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Regulation, Deregulation and Re-regulation: An American Perspective

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January lists of what is "in" and "out" in American society have become increasingly popular.[1] Beginning in the late 1970s and continuing every year since that time, but with diminishing enthusiasm in each of the last several years, the list would have shown that deregulation is "in" and regulation is "out" if administrative law was one of its subjects.[2]

Although deregulation may be "in," there is an ongoing debate among proponents of continuing regulation,[3] regulatory reform,[4] deregulation,[5] and re-regulation[6] about resource alloca-

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1. *See, e.g., Business Week's 1988 Hit Parade: Goodbye Greed, Hello Heartland,* BUSINESS WEEK, Jan. 18, 1988, at 31; Los Angeles Times, Jan. 29, 1987, Part IV, at 27, col. 2; Washington Post, Jan. 18, 1987, at F1; Washington Post, Jan. 4, 1987, at F3, col. 1.

2. For a discussion of the reasons for the waning enthusiasm for deregulation, see *infra* notes 469-525 and accompanying text.

3. Regulation can take a variety of forms. *See infra* notes 32-37 and accompanying text.

4. There are several possible meanings for the phrase "regulatory reform." Regulatory reform can mean "change[s] in government structure—either in the power balance between the two political branches of government . . . or in the oversight mechanisms by which both legislature and executive extend political controls over the regulatory agencies." Strauss, *Regulatory Reform in a Time of Transition,* 15 SUFFOLK U.L. REV. 903, 909 (1981). Regulatory reform can mean "the adoption of measures to reduce the impact of regulatory action—in the vernacular, to get government off the people's back." *Id.* at 910. Regulatory reform also can mean "changes in procedures which agencies employ in public decisionmaking." *Id.* Consequently, regulatory reform can take a variety of forms. *See infra* notes 40-43 and accompanying text. For a further discussion of regulatory reform, see ABA Comm. on Law and the Economy, *Federal Regulation: Roads to Reform* (Exposure Draft 1978).

tion.[7] These proponents have now had a decade to assess the successes and failures of deregulation (if the "Age of Deregulation" in the United States is dated from the enactment of the Airline Deregulation Act of 1978).[8]

One assessment of the "Age of Deregulation" was given in 1986 by Alfred Kahn, who oversaw the almost total deregulation of the airline industry during the Carter Administration.[9] He stated that "something like ninety percent of the results [the

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5. The term "deregulation" may or may not take a variety of forms, depending on how the term is defined. Under the narrow definition, as used in this article, deregulation means market allocation of goods or services. Defined broadly, deregulation can take a variety of forms. One form of deregulation broadly defined would be a Self-Regulatory Organization (SRO). The Muloney Act, ch. 677, 52 Stat. 1070 (1938), which added section 15A to the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3 (1982), authorized the creation of a National Association of Securities Dealers as an SRO and transferred certain oversight responsibilities from the Securities and Exchange Commission to the NASD. Other forms might include one or more of the seven alternatives outlined by Judge Stephen Breyer in his book, S. BREYER, REGULATION AND ITS REFORM (1982). *See infra* note 27 and accompanying text.

6. The re-regulation scenario occurs as follows:

1. A particular activity has been regulated by the federal government;
2. The federal government decides to deregulate that activity;
3. A vacuum is created; and
4. That vacuum is filled by the decision to reregulate the activity.

Re-regulation is a complex phenomenon. Both the groups that favor re-regulation and the entities that carry out re-regulation can be surprising.

Regulatees, for example, may be one of the groups who favor re-regulation. They knew what the rules of the game were and how to act under a regulatory scheme, but the rules of the game and the actions to take in order to obtain a particular result are less certain under a deregulatory scheme. Thus, some regulatees will favor re-regulation.

State governments may be the entity that fills the vacuum created by federal deregulation through re-regulation. This scenario describes what is happening with regard to telephone service. State governments, however, are not the only entities that can engage in re-regulation. At the present time, for example, the federal government is feeling some pressure to re-regulate the airline industry, an industry that was deregulated in 1978.

7. Some favor deregulation. *See, e.g.*, Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Comment, *To Regulate or Deregulate: An Article of Faith or Analysis*, 55 ANTITRUST L.J. 173 (1986); ABA Comm. on Industry Regulation, *Report on Regulatory Reform* (1985) [hereinafter ABA Regulatory Reform Report]. Others either favor regulation or are skeptical about deregulation. *See generally* S. TOLCHIN & M. TOLCHIN, DISMANTLING AMERICA: THE RUSH TO DEREGULATE (1983); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592 (1985).

8. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C. §§ 1301-1315 (1982)).

9. Kahn, *The Theory and Application of Regulation*, 55 ANTITRUST L.J. 177 (1986). This article was part of a panel discussion entitled "To Regulate or Deregulate: An Article of Faith or Analysis?" The other participants on the panel were David Boies, a member of the New York Bar, Antonin Scalia, judge of the Court of Appeals for the District of Columbia Circuit, and James C. Miller III, director of the U.S. Office of Management and Budget.

proponents of deregulation] expected" have been achieved in the industries subject to deregulation.[10] Although Mr. Kahn clearly favors a world in which deregulation replaces regulation, he warns that "the world of partial deregulation, part competition/part regulation, may be the worst of all possible [worlds]."[11]

This article provides another assessment of the "Age of Deregulation." Its thesis is that the world Mr. Kahn most fears is the world that now exists and that is likely to exist in the foreseeable future. A world of partial deregulation has been described by Professor Thomas Campbell as a "patch-work" world whose ingredients consist of unchanged regulation, deregulation, part regulation/part competition, stalled regulation, and re-regulation.[12]

The article begins by briefly outlining the parameters of the debate between proponents of regulation and deregulation. Proponents of regulation contend that regulation is necessitated by market failure; proponents of deregulation disagree, arguing instead that deregulation is necessitated by regulatory failure. After briefly discussing these two arguments, the article begins its assessment of the successes and failures of the "Age of Deregulation."

Deregulation can be viewed from two different perspectives: the legislative/executive perspective and the judicial perspective. The article first examines the legislative/executive perspective by analyzing deregulation of the airline industry and the broadcasting industry. The article then examines the judicial perspective by analyzing two recent Supreme Court decisions suggesting the regulatory environment that is emerging in the "Age of Deregulation." One decision involves "active" deregulation and the other "passive."[13] The article then provides a prognosis for deregulation and concludes with the authors' substantive and pro-

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10. Kahn, *supra* note 9, at 177.

11. *Id.* at 184.

12. Campbell, *Regulation, Deregulation, and Re-Regulation: Theory and Practice,* 20 STAN. LAW. 25 (1985).

13. Motor Vehicle Mfg. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) (involves "active" deregulation), and Heckler v. Chaney, 470 U.S. 821 (1985) (involves "passive" deregulation). Judge Abner Mikva coined the phrases "active" and "passive" deregulation to describe the *State Farm* and *Heckler* decisions. *See* Mikva, *The Changing Role of Judicial Review,* 38 ADMIN. L. REV. 115, 134 (1986).

For further discussion of active deregulation, see Scalia, *The Role of the Judiciary in Deregulation,* 55 ANTITRUST L.J. 191, 191-94 (1986). Also, for a discussion of passive deregulation, see *id.* at 194-96.

cedural assessments about future prospects in a "patch-work" world.

I. BACKGROUND

Americans had a love affair with regulation for more than eighty years. That love affair began due to a growing consensus in the 1880s that market failure was occurring and led to the creation of the Interstate Commerce Commission in 1887.[14] Regulation expressed itself strongly in the 1930s[15] and again in the 1960s[16] but began to wane in the 1970s.[17] Several factors contributed to the end of this "Age of Regulation." One was the studies of revisionist economists and historians, suggesting that the original market failure consensus had developed on the basis of incomplete data and/or inaccurate analysis.[18] Another and more important factor was a growing belief, based on empirical studies, that regulatory failure was occurring.[19] Still, another but more subtle factor was the declining faith of many Americans in their government and its capacity to solve problems through regulation.[20]

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14. Ch. 104, §§ 11, 24, 24 Stat. 379, 383, 387 (1906) (codified as amended at 49 U.S.C. §§ 10301-10388 (1982)).

15. There was a significant surge in regulation during the New Deal period of the Roosevelt Administration in the 1930s. For a discussion of the New Deal period, see Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1243-72 (1986).

16. There was another significant surge in regulation during the Great Society of the Johnson Administration in the 1960s. For a discussion of the "Great Society" period, see Rabin, *supra* note 15, at 1272-78.

17. *See* Rabin, *supra* note 15, at 1315-26.

