. 5. For a general discussion of the elements of New Federalism see Peterson, *The State and Local Sector*, in THE REAGAN EXPERIMENT 157-217 (1982).

⁸ See, e.g., Inaugural Address, *supra* note 7, at 2; Address at Commencement Exercises at the University of Notre Dame, PUB. PAPERS 431, 433 (May 17, 1981). In a speech at Notre Dame University, President Reagan stated that "[f]ederalism, with its built in checks and balances, has been distorted. Central government has usurped powers that properly belong to local and State governments. And in so doing . . . [the] central government has begun to fail to do the things that are truly the responsibility of a central government." *Id.* Many of President Reagan's observations on a centralized government resemble predictions made by early American statesmen who feared that a strong national government would usurp state sovereignty. See, e.g., C. PATTERSON, *supra* note 2, at 110-11 (centralized government presents great danger to state authority and personal liberty).

sufficient as possible.⁹ By reallocating substantial amounts of governmental responsibility and allowing states and municipalities the freedom to experiment with a wide range of social and economic programs,¹⁰ New Federalists have sought to reverse the alleged federal usurpation of governmental control that has occurred during former administrations.¹¹ The Reagan Administration, moreover, has adopted policies that emphasize and encourage federal deregulation¹² by focusing on the removal of regulations that allegedly

⁹ See Palmer & Sawhill, *Perspectives on the Reagan Experiment*, in *THE REAGAN EXPERIMENT 1-2* (1982). During the 1970's, many federal assistance programs flowed directly to cities, counties, and other local government entities. See *id.* at 11. The Reagan Administration, however, chose to deal principally with the states. *Id.* at 10. President Reagan's intention was to make "[f]ederal, state, and local governments . . . almost fully responsible for financing their own services." *Id.* at 12.

¹⁰ See WHITE HOUSE REPORT ON THE PROGRAM FOR ECONOMIC RECOVERY, PUB. PAPERS 116 (Feb. 18, 1981) [hereinafter cited as PROGRAM FOR ECONOMIC RECOVERY]. President Reagan proposed reducing the budget in nine areas, with the effect of reducing social programs and shifting the burden of these programs to either the states or the direct beneficiaries. *Id.* at 120. In addition, some programs were to be entirely eliminated. *Id.*; see REAGAN'S FIRST YEAR 58-59 (M. McNeil ed. 1982). The CETA job program was eliminated, Pell grants, which subsidized education for low-income students, were reduced, and school feeding programs were severely curtailed. See REAGAN'S FIRST YEAR, *supra*, at 58-59. While the private sector would initially bear some of the costs of this reduction, the belief was that if the states stepped in to fill the void left by federal withdrawal, all the above-mentioned programs would effectively shift to state control. See Peterson, *supra* note 7, at 168-69.

¹¹ See *supra* text accompanying notes 5-6; see also J. GUNTHER, ROOSEVELT IN RETROSPECT 279 (1950). President Roosevelt's New Deal agencies were the source of much of the regulation that developed on the federal level. J. GUNTHER, *supra*, at 279. In the famous Hundred Days following President Roosevelt's inauguration the balance of power was shifted radically from the states and private sector to the federal government. *Id.* at 279-80. The Agricultural Adjustment Administration (AAA), Securities Exchange Commission (SEC), Home Owners Loan Corporation (HOLC), and the National Industrial Recovery Act, which produced the NRA (a precursor to the NLRA), all emerged from this substantial reallocation of power. *Id.*; cf. J. PATTERSON, THE NEW DEAL AND THE STATES 50 (1969) (Roosevelt Administration fostered the "most rapid extension of federal welfare in American history"). The Federal Emergency Relief Administration (FERA) provided unemployment assistance payments that were matched by state funds on a three-to-one ratio. J. PATTERSON, *supra*, at 50.

Twenty-five years later, the Kennedy Administration continued to espouse the New Deal philosophy that the federal government should assume the responsibility for solving the country's most basic problems. See J. KENNEDY, THE BURDEN AND THE GLORY 215, 220 (1963) (potential problem of unemployment for baby-boom generation must be solved by government job programs).

¹² S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 21; see Eads & Fix, *Regulatory Policy*, in *THE REAGAN EXPERIMENT 137* (1982); O'Reilly, *supra* note 6, at 514-15; see also Wash. Post, Feb. 21, 1981, at A1, col. 4 (agency officials compiled list of major health, safety, environmental, and social regulations they will alter). The Reagan Administration's drive to deregulate began with an immediate 60-day freeze on the promulgation of regulations, see Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 (1982), and the formation

have curtailed the creativity of industry.¹³

In addition, the Reagan Administration has restructured much of the federal grant program by consolidating numerous categorical grants into block grants.¹⁴ Previously, most federal subsidies were disbursed through categorical grants accompanied by administrative requirements designed to implement federal policies.¹⁵ Block

of the Presidential Task Force on Regulatory Relief, *see id.* The Task Force was charged with the duty of targeting agencies and programs in need of deregulation. *See id.* Agencies charged with the responsibility for administering federal regulations experienced sharp budget cuts and personnel reductions. *See* REGULATION: PROCESS AND POLITICS 68-69 (M. Gottron ed. 1982). To discourage litigation, encourage voluntary compliance with agency determinations, and transfer the burden of the regulatory enforcement to the states, the Administration initiated drastic reductions in agency enforcement activities. *See* Eads & Fix, *supra*, at 140-41. Many social, economic, and environmental regulations affecting state and local governments were eliminated. *See id.* at 141-42; REGULATION: PROCESS AND POLITICS, *supra*, at 69. Nine specific deregulatory guidelines were proposed by President Reagan:

- Preserve "the social safety net."
- Revise entitlements to eliminate unintended benefits.
- Reduce subsidies to middle- and upper-income groups.
- Impose fiscal restraint on other national interest programs.
- Recover costs that can be clearly allocated to users.
- Stretch-out and retarget public sector capital investment programs.
- Reduce overhead and personnel costs of the Federal Government.
- Apply sound economic criteria to subsidy programs.
- Consolidate categorical grant programs into block grants.

PROGRAM FOR ECONOMIC RECOVERY, *supra* note 10, at 120; *see also* FEDERALISM: THE FIRST 10 MONTHS: A REPORT FROM THE PRESIDENT 7 (1981) (local levels of government would be permitted to establish own regulatory methods); G. HALE & M. PALLEY, THE POLITICS OF FEDERAL GRANTS 101 (1981) (federal agencies request unnecessary information and burdensome, overlapping reports); Interview with Reporters on Federalism, PUB. PAPERS 1077 (Nov. 19, 1981) (federal government has become involved in areas never before deemed its province). Responding to a request for examples of appropriate federal and state regulations, President Reagan cited education and welfare as examples of federal regulation stifling the ability of the states to perform functions that can be more efficiently executed on a local level. Interview with Reporters in Federalism, PUB. PAPERS 1077 (Nov. 19, 1981).

¹³ *See* S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 20-21. It has been suggested that deregulation has increased the level of commercial productivity, *see Deregulating America*, BUS. WK., Nov. 28, 1983, at 80, col. 1, and has, in effect, compelled business management to focus its attention on market needs instead of federal regulations, *see* Robertson, Ward & Caldwell, *Deregulation: Surviving the Transition*, HARV. BUS. REV. July-Aug. 1982 at 20.

¹⁴ *See* Palmer & Sawhill, *supra* note 9, at 12.

¹⁵ *See* C. BARFIELD, RETHINKING FEDERALISM: BLOCK GRANTS AND FEDERAL, STATE AND LOCAL RESPONSIBILITIES 1 (1981); Stenberg, *Federalism in Transition: 1959-79*, reprinted in "The Future of Federalism in the 1980's," REPORT AND PAPERS FROM THE CONFERENCE ON THE FUTURE OF FEDERALISM 30 (Alexandria, Va. July 25-26, 1980). The regulations accompanying grants often imposed heavy burdens upon the accepting states, which frequently resulted in states refusing to accept the funds to avoid regulatory compliance. *See* Cappalli, *Mandates Attached to Federal Grants: Sweet and Sour Federalism*, 13 URB. LAW. 143, 144-45 (1981) (grant policies in combination are having serious detrimental effect); Erwin, *Federalism and Federal Grants in Aid*, 43 N.C.L. REV. 487, 495 (1964-65) (fund-matching re-

grants, on the other hand, are dispersed as lump-sum payments that permit state governments to determine how to allocate the funds to specific facilities and programs.¹⁶

New Federalism's emphasis on deregulation, as directed at federal agencies, is aimed at both existing and proposed regulations.¹⁷ The major cause of this curtailment of regulatory activity is Executive Order 12,291,¹⁸ under which agencies are effectively compelled to send regulations, finalized drafts of rules, and regulatory impact analyses to the Office of Management and Budget (OMB).¹⁹ The OMB has been granted the power to review the

quirements often draw revenue away from important programs); Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 610 (1972) (federal regulations have been criticized for improperly intruding on grant recipients); Note, *supra* note 5, at 1695 (conditional grants impact on traditional areas of state power).

¹⁶ See G. HALE & M. PALLEY, *supra* note 12, at 109; U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *BLOCK GRANTS: A COMPARATIVE ANALYSIS 6* (Washington, D.C. U.S. Government Printing Office 1979); *FEDERALISM: THE FIRST 10 MONTHS: A REPORT FROM THE PRESIDENT*, *supra* note 12, at 13. It should be noted that all federal funding for block-grant-subsidized programs eventually will be eliminated. See N.Y. Times, Aug. 9, 1981 at A10, col. 1. Whether the states will be able to bear the costs of these programs remains to be seen. Compare Peterson, *supra* note 7, at 179 (Urban Institute survey indicates most states will be able to replace federal funding lost to Reagan budget cuts) with Muller, *Regional Impacts*, in *THE REAGAN EXPERIMENT* 457 (1982) ("[o]n the whole, President Reagan's policies will widen economic and fiscal disparities between wealthy and growing states, on the one hand, and less affluent and economically vital states, on the other hand") and Comment, *Passing the Bucks: Procedural Protections Under Federal Block Grants*, 18 HARV. C.R.-C.L. L. REV. 231, 232 (1983) (block grants may have devastating effects on poor since funding for relief programs was cut and states will not likely be able to supplement lost revenue).