18. *See generally* G. KOLKO, THE TRIUMPH OF CONSERVATISM (1963). The central thesis of this book is stated by Kolko in his introduction:

> Progressivism was initially a movement for the political rationalization of business and industrial conditions, a movement that operated on the assumption that the general welfare of the community could be best served by satisfying the concrete needs of business. But the regulation itself was invariably controlled by leaders of the regulated industry, and directed towards ends they deemed acceptable or desirable. In part this came about because the regulatory movements were usually initiated by the dominant businesses to be regulated, but it also resulted from the nearly universal belief among political leaders in the basic justice of private property relations as they essentially existed, a belief that set the ultimate limits on the leaders' possible actions.

Id. at 2-3.

19. Regulatory failure is occurring because "ambition no longer counteracts ambition, but rather . . . the ambitions of bureaucrats are reinforced by the electoral needs of congressmen and the private claims of interest groups." J. WILSON, THE POLITICS OF REGULATION viii (1980).

20. Both the Vietnam War and Watergate were major contributors to the declining

Increasingly throughout the 1970s, cacophonous voices across the political spectrum criticized and then defended regulation.[21] The critics of regulation, particularly economic regulation,[22] became the dominant voice by the time President Carter took office in 1976. Thus, an "Age of Deregulation" was born, replacing the earlier "Age of Regulation."

The proponents of the "Age of Deregulation," like the earlier proponents of the "Age of Regulation," bring an almost religious fervor with their own "orthodox doctrines and degrees of orthodoxy, [their] own prophets, high priests, disciples, converts, [their] own heretics, and, . . . of course, [their] own necessary devils" to the debate.[23] Two of their heroes are Alfred Kahn and Mark Fowler. Professor Kahn oversaw deregulation of the airline industry during the Carter administration; Mr. Fowler, as chairman of the Federal Communications Commission (FCC), oversaw the significant deregulation of the broadcasting industry during the Reagan Administration.[24]

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faith of many Americans in their government and its capacity to solve their problems. The Iran/Contra scandal of the Reagan Administration suggests how the restoration of public faith in government is fragile. *See* McElvaine, *Why the Debacle Shouldn't Hearten Liberals*, N.Y. Times, Dec. 9, 1986, at A35, col. 2.

21. *See generally* J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); R. NOLL, REFORMING REGULATION (1971); G. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975).

22. A distinction can be drawn between economic and social regulation. Social regulation involves congressional initiatives in the areas of health, safety, and environmental protection. Most of the critics of regulation have directed their fire at economic regulation:

> No serious effort was mounted to revoke the recent congressional initiatives in the areas of health, safety, and environmental protection—let alone to reassess the need for earlier Progressive era efforts to establish policing controls on the market. Instead, the new criticism was leveled at administrative activity extending beyond the policing model; it constituted an attack—unparalleled in vigor—on price-and-entry regulation.

Rabin, *supra* note 15, at 1317.

23. Smythe, *An Irreverent Look at Regulatory Reform*, 38 ADMIN. L. REV. 451, 451 (1986); *see also* Evans, *Slouching Toward Chicago: Regulatory Reform as Revealed Religion*, 20 OSGOODE HALL L.J. 454 (1982).

24. Mr. Fowler was appointed chairman of the Federal Communications Commission (FCC), the federal agency that oversees regulation of the broadcasting and telephone industries, by President Reagan in 1981. He recently announced his intention to resign as chairman of the FCC. *See* Stuart, *Fowler, Chairman of the F.C.C. During Deregulation, Resigning*, N.Y. Times, Jan. 17, 1987, at 1, col. 2. His successor, Dennis Patrick, shares Mr. Fowler's free-market views. *See* Seghers, *The FCC's New Chief Will Keep Dialing Deregulation*, BUSINESS WEEK, Mar. 23, 1987, at 156.

One commentator distinguishes the Carter and Reagan administrations. The Carter Administration's efforts concerned economic regulations and "were implemented by congressional action," while the Reagan Administration's efforts concerned social as well as

A. *The Debate*

In the debate between proponents of deregulation and defenders of regulation, approaches to the question of resource allocation have been polarized. One approach, the idea of competition or the "regulate nothing" school of thought, argues that the best system of allocation is a market system. This approach values efficiency. The other approach, the idea of fairness or the "regulate everything" school of thought, argues that the best system of allocation is a regulatory system. This approach values equity.[25]

The debate between these two approaches and the ideas they enshrine sometimes becomes so heated that the existence of other approaches between the polar opposites is obscured. One of the contributions of Judge Stephen Breyer's book[26] is its identification of seven alternative approaches that could be considered if a decisionmaker eschews the two dominant approaches.[27]

B. *Failures*

The debate between proponents of deregulation and proponents of regulation has been spirited and lengthy. The debate began in earnest sometime after the Civil War and continues to the present time. Proponents of regulation point to market failure as a justification for a regulatory approach. They argue that markets fail in a variety of ways: (1) markets do not control monopoly power nor "excess profits"; (2) markets do not compensate for spillovers; (3) markets provide inadequate information; (4) markets result in excess competition, unequal bargaining power, and moral hazard; (5) markets are not sufficiently pater-

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economic regulations and were implemented "by administrative fiat . . . ." McGowan, *A Reply to Judicialization*, 1986 DUKE L.J. 217, 231-32.

25. For a more detailed discussion of these polar opposites, see Evans, *supra* note 23, at 468; Flexner, *Introductory Remarks*, 55 ANTITRUST L.J. 173 (1986).

26. S. BREYER, REGULATION AND ITS REFORM (1982).

27. The seven alternative approaches are as follows:

1. unregulated markets policed by antitrust;
2. disclosure;
3. taxes;
4. the creation of marketable property rights;
5. changes in liability rules;
6. bargaining; and
7. nationalization.

Id. at 156-81.

nalistic; and (6) markets do not provide for scarcity.[28] Proponents of deregulation disagree with this critique of market failure. Their first argument is that markets either do not fail or, if they do fail, they do not fail often or they do not fail by much.[29] An alternative argument is that regulation is incapable of responding to what appears to be market failure.[30]

According to proponents of regulation, the appropriate response to market failure is regulation because regulation not only protects entitlements, redistributes wealth, promotes economic efficiency, and responds to interest-group pressures but also is paternalistic and may shape and/or discourage certain preferences.[31] Such regulation can take a variety of forms including: (1) cost-of-service ratemaking;[32] (2) historically based price regulation;[33] (3) allocation under a public interest standard;[34] (4) standard setting;[35] (5) historically based allocation;[36] and (6) individualized screening.[37]

Proponents of deregulation point to "regulatory failure"[38] as

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28. *Id.* at 15-34.

29. *See* Evans, *supra* note 23, at 468.

30. *Id.* Indeed, the argument is made that the only market failures are "[market failures] *induced* by public intervention . . . ." *Id.* (emphasis in original).

31. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946,* 72 VA. L. REV. 271, 272-74 (1986).

32. S. BREYER, *supra* note 26, at 36.

33. *Id.* at 60.

34. *Id.* at 71.

35. *Id.* at 96.

36. *Id.* at 120.

37. *Id.* at 131.

38. Regulatory failure can be described in a variety of ways. *See, e.g.,* Boies, *Deregulation in Practice,* 55 ANTITRUST L.J. 185, 187-89 (1986); Kahn, *supra* note 9, at 178; Sunstein, *supra* note 31, at 274-75.

In spite of regulatory failure, "[o]bsolete regulatory programs do not die a natural death." Miller, *The Administration's Role in Deregulation,* 55 ANTITRUST L.J. 199, 200 (1986). According to James C. Miller III, Director, Office of Management and Budget, the explanation is that the self-interest of the regulatee, the regulator, and Congress—the so-called "iron triangle"—favors regulation rather than deregulation:

> Consider the traditional paradigm of the iron triangle. An agency is captured by its industry and protects it from the ravages of competition. The agency is nurtured by the committees on Capitol Hill who oversee its programs and its budget. The industry is very attentive to the Senators and Representatives on those critical committees.
>
> Now, which of the three will stand up and say, "Enough! Let's deregulate"? What Hill committee will say, "We have been meddling needlessly where free markets would do better"? What agency's employees will say, "Our decisions are counterproductive and our work pointless"? When cutthroat competition is knocking at the door, what industry will say, "Let them in"? The iron triangle is held together by self-interest, not by analytical arguments

a justification for the market approach because regulation (1) supresses innovation, (2) denies price and quality options, (3) encourages wasteful competition, (4) produces resource misallocations, (5) shelters and encourages inefficiency, and (6) encourages a wage/price spiral.[39]

If regulatory failure occurs, one alternative would be regulatory reform. Regulatory reform might involve changes in agency structure,[40] improvements in agency procedures,[41] improvements in the quality of the appointments made to the agency,[42] and/or changes in the substance of the regulatory mandate of the agency.[43] Another alternative would be to select one of the approaches identified by Judge Breyer.[44] Still another alternative, and the one chosen by most proponents of competition, would be deregulation.

II. Assessment of the "Age of Deregulation"

A. The Legislative/Executive Perspective

Although proposals to deregulate have been made in a number of areas, this article has selected deregulation of the airline industry and deregulation of the broadcasting industry for examination. These two industries were selected because they illustrate two kinds of deregulation: deregulation in the airline industry resulted from legislative initiative, and deregulation in the broadcasting industry resulted from agency initiative.