¹⁷ See PROGRAM FOR ECONOMIC RECOVERY, *supra* note 10, at 128. "Future regulatory reform efforts will be directed not only at proposed regulations, but also at existing regulations and regulatory statutes that are particularly burdensome." *Id.*; see also S. TOLCHIN & M. TOLCHIN *supra* note 6, at 41 ("Reagan appointees, who shared their President's commitment to reduce regulatory burden . . . did not hesitate to quash regulations despite professional staff advice, or the number of years it took to develop those rules"); O'Reilly, *supra* note 6, at 514-16 (Reagan's approach to deregulation was blatantly political; previous administrations did regulate but stayed within economic sphere, avoiding health, environmental, and social categories).

¹⁸ Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1982).

¹⁹ See *id.* While the Executive Branch cannot legally force administrative agencies to follow the dictates of Executive Order 12,291, the fact that the President can remove those agency heads who fail to comply with policy directives virtually assures agency compliance. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:40, at 150 (Supp. 1982); see *infra* note 30 and accompanying text.

Those agencies that have chosen to adhere to Executive Order 12,291 are required to submit a regulatory impact analysis for all major regulations, and were directed to apply a cost-benefit analysis to the rulemaking process. See Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 (1982). In his prefatory remarks, President Reagan de-

findings of the agency to determine whether further investigation, subsequent revision, or a total rescission of existing rules and regulations is warranted.²⁰ The likelihood of compliance with Executive Order 12,291 is increased by President Reagan's appointment of agency heads who are sympathetic to the needs of industry.²¹

One of the goals of New Federalism—to increase the amount of responsibility assumed by state governments²²—raises a number of questions requiring judicial resolution.²³ In addition, deregula-

clared that the purpose of the order was "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations . . ." *Id.* "The power to review [agency regulations] . . . is exercised by . . . the Office of Management and Budget [(OMB)], under the supervision of the Director, subject to the direction of [a] Task Force . . . headed by the Vice-President and composed mainly of cabinet officers." K. DAVIS, *supra* note 19, § 6.40, at 147.

²⁰ See 46 Fed. Reg. 13,193 § 3(f) (1-2) (1981); REGULATION: PROCESS AND POLITICS, *supra* note 12, at 67.

²¹ See S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 86; U.S. NEWS & WORLD REP., Sept. 26, 1983, at 51-53. The appointment of key personnel devoted to the Reagan philosophy of "getting the government off the backs of the people" is an essential component of the Reagan Administration's regulatory policy. See S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 41. Many of the Reagan appointees have extensive private-sector experience in combating the efforts of regulatory agencies. See *id.* at 97. For example, Thorne Auchter, current head of the Occupational Safety and Health Administration (OSHA), operated a construction company that was cited for numerous OSHA violations. See *id.*; U.S. NEWS & WORLD REP., Sept. 23, 1983, at 53. Attempting to achieve deregulation by changing the supervisory personnel rather than the controlling statute increases the temptation for an aggressive administrator to overstep his legal bounds. See Eads & Fix, *supra* note 12, at 148.

²² See Peterson, *supra* note 7, at 159. The Reagan Administration's regulatory policy is based, in part, upon the belief that program administration is more cost-effective at the lower levels of government. See Eads & Fix, *supra* note 12, at 141. With a sharp decrease in federal regulations, the states have been left to fill the void in the areas of social and economic regulation. See REGULATION: PROCESS AND POLITICS, *supra* note 12, at 69. Despite the proposed transfer of federal funds to the states, there has been concern that state and local governments may not possess the resources required to fund expensive regulatory programs. *Id.* at 68; see, e.g., S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 254-55 (inability of states to handle financial burden has resulted in drastic cuts in state environmental programs); see also *supra* note 16.

²³ See, e.g., *infra* notes 52-54 and accompanying text. Courts have questioned the methods used by the Reagan Administration in its efforts to deregulate. See, e.g. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 816-17 (D.C. Cir. 1983) (Secretary of Labor's initiative to rescind longstanding rules prohibiting working at home without examining alternative proposals was "antithetical to reasoned decisionmaking"); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 710 F.2d 842, 846-47 (D.C. Cir. 1983). In *Center for Auto Safety*, the Reagan Administration's version of the National Highway Transportation Safety Administration rescinded the Carter Administration's policy to call for public hearings on fuel efficiency. See *id.* at 844-45. The Court of Appeals dismissed the action on the ground of ripeness, but noted that the change appeared to conflict with congressional mandates. *Id.* at 846-47 (dictum).

tion creates difficulties for courts that are called upon to review its legality while avoiding unnecessary interference with executive discretion²⁴ and without abandoning jurisdictional limitations.²⁵ This Note will examine executive policy decisions underlying the Reagan Administration's deregulatory activities and will suggest reforming the deregulatory process to provide a more equitable method for restoring state sovereignty and economic independence. In addition, the Note will explore the substantive and procedural due process ramifications of federal deregulation.

REVIEWABILITY OF EXECUTIVE POLICY DECISIONS

Many federal regulations promulgated over the past one hundred years have emerged from a hostile and uncompromising exchange between administrators of federal agencies and their respective charges.²⁶ While deregulation arguably has brought about substantial improvements,²⁷ the methods employed to implement this program raise significant issues concerning the purview of executive power.²⁸

President Reagan has obtained unprecedented control over the federal rulemaking process through the issuance of Executive

²⁴ Cf. *FTC v. Mandel Bros.*, 359 U.S. 385, 392-93 (1959) (proper scope of review is "to determine if the trier of fact has exercised "allowable discretion"); *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1054-60 (5th Cir. 1971) (great weight given to longstanding interpretation by executive of authority of governor of the canal zone); *Department of Agriculture v. Willey*, 275 F.2d 264, 272 (8th Cir. 1960) ("administrative construction of an Act is entitled to great weight").

²⁵ See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546-47 (1978) (judiciary may not impose hybrid rulemaking requirements); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151-12 (1970) (standing requirements); see also *Myers v. United States*, 272 U.S. 52, 116-18 (1926) (separation of powers doctrine mandates that Congress cannot force President to reinstate cabinet officer).

²⁶ See S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 17. Federal regulatory activity has increased at an incredible rate since the late 1880's, in part because of necessity and in part because the public, industry, and interest groups have demanded it. See F. HEFFRON & N. McFEELY, *THE ADMINISTRATIVE REGULATORY PROCESS* 3 (1983). Unfortunately, it has been suggested that many of the regulatory requirements imposed by administrative agencies have become so onerous that, in the last three decades, expansion and creativity have been greatly curtailed.

²⁷ See, e.g., *Deregulating America*, *Bus. Wk.*, Nov. 28, 1983 at 81, cols. 1-3 (long-distance air fares, trucking rates, cost of phones, cost of buying stock from brokers, and mortgage rates have decreased). The elimination of certain federal regulations has not only revitalized several American industries, but also has improved the nation's economic forecast. See *id.* at 80, col. 1.

²⁸ See *infra* notes 30-64.

Order 12,291, which provides for substantive review of agency regulations by the Office of Management and Budget.²⁹ Although, in theory, this order does not transfer rulemaking power to the President or the OMB, such is its practical effect.³⁰ While courts have recognized the validity and enforceability of executive orders,³¹ such orders appear in certain respects to be incompatible with the separation of powers doctrine.³² In addition, a President's percep-

²⁹ See *supra* note 19 and accompanying text; K. DAVIS, *supra* note 19, § 6:40, at 149-51; S. TOLCHIN & M. TOLCHIN, *supra* note 6, at 127. President Reagan's regulatory involvement exceeds that of President Carter. See K. DAVIS, *supra* note 19, § 6:40, at 149. In addition to creating regulatory organizations to coordinate rulemaking and to supervise regulatory analysis, President Carter actively participated in the administrative rulemaking procedure. *Id.*; see also *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981) (deference given to President Carter's participation in rulemaking procedure of executive agency validated). Relying upon the *Sierra Club* holding, the Reagan Administration undertook an extensive program of Presidential intervention in agency rulemaking by using the OMB as a regulatory clearinghouse. See *Wash. Post*, July 29, 1981, at A17, col. 1.

³⁰ K. DAVIS, *supra* note 19, § 6:40, at 150 (citing § 3(f)(3) of the Executive Order ("[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law"). While the President cannot actually compel an agency to transfer rulemaking power to another body, any cabinet officer or policymaking subordinate who does not comply with the order risks removal from office. *Id.* (citing *Myers v. United States*, 272 U.S. 52 (1926)).

³¹ See, e.g., *Moehl v. E.I. Du Pont De Nemours & Co.*, 84 F. Supp. 427, 431 (N.D. Ill. 1947) (properly promulgated executive orders have force of law).

³² Chemeninsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 891 & n.150 (1983); Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 842-43 (1981); see also Comment, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 711-12 (1972); Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 117-18 (1964).

While it has been recognized that the president can play an important and necessary role in the formation of agency policy, see *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981), presidential directives cannot properly induce agencies to ignore legislative priorities or avoid statutory mandates, see, e.g., *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 828 (D.C. Cir. 1983) (administrative agencies must implement statutes in a rational manner because they are the products of democratic decisionmaking); *National Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 765-67 (3d Cir. 1982) (adherence to Executive Order held not justification for failure to comply with the APA); O'Reilly, *supra* note 6, at 525 n.99 (agencies are subject to judicial review and should act pursuant to legislative intent and not political motivation); Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 679 (1983) (agencies ought not to rely on Presidential acts that are contrary to Congressional preference); see H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 153 (1962) (Presidential involvement in regulatory process highly questionable).