1. Deregulation of the airline industry

Dismantling an agency is an uncommon event because that type of act traditionally has signaled either that the agency has accomplished its mission (agencies almost by definition never accomplish their missions) or that the legislature's level of frustration with an agency's failure to perform its missions has reached unmanageable proportions. Congress' level of frustration with the performance of the Civil Aeronautics Board (CAB) reached

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over the merits of regulation.
Id. at 200.

39. Kahn, *supra* note 9, at 178.
40. S. Breyer, *supra* note 26, at 354.
41. *Id.* at 345.
42. *Id.* at 342.
43. *Id.* at 363.
44. *See supra* note 27 and accompanying text.

those proportions in the mid-1970s. According to a Senate subcommittee chaired by Senator Edward Kennedy, "[t]hroughout most of its pre-1975 history, the [CAB] systematically restrained airline management by denying or dismissing most applications for new routes, by refusing to allow new carriers to enter the truckline industry, and by discouraging experiments with reduced coach fares or deep discount fares."[45] These congressional findings prompted Congress to rethink the function of, and need for, the CAB. The result was the Airline Deregulation Act of 1978 (ADA)[46] which abolished the CAB's rate setting responsibility, transferred its safety responsibilities to other federal agencies, and had all other functions, powers, or duties of the CAB absorbed by various agencies in the Department of Transportation. All of these responsibilities, functions, powers, and duties of the CAB were phased out or transferred on a staggered basis.[47]

This section on airline deregulation begins by providing some background information about the creation of the CAB and the events leading up to its demise. This section continues by reviewing the objectives Congress hoped to accomplish by abolishing the CAB, and concludes by assessing the current status of the airline industry in terms of those objectives.

a. Creation and demise of the Civil Aeronautics Board Although the federal government's first minor attempt at regulating the airline industry occurred in 1918,[48] the first comprehensive regulation did not occur until Congress enacted the Civil Aeronautics Act of 1938 (CAA).[49] In 1938, there was no consensus among authorities about the health of the airline industry, about safety performance, or about the need for a regulatory scheme. However, some authorities now argue that the airline industry was healthy and safe and needed no regulation, while other authorities disagree and describe a struggling industry doomed to failure unless the federal government imposed a regulatory scheme.[50]

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45. H.R. REP. No. 1211, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3738.

46. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 1301-1315 (1982)).

47. *Id.*

48. Keplinger, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187, 188-89 (1976).

49. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

50. For example, Donald J. Lloyd-Jones, Senior Vice President of Operations for

Despite this disagreement, Congress enacted the CAA and created the CAB. This decision to regulate raised a number of concerns. One concern was the impact such a regulatory scheme might have on applications by new carriers to provide scheduled airline service, or scheduled airline service over new routes. Senators opposing creation of the CAB feared that it might either hamper freedom of entry into the airline industry by new carriers or fail to encourage healthy industry competition among carriers in the airline industry. Senator Harry S. Truman, then chairman of the Senate subcommittee sponsoring the CAA, gave specific assurances that the 1938 Act was not intended to limit the number of major air carriers to those in existence.[51] Despite these assurances, statistics show that the CAB did hamper freedom of entry into the airline industry by new carriers. Between 1950 and 1974, for example, the CAB received seventy-nine applications from new airlines wishing to offer domestic scheduled airline service. None of these applications was granted.[52]

The World Airlines incident typifies how the CAB handled

American Airlines said:

> Prior to 1938 the industry was in a state of chaos, most carriers were experiencing serious financial problems or were on the brink of bankruptcy, the industry safety record was poor, unfair competition was the order of the day, and the public had no protection from deceptive practices. The CAB was established in 1938 to bring order to the industry, to prevent the wave of bankruptcies that threatened to reduce the industry to a few surviving carriers, and to protect the public from abusive pricing practices.

Lloyd-Jones, *Deregulation and its Potential Effect on Airline Operations*, 41 J. AIR L. & COM. 815, 815-16 (1975). Mr. Lloyd-Jones' arguments are refuted by Bruce Keplinger in his comment, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187, 190-98 (1976), where Mr. Keplinger argues that the creation of the CAB was in response to the airline's industry wanting to set up a protected industry. Mr. Keplinger argues that the airline industry situation prior to 1938 was quite healthy with a good safety record, and that the creation of the CAB in 1938 was not necessary.

51. 83 CONG. REC. 6730-33 (1938) (Remarks of Senator Truman). Certain Senators were very concerned that the 1938 Act would allow airlines to violate the antitrust laws and consolidate into a few airlines. In the early 1930s the airlines on their own initiative consolidated and divided up the lucrative mail routes which created concern about antitrust violations. Proponents of the 1938 Act asserted that what happened before would happen again, but this time Congress indirectly would have approved the monopolizing of the air transport industry through the CAB. Senator Truman and Senator McCarren, sponsors of the 1938 Act, assured fellow Senators that the 1938 Act was not intended to limit the number of carriers; rather the CAB would have "broad and flexible powers" to ensure that the airlines would not consolidate and that a competitive environment would be created. A Summary of the Report of the Senate Subcommittee on Administrative Practice and Procedure was printed in Special Report, *Airline Regulation by the Civil Aeronautics Board*, 41 J. AIR L. & COM. 607, 614 (1975).

52. *Id.*

applications for new service. In 1967, World Airlines proposed low-fare transcontinental service. The CAB took no action on World Airlines' application for seven years and then dismissed the application as "stale."[53] In 1975, Senator Kennedy's subcommittee summarized the 1938 to 1975 history of applications for new service, reporting that "[i]n 1938 the [airline] industry consisted of sixteen trunk carriers; today those sixteen have been reduced through merger to ten, which account for more than 90 percent of all scheduled airline service."[54]

Another concern about the regulatory scheme of CAB was its impact on efficiency. In 1975, Senator Kennedy's subcommittee described the industry regulated by the CAB as a place where "the skies are filled with gourmet meals and Polynesian pubs; scheduled service is frequent. Yet planes fly across the continent fifty percent empty. And fares are 'sky high.' "[55] The Senate subcommittee drew some remarkable contrasts in terms of fares between this regulated airline industry and unregulated intrastate airlines:

> A traveler flying 456 miles from San Francisco to San Diego pays $26 [on non-CAB regulated intrastate airlines]. On strictly comparable routes elsewhere in the country the traveler must pay at least 60 percent more as of February 1, 1976, $47 to fly 399 miles between Boston and Washington, D.C. A comparison of virtually any intrastate route (which the CAB does not regulate) with virtually any comparable interstate route (which the CAB does regulate) reveals similar fare differences.[56]

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53. H.R. REP. No. 1211, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3739. World Airlines offered a transcontinental fare of $89, while the CAB regulations called for a $179 fare for the same flight.

54. Special Report, *supra* note 51, at 610.

55. *Id.*

56. *Id.* at 611. In 1976, Senator Kennedy continued his assault on the CAB when he said:

> This anti-competitive attitude regarding entry carries over into the area of fares, where the CAB has always discouraged price competition. On April 29, 1974, it took the extraordinary step of virtually outlawing price competition and now sets all coach and first class fares within the continental United States according to a formula which seems to be based primarily on administrative convenience. The CAB itself has admitted that it was not based on the costs of serving the individual routes.

Comment, *The American Airline Industry and the Necessity of Deregulation*, 9 AKRON L. REV. 631, 632 (1976).

b. Congressional objectives of the Airline Deregulation Act Congress responded to the CAB's inadequate performance by enacting the ADA, which phased out the CAB. The ADA outlines ten objectives Congress desired to accomplish by deregulating the airline industry. These ten objectives are:

1) maintain safety as the highest priority;
2) prevent deterioration in safety procedures;
3) encourage adequate, economic, efficient, and low-priced services;
4) promote use of competition to provide needed air transportation and encourage efficient and well-managed carriers that will attract capital and earn adequate profits;
5) encourage a sound regulatory environment;
6) encourage satellite airports;
7) prevent unfair, deceptive, predatory, or anticompetitive practices;
8) protect small community service;
9) rely on competition to provide for efficiency, innovation, and lower prices; and
10) encourage entry of new carriers.[57]

To determine whether deregulation has been successful, this article will examine the ten objectives of the ADA to determine whether they have been accomplished. While competition and efficiency were the central issues in 1978, safety has emerged as the dominant issue today. Consequently, the primary focus of this discussion will be on safety and competition/efficiency.

(1) Safety and safety procedures Despite the current concern over midair collisions, experts agree, and the most current figures suggest, that safety has not been affected by deregulation. Professor Kahn, who oversaw the dismantling of the CAB, attacked the "strong popular impression" that safety has deteriorated. He stated that "[s]o far as the available facts show, that [impression] is simply incorrect: the safety record *of the part of the industry that we deregulated* has improved markedly."[58] Professor Kahn explains by adding:

> Do not be misled by the terrible accidents involving Japan Air Lines or Air India or Mexicana Air or the charters of Arrow and Galaxy Airlines. We never regulated the charters. And, ob-

57. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 1301-1315 (1982)).