Although the *Sierra Club* and *Donovan* decisions may themselves be somewhat violative of the separation of powers doctrine since "the Constitution does not authorize a federal court to interfere in [a] policy decision of another branch of government if that policy is rationally related to a legitimate governmental purpose," *Johnson v. Smith*, 696 F.2d 1334, 1338 (11th Cir. 1983) (quoting *New York Transit Auth. v. Beazer*, 440 U.S. 568, 594 (1976)),

tion of "national policy" is likely to be more one-sided than is a policy set by compromise reached through the legislative process.³³

It is submitted that the most disturbing aspect of Executive Order 12,291 is its apparent incompatibility with sections 553(c) and 706(2)(A) of the Federal Administrative Procedure Act (APA).³⁴ As has been noted, agencies complying with Executive Order 12,291 must send all proposed rules, final rules, and regulatory impact analyses to OMB.³⁵ Although a rulemaking agency is compelled by section 553(c) of the APA to receive evidence from

executive officials are, nonetheless, required to remain within constitutional boundaries, *see* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793 (D.C. Cir. 1971). The requirement that executive action conform to the Constitution applies to the President. *See* United States v. Nixon, 418 U.S. 683, 707 (1974); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (exertions of presidential power contrary to express or implied will of Congress will be closely examined for constitutional improprieties).

When a President issues an order that is inconsistent with a federal statute or congressional intent, his power is at its lowest level and the order is valid only if congressional action is constitutionally barred. *See id.* (Jackson, J., concurring). *Compare* Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (as creator of administrative agencies, Congress can forbid President from removing presidential appointee for reasons other than those delineated by statute) *with* Myers v. United States, 272 U.S. 52, 176 (1926) (President's power to remove officer from executive agency cannot be denied by Congress).

³³ *See* Note, *supra* note 32, at 641, 679. Notwithstanding statutory and constitutional limitations, executive controls tend to be unresponsive to local concerns since the President is primarily responsible for addressing national concerns. *See id.* at 641 & n.98. In addition, since the President is but one of several voices that shape national policy, presidential policy alone is not indicative of the national will. *Id.* at 679; *cf.* INS v. Chadha, 462 U.S. 819, —, 103 S. Ct. 2764, 2782 (1983) (Framers intended lawmaking power to be shared by Congress and the President).

³⁴ *See* 5 U.S.C. § 553(c) (1982), § 706(2)(A). Section 553(c) of the Administrative Procedure Act (APA) provides in pertinent part:

(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.

Id. § 553(c). Section 706 of the APA provides in pertinent part:

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—

(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.

Id. § 706.

³⁵ Exec. Order No. 12,291 § 3(c), 3 C.F.R. 127, 129-30 (1982), *reprinted in* 5 U.S.C. § 601 (1982); *see supra* note 19 and accompanying text.

all affected parties³⁶ and to weigh this evidence in its final determination,³⁷ the OMB is under no such obligation under the Executive Order.³⁸ Furthermore, it is submitted that the highly secretive decisionmaking process used by the OMB in reviewing proposed regulations³⁹ is hardly consistent with a concept of open government.

Under section 706(2)(A) of the APA, agency rulemaking will be deemed unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁰ Agency decisions that are not supported by substantial evidence or are not in accordance with statutory requirements are generally deemed violative of these provisions of the APA.⁴¹ In *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*,⁴² for example, the United States Supreme Court deemed

³⁶ See 5 U.S.C. § 553(c) (1982).

³⁷ See *id.*

³⁸ See K. DAVIS, *supra* note 19, § 6:40, at 152-53. As Professor Davis has indicated, Executive Order 12,291, in its original form, would increase the risk that relevant factual information would not be given due consideration. See *id.* While most presidents have maintained some level of control over the administrative process, the manner and scope of Presidential intervention should be subject to the limitations of § 553. *Id.* Under the original version, once the final rule of the agency is turned over to OMB, "it can be altered by someone who (a) is not required to consider the written comments, (b) does not in fact ordinarily consider them, (c) considers other facts and influences that may be kept secret, and (d) does in fact keep secret the new facts and influences." K. DAVIS, *supra* note 19, § 6:40, at 153.

³⁹ K. DAVIS, *supra* note 19, § 6:40, at 153 (OMB reluctant to go before congressional investigative committee). OMB scrutiny is contrary to judicial precedent requiring that rules must be rational in light of the facts and ideas presented to the agency. K. DAVIS, *supra* note 19, § 6:40, at 156-59; see, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1976) (court should determine if agency decision is based on "a consideration of relevant factors"), *cert. denied*, 426 U.S. 941 (1976). OMB and Task Force decisions would seem to violate this precedent, since both groups are authorized to act without revealing any of the information upon which their decisions are based. K. DAVIS, *supra* note 19, § 6:40, at 153; see also Wash. Post, July 29, 1981, at A17, col. 3 (OMB criticized as "backdoor" policy maker).

⁴⁰ 5 U.S.C. § 706(2)(A) (1982).