58. Kahn, *supra* note 9, at 179 (emphasis in original).

> viously, we did not deregulate Japan Air Lines or Air India. If you look at United States carriers alone, in both domestic and international scheduled service, you will find that in every important respect—number of accidents per million flights, number of fatal accidents per million flights, number of fatalities per million flights—we have experienced something like a thirty-five to thirty-eight percent decline.[59]

Empirical evidence supports Professor Kahn's position: "the death rate—fatalities per 100 million passenger-kilometers—has declined sharply in the past 35 years."[60] The death rate for general aviation declined by twenty-three percent, and the death rate for commuter airlines declined by sixty-eight percent between 1975 and 1984.[61]

However, the rising number of Near Mid-Air Collisions (NMACs), commonly called near misses, has raised questions about the success of deregulation.[62] The FAA reported 311 near misses in 1982, 475 in 1983, 589 in 1984, and 779 in 1985.[63] According to these statistics, NMACs increased 250 percent between 1982 and 1985. An FAA spokesman noted "that about two near-miss reports are made daily; the total rose to 396 in the first half of this year [1986], from 375 in the first half of 1985."[64] The most recent figures indicate that at least 812 NMAC's were reported in 1986.[65]

Critics argue that the dramatic increase in NMACs suggests the safety of commercial air travel has declined since deregulation. However, the preceding statistics are misleading as applied solely to commercial air travel because they include all types of air travel and do not differentiate between the various categories of NMACs. The FAA divides air traffic into three categories: air carriers (commercial airlines),[66] military, and general aviation

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59. *Id.*

60. Main, *Making It Safer to Fly*, FORTUNE, Oct. 14, 1985, at 20.

61. *Id.*

62. U.S. Department of Transportation, Office of the Assistant Secretary for Public Affairs, Press Release No. FAA 17-86 (Apr. 14, 1986) ("FAA defines a near midair collision as an incident in which a collision hazard exists between two or more aircraft because separation is less than 500 feet, or because one or more of the pilots reports a collision hazard.").

63. Magnuson, *Be Careful Out There*, TIME, Jan. 12, 1987, at 24, 25; Main, *supra* note 60. There is a very slight discrepancy between the numbers reported in these magazines.

64. Wall St. J., Sept. 17, 1986, at 40, col. 3.

65. Magnuson, *supra* note 63, at 25.

66. U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, OF-

operators.[67] In 1986, the FAA divided NMACs into four categories: critical, potential, no hazard, and unclass.[68]

An examination of these categories suggests the actual number of critical NMACs between commercial aircraft is relatively small. A 1986 FAA report suggests that NMACs between air carriers comprise only about four percent of the total conflicts,[69] whereas eighty-four percent of the NMACs reported between 1983 and 1985 involved general aviation which was not regulated by the CAB before deregulation.[70] This percentage (84%), according to the FAA, is not wholly accurate of the percentage of NMACs involving general aviation because this group has "a less stringent reporting philosophy or criteria."[71] Less than twenty percent of the conflicts involving general aviation pilots are reported. Consequently, based upon air traffic counts and "considering the general aviation inclination toward less reporting, the[ir] actual involvement probably approaches . . . 98%."[72]

The number of critical NMACs involving an air carrier and general aviation increased when comparing 1983 to 1984 but

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FICE OF AVIATION SAFETY, SAFETY ANALYSIS DIVISION, *Selected Statistics Concerning Pilot Reported Near Mid-Air Collisions (1983-1985)* 9 (Revised and Updated by Trans System Corporation, June 1986). "Air carrier operators, which include scheduled Part 121 carriers, as well as Part 135 air taxis and commuters." In footnote 7, this report states that the

> Code of Federal Regulations 14; Part 121 provides the rules governing the operation of air carriers utilizing aircraft having more than 30 passenger seats or a maximum payload capacity greater than 7,500 pounds. Part 135 operating rules are applicable to carriers using aircraft having 30 passenger seats or less and a maximum payload capacity of 7,500 pounds [or less].

Id. at 9 n.7.

67. *Id.* at 8. General aviation operators are those who are not military or air carriers.

68. *Id.* at 3. The FAA defines these terms as:

> *Critical*: a situation where collision avoidance was due to chance rather than an act on the part of the pilot. Less than 100 feet of aircraft separation would be considered critical.
>
> *Potential*: an incident which would probably have resulted in a collision if no action had been taken by either pilot. Closest proximity of less than 500 feet would usually be required in this case.
>
> *No Hazard*: when direction and altitude would have made a mid-air collision improbable regardless of evasive action taken.
>
> *Unclass*: each year there are some NMAC reports for which the inspectors are unable to contact those involved in the incident and/or there is insufficient information to determine a hazard classification.

Id.

69. *Id.* at 9.

70. *Id.* at 8.

71. *Id.*

72. *Id.* at 9.

then fell when comparing 1984 to 1985.[73] However, there was a general increase from 1983 to 1985.[74] The number of NMACs involving air carriers and the military also increased when comparing 1983 to 1984 but then fell in every category when comparing 1984 to 1985.[75] However, air carrier/military conflicts only comprise approximately four percent of the total NMAC reports.[76] Nevertheless, any criticism of deregulation based on NMACs involving an air carrier and general aviation or the military is ill-founded because the latter two groups were never regulated by the CAB.[77]

Although there has been an "increasing trend in the number of total reports [NMACs] from 1983 to 1985,"[78] "it is not yet clear that the increase in NMACs is an actual increase in the number of unsafe events or is simply the result of a more accurate reporting system."[79] In 1985, the FAA responded to the concern for accurate reporting of NMACs by implementing a "new reporting system . . . which set deadlines for completion of reports on incidents and called for quarterly audits by regional offices."[80] Consequently, comparisons between 1985 and previous years operating under the old reporting system may be misleading.[81]

The decrease in the number of NMACs does not mean that there is not a problem. Reacting to public concerns over NMACs, the FAA recently announced its "plans to require airlines to equip there jetliners with devices that will warn pilots when there are dangerously near other aircraft."[82] The FAA also will require "small planes [to] be equipped with transponders that warn air traffic controllers [of] their altitude."[83] Such equipment will help avoid mid-air collision.

(2) Prevent deterioration of safety When looking to see if

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73. *Id.* at 11.
74. *Id.* at 10.
75. *Id.* at 11.
76. *Id.*
77. *Id.*
78. *Id.* at 9.
79. *Id.* at 8.
80. U.S. Department of Transportation, Press Release, *supra* note 62.
81. *Id.* FAA Administrator Donald D. Engen stated: "I think it's worth noting that there is no statistical correlation between NMACs and midair collisions. In fact, the number of actual midair collisions has been declining in recent years, and the 24 in 1985, none of which involved air carriers, was the second lowest total in 20 years." *Id.*
82. *Warning Device For Jetliners to Be Required,* Wall. St. J., Sept. 22, 1986, at 16.
83. *Id.*

deregulation has been successful in terms of airline safety, the figures suggest that although millions more are traveling,[84] air travel safety has not deteriorated. Those who raise the problem of NMACs and assert that safety has deteriorated under deregulation need to look behind the total number of NMACs to see who is responsible and what are the possible causes for the increases. Also, they must consider that the FAA is acting in response to public concerns over air safety involving public aircraft and commercial carriers by implementing new safety equipment requirements.[85] Since the FAA recently reorganized the accounting procedures for NMACs and is changing safety requirements, the jury might still be out; but based on current information, commercial airline safety has not deteriorated.

(3) Adequate, economic, efficient, and low-price services Deregulation has lowered fares. At one time in 1986, for example, "87 percent of all seats sold . . . [were] discounted."[86] According to a Brookings Institute study, lower fares have resulted in at least a "$6 billion (in 1977 dollars) annual improvement in the welfare of travelers."[87]

Deregulation also has affected service: "service has improved under deregulation," according to Paul R. Ignatius, President of the Air Transportation Association.[88] The Brookings Institute study agrees, finding that airline service is more efficient and that "both travelers and carriers have benefited from greater price competition and increased productivity."[89]

The effect of deregulation on departures, i.e., the frequency of flights, is less clear. There was a four percent increase in do-

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84. Magnuson, *supra* note 63, at 27.

85. Some of the possible causes for the current NMAC figures are the improved reporting system implemented in 1985, the increase in air traffic, and the air traffic controller strike in 1981 and President Reagan's decision to fire all striking air controllers.

86. Work, *Giving Travelers The Ride They Want*, U.S. NEWS AND WORLD REPORT, June 23, 1986, at 56; *see also U.S., Carrier Officials Oppose Reregulation in Spite of Losses*, AVIATION WEEK AND SPACE TECH., June 6, 1983, at 51 [hereinafter *U.S. Carrier*] ("in 1982, 80% of all coach travel was on discount fares, compared with 48% in 1978. In 1982, passengers with discount fares received an average discount of 45% off normal full fare, compared with 34% in 1978.").

87. S. MORRISON & C. WINSTON, THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION 1-2 (1986). This publication is part of the Studies in the Regulation of Economic Activity and is published by the Brookings Institute of Washington, D.C.

88. *U.S. Carrier*, *supra* note 86, at 51. This article summarizes testimony of Air Transport Association President Paul R. Ignatius and Civil Aeronautics Board Chairman Dan McKinnon given before the House Public Works and Transportation, Aviation Subcommittee.

89. S. MORRISON & C. WINSTON, *supra* note 87, at 2.

mestic departures between October 1978 and October 1982.[90] Even if there has been no increase, and possibly a decrease, in domestic departures, two economists, George Douglas and James C. Miller III, argue that the benefits of lower fares outweigh the costs of less frequent departures.[91]

(4) Use of competition to provide needed air transportation and encourage efficient and well-managed carriers that will attract capital and earn adequate profits The fourth objective of the ADA has three parts: (1) provide needed air transportation; (2) encourage efficient and well-managed carriers; and (3) encourage carriers that will attract capital and earn adequate profits. There is a strong consensus that efficient and well-managed carriers have been encouraged. There is a slightly weaker consensus that the other two parts of the objective have been met.[92]

Some assert that deregulation has actually resulted in a cutback of needed air transportation.[93] Others dispute this assertion by pointing to statistics showing there was an increase in the number of domestic departures between October 1978 and October 1982.[94] Even if there has been a minor reduction in the number of domestic departures since 1982, they argue that this loss has been offset by lower fares.[95]

In testimony before the Aviation Subcommittee of the House Public Works and Transportation Committee, Dan McKinnon, chairman of the CAB, took the position that deregulation is "producing what advocates promised: a more efficient and responsive industry."[96] He described the emerging airline industry in glowing terms: "The industry is becoming more efficient, service is improving and fares are being established by market conditions."[97] A 1986 Brookings Institute study also found the public interest has been well served by deregulation: "Based on

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90. *U.S. Carrier*, *supra* note 86, at 51.

91. S. MORRISON & C. WINSTON, *supra* note 87, at 4. Mr. Miller's and Mr. Douglas' findings were reported in a 1974 Brookings Institute study entitled "Economic Regulation of Domestic Air Transport: Theory and Policy."

92. *See* Morash, *Airline Deregulation: Another Look*, 50 J. AIR L. & COM. 253 (1985).

93. *See* Kaldahl, *Let the Process of Deregulation Continue*, 50 J. AIR L. & COM. 285 (1985).

94. Kelleher, *Deregulation and the Troglodyies—How the Airlines Met Adam Smith*, 50 J. AIR L. & COM. 299, 309-10 (1985); *see also U.S. Carrier*, *supra* note 86, at 51.

95. S. MORRISON & C. WINSTON, *supra* note 87, at 4.

96. *U.S. Carrier*, *supra* note 86, at 51.

97. *Id.*

all efficiency grounds and on most distributional grounds, airline deregulation has served the public interest much more effectively than regulation would have."[98]

During this "Age of Deregulation," the airline industry has altered its way of doing business in regards to, *inter alia*, personnel, routes, financing, and equipment.[99] These alterations have attracted and should continue to attract capital. For example, in the area of equipment, the airline industry has moved to medium-sized jets such as Boeing 373-300s, 767s, and 757s. These aircraft are more fuel efficient, and some are designed to operate with two pilots instead of three. "The new industry capital structure will lead to more carrier efficiency gains under deregulation [which would not have occurred under the old regulated system]."[100]

The effect of deregulation on profitability is less clear. One critic of deregulation has argued that "[t]he recent financial difficulty of the airline industry . . . commend[s] some form of regulation of airline practices."[101] Much of this criticism, however, is based on figures from 1981 to 1983, a period of economic recession and sharp increases in the price of oil. Testimony before a congressional committee in 1983 revealed that "prospects are expected to improve this year and continue for the next several years as the effects of the recession and sharp upswings in oil prices diminish."[102] These prospects proved correct. By 1985, the airline industry had made a complete change:

> The 12 major U.S. airlines had combined operating profits of more than $2 billion and net profits of about $809.6 million last year [1984], making 1984 the best year for the airlines since 1978.
>
> Operating income in 1984 represented an improvement of $1.75 billion over 1983 when the same group of carriers reported operating profits of $246.9 million. The same dozen airlines had a collective net loss of $163.7 million in 1983, so that 1984's net results represent a $973.3 million turn around.[103]

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98. S. MORRISON & C. WINSTON, *supra* note 87, at 72.

99. *Id.*

100. *Id. See also* Kelleher, *supra* note 94.

101. Morash, *supra* note 92, at 274.

102. *U.S. Carrier*, *supra* note 86, at 51.

103. Shifrin, *U.S. Major Carriers Record Best Earnings Since 1978*, AVIATION WEEK AND SPACE TECH., Feb. 25, 1985, at 32. In the fourth quarter of 1981, nine of the ten major domestic carriers reported losses. *Airline Income, Expense, Fourth Quarter 1981*, AVIATION WEEK AND SPACE TECH., May 10, 1982, at 36. In the first quarter of 1982 alone,

The airline industry's financial health continued to improve in 1986. According to Julius Maldutis, the author of a recent study of airline profitability, "[t]he industry could be highly profitable this summer [1986]."[104] Maldutis' study, along with other data, indicated that in 1986 the airline industry was financially stable despite deregulation.

(5) A sound regulatory environment The objective of a sound regulatory environment is vague. Consequently, this objective has not created much debate among critics and defenders of deregulation.

(6) Satellite airports No airports have been constructed since the Dallas-Fort Worth Airport opened in 1974, and there are no plans to construct a new airport in the near future.[105] Thus, it appears that deregulation has not encouraged satellite airports.

(7) Prevention of unfair, deceptive, predatory, or anticompetitive practices No one argues that deregulation has led to unfair, deceptive, predatory, or anticompetitive practices. The airline industry is in a state of flux because the market, rather than a regulatory agency, controls the price at which the service is offered. Robert L. Crandall, Chairman of American Airlines, has noted that "since deregulation, 72 new airlines have started, and 33 have disappeared."[106]

(8) Protect small community service No consensus has formed concerning the impact deregulation has had on small community service. When the ADA was being formulated, Senator Kennedy's subcommittee was aware of the argument that airlines during regulation might have been cross-subsidizing routes: profits from higher than required fares on heavily traveled routes between major communities were being used to maintain lower than required fares on lightly traveled routes between small communities.[107] The subcommittee rejected the ar-

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all ten carriers suffered losses that totaled $495,890. *Airline Income, Expense First Quarter, 1982,* AVIATION WEEK AND SPACE TECH., July 12, 1982, at 45. This time period was the low point in the airline industry. Compare that situation with 1985 where nine carriers reported $1,013,180 in profits, and only three carriers did not make a profit. *Airline Income and Expense, Full Year 1985,* AVIATION WEEK AND SPACE TECH., June 2, 1986, at 41. One of those companies that did not make a profit in 1985 was United, which was crippled with a pilots' strike.

104. Main, *The Worsening Air Travel Mess,* FORTUNE, July 7, 1986, at 52.

105. *Id.*

106. *Id.* at 50.

107. Special Report, *supra* note 51, at 612.

gument that deregulation might upset this equilibrium to the detriment of small community service. One reason for this rejection was that the subcommittee did not believe that the small communities would lose all service under deregulation. After reviewing a study by United Air Lines and data from the American Transport Association, the subcommittee concluded that commuter carriers would fill any void created by major trunk carriers if they were to discontinue service to small communities.[108] The subcommittee believed that even if service to small communities did drop dramatically, a direct government subsidy supporting such service was preferable to the cross-subsidization system.[109]

Subsequent history suggests the subcommittee's conclusions were correct. In 1986, for example, the Brookings Institute study reported that "deregulation has not so far contributed to a net loss of service to small communities."[110]

(9) Promote efficiency, innovation and lower prices The objective of efficiency, innovation, and lower prices has been met. Over eighty percent of current airline tickets are discounted. Competition has forced the major airlines to compete with fare-cutting by non-major airlines. The major airlines have become competitive by using "computers that give them far greater flexibility in meeting passengers' demands and competitors' fares, and by cutting costs through lower wages and greater efficiency."[111] The non-major airlines are trying to respond to this increased competition by experimenting with ideas like a new multiple-choice service that simultaneously offers budget prices to attract cost-conscious passengers. They are also experimenting with new classes of service to attract business passengers.[112] The resulting variation of services and modifications in the airline industry could not have occurred without deregulation.