⁴¹ See, e.g., *Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982) (notice and opportunity to be heard expressly required by APA when revoking a rule), *aff'd*, 103 S. Ct. 3556 (1983); *Wawszkiewicz v. Department of Treasury*, 670 F.2d 296, 301 (D.C. Cir. 1981) (*per curiam*) (when reviewing under the "arbitrary and capricious" standard, court must consider "relevant factors") (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.) (§ 706(2)(A) requires a "rational connection between facts found and choices made") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)), *cert. denied*, 434 U.S. 829 (1977).

⁴² 463 U.S. 29, 103 S. Ct. 2856 (1983).

agency rescission of existing safety regulations "arbitrary and capricious" because the agency failed to supply a sufficient explanation for the revocation.⁴³ The Court stated that an agency must scrutinize all pertinent data and supply a reasoned analysis for its decision.⁴⁴ Justice White determined that the agency had improperly relied "on factors which Congress had not intended it to consider, entirely fail[ed] to consider an important aspect of the problem, and offer[ed] an explanation for its decision that [ran] counter to the evidence before the agency."⁴⁵

Similarly, in *International Ladies' Garment Workers' Union v. Donovan*,⁴⁶ the Court of Appeals for the District of Columbia Circuit held that the Secretary of Labor's decision to remove restrictions on the employment of homeworkers in the textile industry was arbitrary and capricious.⁴⁷ The court admonished the Reagan Administration for its failure to follow the congressional intent behind the Fair Labor Standards Act.⁴⁸ It is submitted that the holdings in *Motor Vehicle Manufacturer's Association* and *International Ladies' Garment Workers' Union* demonstrate the continued need for judicial review of agency rule rescissions, especially when those rescissions are the product of unchecked oversight by the OMB acting in its capacity as a regulatory clearinghouse, to ensure that agency responsibilities are not being treated in an arbi-

⁴³ See *id.* at 2862. In *State Farm*, the National Highway Transportation Safety Administration (NHTSA) rescinded a passive restraint requirement for automobiles, based upon a determination that such devices were no longer feasible. *Id.* at 2864. The Court refused to accept the lack of feasibility as an adequate explanation for the rescission. See *id.*

⁴⁴ *Id.* at 2866-67.

⁴⁵ *Id.* at 2867.

⁴⁶ 722 F.2d 795 (D.C. Cir. 1983).

⁴⁷ *Id.* at 815.

⁴⁸ *Id.* at 828. Judge Edwards was highly critical of the Reagan Administration in *Donovan*, stating:

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 also products of democratic decisionmaking. 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.

Id. (citing with approval *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, ___ 103 S. Ct. 2856, 2875 (1983)); see also *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983) (criticizing FCC for overly aggressive deregulation). See generally N.Y. Times, Nov. 30, 1983, col. 2 (*International Ladies' Garment Workers' Union* symbolic confrontation between Reagan Administration deregulators and New Deal regulators).

trary and capricious manner.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

State and federal governmental activities are subject to due process review⁴⁹ that must be both procedural—to guarantee a fair decisionmaking process⁵⁰—and substantive—to ensure that legislative enactments are consistent with the Constitution.⁵¹ It is suggested that the regulatory changes made pursuant to the New Federalism present issues of both substantive and procedural due process whenever a liberty or property interest is involved.⁵² The

⁴⁹ U.S. CONST. amends. V, XIV § 1. The Due process Clause of the fifth amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.* The fifth amendment due process provision has been held applicable to the federal government only. *See Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). Due process limitations are imposed upon the states by the fourteenth amendment. *See Ballew v. Georgia*, 435 U.S. 223, 229 (1977); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); U.S. CONST. amend. XIV.

⁵⁰ Procedural due process assures that a fair decisionmaking process will be employed before the government engages in any activity restricting a person's life, liberty or property. *See, e.g., Schall v. Martin*, 104 S. Ct. 2403 (1984). (juveniles entitled to procedural and substantive due process); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1971) (procedural due process protects life, liberty, or property); *Bell v. Burson*, 402 U.S. 535, 542 (1970) (procedural due process requires state to provide a forum before depriving plaintiff of driver's license).

Procedural due process requires a consideration of three factors: first, the individual liberty or property interest at issue; second, the extent to which additional or alternative procedural safeguards would reduce the possibility of erroneous decisionmaking; and third, the governmental interest in maintaining the current procedures, including the financial and administrative burdens that alternative standards would generate. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1975). The criteria set forth in *Mathews* have received uniform recognition. *See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* 560 (2d ed. 1983).

⁵¹ The Supreme Court has articulated several standards to review whether a statute or regulation complies substantively with the Due Process Clause. *See J. NOWAK, R. ROTUNDA & J. YOUNG, supra* note 50, at 449-51. If an enactment has a debilitating effect on an individual's fundamental rights, the government must show that the enactment is necessitated by a compelling state interest. *See Schall v. Martin*, 104 S. Ct. 2403 (1984) (right to adjudication of guilt before punishment). Conversely, legislative pronouncements that infringe on non-fundamental rights will be upheld so long as the court can find that the enactment is rationally related to a legitimate government interest. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 381 (1937); *see also Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1176 (5th Cir. 1979) (regulation does not violate substantive due process if it is rationally related to a legitimate government end). Yet another standard, the "middle-tier test," compels the government in certain circumstances to be substantially related to achievement of "important governmental objectives." *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975); *Reed v. Reed*, 404 U.S. 71, 77 (1971).