(10) Encouraging entry of new carriers Deregulation has encouraged new carriers to enter the airline industry: seventy-two have entered the industry since enactment of the ADA. Al-

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108. *Id.* at 612-13.

109. *Id.* at 613. The subcommittee also said that "lower fares to and from major hubs should increase demand for air travel to and from smaller communities as well, with the probable result that service to those communities will increase, not diminish." *Id.*

110. S. MORRISON & C. WINSTON, *supra* note 87, at 2.

111. Work, *supra* note 86, at 56.

112. *Id.*

though all seventy-two have not survived, the flexibility of the market has provided the airlines with the freedom to either enter or exit the market.[113]

c. Success of deregulation of the airline industry To some extent, the success of deregulation of the airline industry can be gauged against the objectives of the ADA. After considering the ten objectives of the ADA, most would agree that almost all of the objectives have been satisfied. However, there are some current problems with the airline industry, and these problems, oddly enough, stem from the success of deregulation.[114]

For example, deregulation lead to lower ticket prices, opening up the opportunity for millions of Americans to fly who never would have under the old regulated system. Lower prices was one of the goals of deregulation; however, the dramatic growth in the number of flyers that followed simply clogged the system. "It is obvious that the FAA and the U.S. Department of Transportation planned poorly for deregulation's explosive impact on the system. [According to a Department of Transportation official], we never really dreamed [the industry] was going to grow so much."[115] Some of those problems, such as departure delays, were never envisioned by the advocates of deregulation, and such problems have enlarged the focus for determining deregulation's success.

Besides the recent safety questions, there are concerns about the rising number of service complaints by airline patrons.

> During the first five months of this year [1978], consumer complaints to the Transportation Department about poor airline service reached 9,812, an 81% increase over the same period

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113. Main, *supra* note 104, at 50.

114. "But the system is under strain, and all aviation professionals know it. The main reason, ironically enough, is the booming success of the airline deregulation." *The Year of the Near Miss,* NEWSWEEK, July 27, 1987, at 20, 22.

115. *Id. See also High Anxiety and Rage,* TIME, July 20, 1987, at 52-54:

> Ironically, anxiety and irritation about air travel are rising just as the industry is entering a period of robust financial health. Passenger traffic on U.S. carriers reached a record 418 million in 1986, up from 382 the year before. During the first half of 1987, traffic rose another 15% or so. Wall Street analysts expect the 22 major U.S. carriers to earn operating profits of as much as $3.5 billion in 1984.

However, the growth of the number of passengers has not kept pace with the growth of people who control where the planes fly. *See Worries in Busy Skies,* U.S. NEWS AND WORLD REPORT, Aug. 24, 1987, at 18-19 ("The sad fact is that the American air-traffic-control system has not kept pace with the steep growth in air travel over the last decade.").

> last year. The number of flight delays of 15 minutes or more at the 22 busiest U.S. airports, as compiled by the FAA, rose by 13% in the first three months of 1987 compared with the first quarter of last year.[116]

These problems can be blamed on many causes, but the unexpected dramatic increases in the number of air travelers shoulders part of the blame.

This current situation, where deregulation has become the victim of its own success, has caught the attention of Congress. Problems with "airline delays, allegedly confusing and deceitful advertising, flight cancellations and ticket refund problems" prompted the House Aviation Subcommittee to conduct hearings in June of 1987.[117] The outcome of these hearings is uncertain.

In summary, safety is an ongoing concern, and problems with near misses could jeopardize a continued expansion of service. The federal government has been responding to these problems and Congress has also taken interest by holding its own hearings to determine how to best deal with the bulging airline system. The airline industry has passed through a series of adjustments since deregulation in 1978, including the difficult economic period from 1981 to 1983, but the industry has always rebounded. The future success of deregulation depends on how the current problems are resolved. For now, the original objectives of ADA have been met, and the future of deregulation in the airline industry depends on the industry's and the federal government's ability to resolve new problems as they develop.

2. *Deregulation of the broadcasting industry*

The FCC's drive to deregulate the telecommunication's industry has been an ongoing process.[118] In 1981, the FCC deregu-

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116. *See High Anxiety and Rage*, *supra* note 115, at 52-54.

117. *House Panel Considers Reregulation of Airlines*, AVIATION WEEK AND SPACE TECH., June 15, 1987, at 74-75. In the wake of consumer complaints, Congressmen and Senators have proposed at least eight new bills addressing the problems of flight delays, advertising, ticket refunds, and accountability of the airlines. *Id.* at 74; *see also Delays, Service Problems Prompt Strong Congressional Reaction*, AVIATION WEEK AND SPACE TECH., Aug. 10, 1987, at 33-35.

118. Notice of Inquiry and Proposed Rulemaking; Deregulation of Radio, 73 F.C.C.2d 457, 458 (1979) [hereinafter Radio Deregulation NPRM]. In 1972, the Commission commenced a reregulation study and created a multidisciplinary Reregulation Staff to examine all technical broadcast rules. *See* Public Notice entitled "Broadcast Regulation Study," FCC Mimeo No. 83444 (Apr. 6, 1972). Since that time the Commission has

lated the radio industry[119] in four major areas: (1) community nonentertainment programming guidelines,[120] (2) community ascertainment requirements,[121] (3) commercial guidelines regulating maximum amounts of commercial minutes per hour,[122] and (4) program log keeping requirements.[123] In 1984, the FCC began deregulation of the television industry in a similar vein.[124] The Commission discontinued routine review of programming,[125] the levels of commercialization,[126] and the formal community ascertainment practices of television licenses.[127] In addition, existing logging requirements were revised and a quarterly issues/programs list, similar to that required in the radio industry, was instituted.[128]

The FCC, as well as those advocating a marketplace approach to regulation of the telecommunication's industry, herald communications deregulation as a milestone in fulfilling the leg-

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either relaxed or deleted over 800 rules which were determined to be no longer necessary or appropriate.

119. Deregulation of Radio, 46 Fed. Reg. 13,888 (1981) (Report and Order) [hereinafter Deregulation of Radio R & O].

120. *Id.* at 13,890-97. The FCC's guidelines called for AM radio stations to offer eight percent nonentertainment programming and for FM stations to offer six percent. *Id.* at 13,890. Nonentertainment programming included news, public affairs, public service announcements, and religious programs. *Id.* at 13,890. Stations proposing to offer less than the recommended percentage were not barred from doing so, however, the applications for renewal were not routinely processed by the FCC. *Id.* at 13,897-900.

121. *Id.* at 13,899. Ascertainment is the process by which radio stations discover the needs, tastes, and desires of their communities or service areas. The principle focus of ascertainment has been to uncover issues facing the "community" or "service area" that go beyond those that might be discovered through the licensee's ordinary contacts, which might be limited to a rather narrow range of persons or groups. *Id.* at 13,897-900.

122. *Id.* at 13,900. The Commission's guidelines regulating maximum amounts of commercial minutes per hour prevented the Broadcast Bureau from routinely processing a license application when an applicant proposes more advertising than the applicable guideline, generally eighteen minutes of commercials per hour. A licensee that proposed less than the guideline avoided full Commission review of the application on that issue. *See id.* at 13,900-03.

123. *Id.* at 13,903. These requirements specified the general design of the logging system, the manner for entering and correcting data, and the details of how the logs were to be made available to the public for their inspection. As previously constituted, the logs provided a rather comprehensive record of the level and timing programming for every specified program type. *See id.* at 13,903-04.

124. Notice of Proposed Rule Making; Deregulation of Commercial Television Stations, 94 F.C.C.2d 678 (1983) [hereinafter Television Deregulation NPRM].

125. The Revision of Programming & Communication Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television, 98 F.C.C.2d 1076, 1078-97 (1984) (Report & Order) [hereinafter Television Deregulation R & O].

126. *Id.* at 1101-05.

127. *Id.* at 1091-101.

128. *Id.* at 1106-11.

islative mandate of regulating in the public interest and in accommodating the first amendment rights of those who operate commercial radio and television stations.[129] However, those espousing the "public trust doctrine" criticize this approach, arguing that economic analysis and efficiency determinations do not effectively regulate the broadcasting field.[130]

This section examines deregulation of the broadcasting industry to determine whether it has been successful. The section begins with some historical information about regulation of the radio and television industries. It then briefly discusses several perceived changes in the broadcasting industry leading to its deregulation. After this discussion, the section reviews the deregulation objectives of the FCC and concludes with an assessment of the effect of deregulation on the FCC's ability to regulate in the public's interest.

a. History of governmental regulation The first attempt at regulating the broadcasting industry occurred with the Radio Act of 1912.[131] Under this Act, the Secretary of Commerce and Labor was given broad authority over the licensing of radio stations and operators.[132] However, the courts subsequently restricted his authority, essentially leaving the Secretary with nothing more than the ministerial duty of issuing licenses to applicants.[133] Due to this lack of control, the situation in the

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129. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

130. For general criticisms of the marketplace theory, see Brennan, *Economic Efficiency and Broadcast Content Regulation*, 35 FED. COMM. L.J. 117 (1983); Brosterhous, United States v. National Ass'n of Broadcasters: *The Deregulation of Self-Regulation*, 35 FED. COMM. L.J. 313 (1983); Krasnow, Cole & Kennard, *FCC Regulation and Other Oxymorons: Seven Axioms to Grind*, 5 COMM/ENT L.J. 759, 763-64 (1983); Schreiber, *Don't Make Waves: AM Stereophonic Broadcasting and the Marketplace Approach*, 5 COMM/ENT L.J. 821 (1983); Note, *A "Better" Marketplace Approach to Broadcast Regulation*, 36 FED. COMM. L.J. 27 (1984); Comment, *Radio Entertainment Format—Free Market Approach*—FCC v. WNCN Listeners Guild, 28 N.Y.L. SCH. L. REV. 221 (1983).

131. Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in 47 U.S.C. §§ 151-610 (1982 & Supp. II 1986)).

132. Radio Deregulation NPRM, *supra* note 118, at 460.

133. In 1923, the Secretary's power was initially limited when the court held that "the only discretionary act is in selecting a wave length, within the limitations prescribed in the statute, which, in [the Secretary's] judgment, will result in the least possible interference." Hoover v. Intercity Radio, 286 F. 1003, 1006-07 (D.C. Cir. 1923), *dismissed* 266 U.S. 636 (1925). In 1926, the court held that a licensee could not be criminally prosecuted for its failure to operate at authorized times on authorized wavelengths. United States v. Zenith Radio Corp., 12 F.2d 614, 618 (N.D. Ill. 1926). Subsequently, the Attorney General issued an opinion concluding that the 1912 Act was inadequate to regulate

broadcasting industry became chaotic.[134]

To fill the void created by deficiencies in the Radio Act of 1912 and "to protect the national interest involved in the new and far-reaching science of broadcasting," Congress formulated a comprehensive regulatory system:[135] the Radio Act of 1927.[136] This act was based on a public trust rationale, arising out of what has been termed the "scarcity theory."[137] In light of this public trust rationale, the Radio Act of 1927 mandated that radio stations be operated in the public interest.[138]

The Communications Act of 1934 structurally changed the Radio Act of 1927, shifting the primary responsibility for regulation of the broadcasting industry to the newly created FCC.[139] The Communications Act, however, did not substantively change the Radio Act of 1927.

Almost immediately, the FCC began taking a very active regulatory role, using its delegated authority to regulate in the public interest. In 1947, the FCC issued a policy statement, the *Report on Public Service Responsibility of Broadcast Licensees*, commonly referred to as the "Blue Book,"[140] emphasizing that broadcast radio was responsible for providing programming that reflected local interests, activities, and talents.[141] In 1949, the FCC issued another policy statement, its *Report on Editorializing by Broadcast Licensees*, indicating that licensees had the duty to devote a "reasonable amount of time" for discussion of public issues.[142] Finally, in 1960 the FCC issued its *Report re En*

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broadcasting. 35 Op. Att'y Gen. 126 (1926).

134. Radio Deregulation NPRM, *supra* note 118, at 460-61. Radio stations increased their power and changed their operating hours and frequencies at will in order to achieve a competitive advantage. This resulted in tremendous growth in the radio industry which was controlled by a trust of only four major companies.

135. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

136. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in 47 U.S.C. §§ 151-610 (1982 & Supp. II 1986)). The primary focus of this legislation was (1) to properly allocate frequencies; and (2) to prohibit noncompetitive programming feared to result in censorship, mal-distribution of service and discrimination in service. Radio Deregulation NPRM, *supra* note 118, at 462.

137. The most recent enunciation of this theory was in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

138. Radio Deregulation NPRM, *supra* note 118, at 462.

139. Communications Act of 1934, 47 U.S.C. §§ 151-610 (1982 & Supp. II 1986).

140. This book was issued as an internal FCC document and is available in the FCC's library. It may also be found in a slightly edited form in DOCUMENTS OF AMERICA 55, 135-216 (F. Kahn ed. 3d ed. 1978).

141. *Id.*

142. 13 F.C.C. 1246 (1949).

Banc Programming Inquiry (Programming Statement), declaring that broadcasters were obligated to ascertain the needs and interests of their service areas.[143] The Programming Statement outlined fourteen factors broadcasters were to consider in discharging this obligation.[144] However, within twenty years after issuance of this Programming Statement, the FCC decided, due to changes in the broadcasting industry, that public interest could best be served by a market approach.

b. Perceived changes in the broadcasting industry leading to its deregulation Some of the perceived changes in the broadcasting industry that has led to its deregulation have been technical and others have been structural. Technological advances undermined the "public trust rationale" because the scarcity theory was no longer viable.[145] This theory was premised on the notion that the radio or television spectrum was limited. Consequently, it was thought that broadcasting was a natural monopoly that needed to be regulated as a public trust.[146] However, due to changes in technology, such as cable television, this premise is no longer valid.[147]

The broadcasting industry has also experienced several structural changes. First, the number and type of broadcasters have substantially increased, especially in the urban areas.[148] Not only does the broadcasting market face more internal competition, but television licensees now are facing competition from other unregulated or less regulated industries, such as the video industry.[149] Television's ability to adequately compete

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143. Report re En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

144. Radio Deregulation NPRM, *supra* note 118, at 470. Later in 1965 and 1966 the Commission adopted new forms that imposed a four-step ascertainment process which was to include information concerning the following: (1) steps taken to become informed of the problems and needs of the area; (2) suggestions received as to how the station could help meet those needs and problems; (3) the applicant's evaluation of the suggestions; and (4) programming proposed to meet evaluated problems and needs. Television Program Form, 5 F.C.C.2d 175, 178 (1966).

145. M. Fowler & D. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 222 (1982).

146. NBC v. United States, 319 U.S. 190, 213 (1943).

147. M. Fowler & D. Brenner, *supra* note 145, at 225.

148. Fowler, *The Public's Interest*, 4 COMM. & LAW 51 (Winter 1982).

149. "This growth represents both an extension of radio service into previously unserved rural areas and a substantial increase in the number of stations in existing urban markets." Radio Deregulation NPRM, *supra* note 118, at 484. The Commission interprets this growth to mean that media competition "tends to force [radio] stations, in their own self-interest, to be responsive to shifts in consumer tastes or else lose their audience to more responsive stations." *Id.* at 486.

with such industries is open to debate. Second, radio has relegated its position as the major mass medium to the television industry.[150] Third, the broadcasting industry has become more specialized as the American society has become more diverse.[151]

Another significant change leading to deregulation of the broadcasting industry was a change in the public's perception about regulation. Not only have the American people in general, but the FCC in particular, has become less hospitable to comprehensive regulatory systems.[152] There are strong policies—both legislative and executive—against government overregulation.[153] These policies militate against regulations requiring literally thousands of hours in paperwork for compliance.

c. Objectives and anticipated results of deregulation In light of these technological advances, structural changes, and altered perceptions about regulation, the FCC became convinced in the early 1980s that public interest would be better served by a market rather than a regulatory approach.[154] The FCC believed that market incentives were preferable to regulatory in-

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In the area of direct competition, not only is the number of households that receive some type of television transmission increasing, but the percentage of all television households receiving increased numbers of channels is also increasing. For example, almost ninety percent of all households receive four or more television stations, while sixty-five percent receive seven or more signals. Meanwhile the total number of commercial stations has grown from a total of six in 1945 to over 800 at the present.

150. The Commission points out that television has replaced radio as the primary source of information and entertainment because it adds a preferred visual dimension to the audio dimension offered by radio. *Id.* Consequently, it is in the interest of broadcasters to target those specialized audiences that tend to listen to radio. The market is supposedly the best means to identify these specialized audiences. *Id.* at 487.

151. The FCC further maintains that the American public is undergoing a change that it identifies as the "new community." This has again resulted in the need for specialization. Radio stations have a supposed advantage over other types of media in this area because they are more inclined to specialize rather than generalize as does television. This is due primarily to the "economics of radio" which allow that medium to be far more sensitive to the diversity within a community and the attendant specialized community needs. *Id.* at 490.

152. In addition to direct competition in the form of traditional over-the-air television, other delivery systems have burgeoned and thus offer additional avenues of video product delivery to consumers. These include cable, cable program channels, multipoint distribution services and other new forms of video delivery systems such as video tape recorders and video disks. Fowler, *The Boom Goes Bust, The Bust Goes Boom,* 6 COMM. & LAW 23 (June 1984); Fowler, *supra* note 148.

153. *See, e.g.*, Regulatory Flexibility Act, Pub. L. No. 96-354, § 2(a), 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 (1982)); Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2(a), 94 Stat. 2812 (codified at 44 U.S.C. § 3501 (1982)).