⁵² *See J. NOWAK, R. ROTUNDA, & J. YOUNG, supra* note 50, at 460. *Id.* The concept of property under the due process clause is quite broad. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (extending concept of "property" to public assistance payments). *Goldberg* con-

current block grant program, for example, has been criticized for its alleged failure to provide sufficient procedural safeguards to individuals who previously had enjoyed substantial federal protection under the categorical grant program.⁵³ In addition, it is suggested that deregulation has been accomplished through procedural improprieties, manifested by reluctance on the part of

cerned the distribution of Aid to Families with Dependent Children (AFDC). *Id.* at 255-56. The *Goldberg* Court held that the entitlement to receive AFDC payments was "property," and, therefore, recipients must be afforded a hearing before benefits can be terminated. *Id.* at 264. AFDC and other similar entitlements are now covered by federal block grants. Comment, *supra* note 16, at 236. Since statutory entitlements include "many of the core values of unqualified liberty," the government cannot withdraw such opportunities without complying with the requirements of procedural due process. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 516-17 (1978) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)); see also O'Reilly, *supra* note 6, at 552 (adjudication of life sustaining benefit entitlements requires due process safeguards).

While some commentators note that the Due Process Clause usually has not been applied to agency acts, see O'Reilly, *supra* note 6, at 552, and, thus, agency deprivation of due process is not a basis for judicial review, Note, *supra* note 32, at 632, it is submitted that disregard for statutory mandates warrants due process review if an agency fails to provide a fair decisionmaking process to an individual.

⁵³ See Comment, *supra* note 16, at 232-33. The public hearing requirements of certain block grants are not well structured, and many states have combined the hearings for block grant allocation plans with hearings designed to determine appropriation of state monies. *Id.* at 240. Open hearings are inhibited further by the absence of restrictions on the state's methods of data collection and fund allocation. *Id.* at 241. Moreover, courts will not impose higher standards on an administrative agency than are contained in the enabling statute of that agency. *Id.*; cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (courts usually are precluded from forcing agencies to employ procedural requirements beyond those formulated by Congress).

While an individual may file a complaint alleging a failure to comply with block grant legislation, the only clear remedy available is to deny the state access to the federal subsidies. Comment, *supra* note 16, at 245 (citing 45 C.F.R. § 96.51 (1982)). The injured beneficiary has no direct relief. Comment, *supra* note 16, at 245-46. Furthermore, such preclusion from the appeals process has not been offset by adequate complaint procedures. See *id.* at 246-47. While it has been contended that legal remedies such as state administrative procedure acts are available to challenge these procedural deficiencies, see *id.* at 267-80, it is submitted that future federal assistance programs should be formulated so that the procedural inadequacies in current block grants will be avoided in the first instance.

Because strict federal restrictions are not included in block grants, it has been contended that groups with little political influence will be at an extreme disadvantage. *Id.* at 233. The shift of authority over the disbursement of grants is especially problematic for indigents who receive assistance from these grants, since, although they possess the greatest need for aid, they generally command the least political influence. See *id.* at 232. It has also been noted that when there is no controlling federal statute, states often refuse to recognize expectations set forth in the Constitution and in Supreme Court decisions. See generally *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) (state autonomy was primary source of governmental abuse in pre-Civil War America).

agency officials to implement controlling legislation,⁵⁴ and by attempts to circumvent certain judicial and statutory mandates.⁵⁵ Such arbitrary conduct on the part of governmental entities in other contexts has been held violative of the due process clause.⁵⁶

It is submitted that judicial intervention in arbitrary agency deregulatory action is highly appropriate because, left unchecked, these decisionmaking processes would unduly infringe due process guarantees.⁵⁷ It is further submitted that the middle-tier analy-

⁵⁴ See, e.g., *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 828 (D.C. Cir. 1984) (*Donovan I*) (rescission of ban on homework in the knitwear industry found to be abdication of Secretary of Labor's duty to implement Fair Labor Standards Act); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 817-18 (D.C. Cir. 1983) (EPA deferred permit processing without notice or comment in violation of APA); *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982) (EPA's postponement of effective date of final amendments to regulations promulgated pursuant to Clean Water Act without notice or comment found to be a violation of APA).

⁵⁵ See, e.g., *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 921 (D.C. Cir. 1984) (*Donovan II*) (avoidance of judicial mandate); *Public Citizen v. Steed*, 733 F.2d 93, 94 (D.C. Cir. 1983) (avoidance of statutory mandate). In *Donovan I*, the court held that the Secretary of Labor's rescission of homework restrictions in the knitted outerwear industry was arbitrary and capricious, and ordered the Secretary to reinstate the restrictions. *Donovan I*, 722 F.2d 795, 827-28 (D.C. Cir. 1983). The Secretary subsequently issued a final "emergency" rule that suspended the effect of the court's decision for 120 days. *Donovan II*, 733 F.2d at 921. The district court subsequently denied the *International Ladies' Garment Workers' Union's* motion to compel compliance with the court's decision, on the ground that the Union had failed to show irreparable injury. *Id.* at 921-22. On appeal, the Court of Appeals for the District of Columbia Circuit noted that the shift of focus to irreparable injury was erroneous and that the district court was empowered to protect appellants "where an administrative agency plainly neglect[ed] the terms of a mandate." *Id.* at 922. The court remanded the case for a determination of whether the "emergency" rule violated the court's mandate in *Donovan I*. *Id.* at 923. In doing so, it expressed its opinion that "[s]uch an attempt to circumvent a lawful order . . . does not satisfy the requirement of reasoned decisionmaking . . ." *Id.*

Public Citizens concerned the National Highway Traffic Safety Administration's suspension of tire treadwear grading requirements. *Id.* at 93. The court noted the existence of a 13-year gap between the congressional mandate and implementation of tire testing regulations by NHTSA. 733 F.2d at 94. In discussing the side-stepping effect of the 1975 regulations promulgated by the agency, the court noted:

The regulations did not require tire manufacturers to use the actual grade derived from the federal road test in advertising their tires to the public. Rather, the federal test grade reflected a *minimum* level of performance that the manufacturers would guarantee to their customers. The manufacturers were free to assign *lower* grades than those determined by the federal test . . .

Id. at 95. Finding the defendant's "indefinite suspension" of the requirements in question arbitrary and capricious, the court noted that "[i]t is hard to imagine a more sorry performance of a congressional mandate" and "[w]e cannot imagine a more complete flouting of the statutory scheme." *Id.* at 105.

⁵⁶ See *supra* notes 41-45 and accompanying text.

⁵⁷ See *Poe v. Ullman* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Justice Harlan

sis,⁵⁸ requiring that governmental action be substantially related to an important governmental purpose, is the proper standard of review. Use of the middle-tier analysis is consistent with the "arbitrariness" standard articulated in *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*⁵⁹

State Farm concerned the revocation of a regulation requiring passive restraints in new cars.⁶⁰ The Court held that the action of the agency was "arbitrary and capricious" because the agency failed to provide an adequate basis and explanation for the rescission.⁶¹ While the Court noted that the scope of review should not be enlarged beyond that established by law, Justice White observed that the minimum rationality due process analysis was insufficient for reviewing agency decisions.⁶² It was asserted that some reasoned explanation and documentation is necessary to ensure the protection of constitutional guarantees.⁶³

While *State Farm* arguably applies only to the rescission of safety regulations, it is submitted that the standard of review set forth therein is the minimum standard to be applied to deregulatory activity affecting the fundamental rights of liberty and property. Although the compelling state interest standard may be too burdensome, the *State Farm* arbitrariness standard at least requires a greater effort at reasoned decisionmaking on the part of

considered the due process clause a versatile instrument of justice, ready to abort arbitrary conduct in whatever form it took:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id. (citations omitted); see also Note, *supra* note 32, at 628 (judicial review of inaction that results in nonimplementation necessary to preserve integrity of judicial system); cf. *Public Serv. Health Group v. Aucther*, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (while slow rulemaking does not always necessitate judicial intervention, courts will be more apt to step in when there is risk of grave danger).

⁵⁸ See *supra* note 51.

⁵⁹ 463 U.S. 29, —, 103 S. Ct. 2856, 2865-66 (1983).

⁶⁰ *Id.* at 2864.

⁶¹ *Id.* at 2863-73.

⁶² *Id.* at 2866 n.9.

⁶³ *Id.* at 2866-67.

the agency.⁶⁴

CONCLUSION

The Reagan Administration's program of deregulation arguably has had a beneficial impact on the American economy. Nevertheless, the exercise of executive discretion must not exceed constitutional bounds. It is imperative, therefore, that the courts pay particular attention to the deregulatory activities of federal administrative agencies so that the desire to stimulate efficiency and economic growth does not supersede the need to conform to statutory and constitutional requirements.

To this end, this Note has suggested that, in light of OMB intervention in agency rule rescissions, judicial review for arbitrary and capricious decisionmaking should be strictly maintained. Furthermore, to satisfy the requirements of due process, this judicial review should determine whether the deregulatory activity is substantially related to an important governmental purpose when that activity affects fundamental rights of liberty and property.

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⁶⁴ See O'Reilly, *supra* note 6, at 533. Governmental actions that affect fundamental constitutional rights, such as liberty and property, are generally subjected to strict scrutiny, that is, the "compelling state interest" test. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 50, at 457. However, if a court were to require proof of a compelling state interest to justify deregulation, the burden of proof would be so difficult to satisfy that the regulations could possibly become permanent. See O'Reilly, *supra* note 6, at 533. On the other hand, the rational relation test has been traditionally considered weak, see J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 50, at 719, and it has been noted that a low-level standard of review would only encourage arbitrary and politically oriented agency action, see O'Reilly, *supra* note 6, at 543.