154. Deregulation of Radio R & O, *supra* note 119.

centives for ensuring programming that would recognize and respond to community needs and problems. What follows is a more particularized list of objectives and anticipated results in the four major areas of deregulation as they pertain first to the radio industry and then to the television industry.

(1) Radio industry

(a) Program guidelines The FCC established a program guidelines requirement because of its overriding concern that citizens of the United States be well informed on issues affecting them and their communities. Although the FCC later eliminated this requirement, it still believed that radio broadcasters have an obligation to discuss issues of community concern. Radio broadcasters still must satisfy the public interest mandate, but they are now assured maximum flexibility, with minimal governmental influence, in responding to public interest issues.[155]

The decision to eliminate the program guidelines requirement was based on a judgment that it was unnecessary to specify the precise quantities of programming that should be presented by all stations, regardless of local needs and conditions.[156] This was a wise decision. First, because of the increasing numbers of stations and competition in the radio broadcasting field, the American people will probably continue to be informed on issues affecting their communities.[157] Second, because the renewal standard will be retrospective in application, the licensee must show that during the prior licensing period the licensee addressed community issues with programming.[158]

(b) Ascertainment The FCC imposed an ascertainment requirement on radio broadcasters to prod them to uncover local issues going beyond those capable of discovery through the licensee's ordinary contacts. The concern was that those contacts might be limited to a rather narrow range of persons or groups.[159]

The FCC eliminated the ascertainment requirement because it believed, contrary to its original position, that elimination of the requirement would actually further its goal of presenting programming on public issues relevant both to the community at large and, in the appropriate circumstances, to the more special-

155. *Id.* at 13,891.
156. *Id.* at 13,893.
157. *Id.*
158. *Id.* at 13,893-94.
159. *Id.* at 13,899.

ized interests of its own listenership. Each station need not attempt to provide service to all segments of the community where alternative radio sources are available.[160]

(c) Commercial guidelines The FCC historically has attempted to balance its persistent concern that advertising not become the superseding force in broadcast service and programming and its concurrent reluctance to set definitive and rigid standards, causing all broadcasters to operate in the same mold.[161] The FCC concluded that both of these objectives could best be served by the market approach rather than the regulatory approach.[162]

In essence, the FCC decided to allow the interplay of good faith discretion of licensees and the competitive forces of the marketplace to determine which advertising policies better served the needs and interests of particular listening audiences.[163] The FCC decided, therefore, to eliminate the processing guidelines which required maximum amounts of commercial time.[164] The FCC believed that such a move would lead to an increased willingness to experiment with advertising formats that might exceed present limits but serve the public interest.[165]

(d) Programs logs The FCC revised its program log system and discontinued the program log requirement because of its tremendous paperwork burden and the limited use of such records. Radio broadcasters, however, are still required to maintain their public files.[166] The belief is that the general public, as well as the FCC itself, will still have access to the same basic information under the revised system as was available under the old system without the costs of keeping such information.[167]

(2) Television

(a) Program guidelines The decision to eliminate the program guidelines requirement for television was based on two fundamental considerations. "First . . ., review of the record and study of station performance [indicated] that licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future market-

160. *Id.*
161. *Id.* at 13,900.
162. *Id.* at 13,901.
163. *Id.* at 13,903.
164. *Id.*
165. *Id.*
166. *Id.* at 13,904.
167. *Id.*

place incentives, thus obviating the need for existing guidelines."[168]

Second, "re-examination of the current regulations revealed several inherent disadvantages, including potential conflicts with Congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act, imposition of burdensome compliance costs, possibly unnecessary infringement on the editorial discretion of [television] broadcasters, and distortion of the [FCC's] traditional policy goals in promulgating and monitoring programming responsibilities."[169]

(b) Ascertainment Several reasons were given for the FCC's decision to eliminate the ascertainment requirement: (1) current figures for non-entertainment categories of programming show percentages beyond those required; (2) ascertainment is not mandated by the statute and is not an exclusive way to assure that licensees remain aware of their communities; (3) costs are numerous; (4) other costs to the public and the FCC such as litigation over the formalized requirements are unwarranted; and (5) to the extent the licensee is compelled to follow specific procedures, resources are diverted and the opportunity for license discretion is foreclosed.[170]

(c) Commercial guidelines The FCC's concerns with commercial practices have been shaped by two primary considerations: "the desire to prevent the abuse of scarce broadcast resources through excessive commercialization, and a reluctance to adopt rigid quantitative standards."[171]

Several reasons were given for the decision to eliminate the commercial guidelines requirement: (1) market incentives that keep commercials to a minimum; (2) existing regulation that is burdensome; (3) competitive effect; and (4) first amendment concerns.[172]

(d) Program logs The decision to eliminate program logs for television broadcasters is similar to the decision with respect to radio broadcasters.[173]

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168. Television Deregulation R & O, *supra* note 125, at 1080.

169. *Id.*

170. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); United States v. S.W. Cable Co., 392 U.S. 157 (1968); NBC v. United States, 319 U.S. 190 (1943).

171. Television Deregulation R & O, *supra* note 125, at 1101.

172. *Id.* at 1098-1100.

173. *Id.* at 1101-05.

d. Impact and effect of deregulation

The impact and effect of deregulation in the broadcasting industry is difficult to assess.[174] While the FCC has been empowered with the authority to "regulate" in the public interest, the standard is elusive and not easily subject to precise interpretation. The decision to deregulate was based on the belief that traditional modes of regulation hindered the efforts of the FCC to regulate in the public interest. Whether the laissez-faire approach adopted by the FCC is any better is subject to debate. However, if the FCC is able to obtain the same results under deregulation as were achieved under comprehensive regulation, then deregulation should be considered a success.

B. The Judicial Perspective

In addition to the legislative/executive perspective of deregulation outlined in the foregoing section, there also is a judicial perspective of deregulation. That perspective is provided in this section by examining initially the procedural environment in which judicial review takes place and then two of the most important Supreme Court decisions in the "Age of Deregulation."

Congress enacted an Administrative Procedure Act (APA) in 1946.[175] The APA authorizes federal agencies to conduct four categories of proceedings: informal rulemaking;[176] formal rulemaking;[177] informal adjudication;[178] and formal adjudication.[179] One of the early problems with agency practice under the APA was that federal agencies initially relied heavily on adjudication and only sparingly on rulemaking.[180] Both Congress

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174. E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 15 (2d ed. 1978).

175. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (1982)).

176. 5 U.S.C. § 553 (1982).

177. *Id.* §§ 553(c), 556-557.

178. Although adjudication is the subject of three sections of the APA—sections 554, 556, and 557—all are devoted to formal adjudication. No section or subsection of the APA is devoted exclusively to informal adjudication.

For a discussion of informal adjudication, see R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.4.10, at 335 (1985) [hereinafter ADMINISTRATIVE LAW AND PROCESS].

179. 5 U.S.C. §§ 554, 556-557.

180. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 472 n.3 (2d ed. 1985).

There are a number of reasons why an agency might prefer adjudication to rulemaking. *See, e.g.*, Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive*

and federal courts encouraged greater reliance on rulemaking.[181] Federal agencies responded affirmatively to this prompting.

Increasing reliance on rulemaking, particularly informal rulemaking, created another problem. As outlined in section four of the APA,[182] the process of promulgating informal rules involves four steps. The process begins with the publication of a notice of proposed rulemaking in the Federal Register.[183] This notice includes "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and either (3) the terms or substance of the proposed rule or a description of the subjects and issues involved."[184] After publication of this notice, the second step is to provide "interested person[s with] an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."[185] The third step requires the agency to consider the "relevant matter presented" in the comments before promulgating a final rule.[186] The process concludes with publication of a final rule containing "a concise general statement of [its] basis and purpose."[187]

First the courts[188] and then Congress[189] began to have misgivings about whether the preceding four-step process for informal rulemaking provided sufficient procedural protection. They

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Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1245-47, 1274-75 (1974); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 995-96 (1980).

181. *See* ADMINISTRATIVE LAW AND PROCESS, *supra* note 178, § 6.4.1c, at 295.

182. 5 U.S.C. § 553.

183. *Id.* § 553(b)

184. *Id.*

185. *Id.* § 553(c).

186. *Id.*

187. *Id.* §§ 553(c), (d).

188. On a number of occasions the courts have transformed the notice-and-comment process of informal rulemaking into a "paper hearing" process. *See, e.g.*, Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Texas v. EPA, 499 F.2d 289 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976); Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

189. Congress has enacted statutes authorizing hybrid rulemaking proceedings. These statutes include 50 different rulemaking proceedings. *See* S. Wood, Amending and/or Revoking Rules Promulgated in Hybrid Rulemaking 30 (December 13, 1982) (unpublished report submitted to the Administrative Conference of the United States).

responded by creating a fifth category of proceeding, hybrid rulemaking.[190]

Hybrid rulemaking does not describe a single type of rulemaking proceeding, but includes any rulemaking proceeding that involves more procedure than informal rulemaking[191] but less procedure than formal rulemaking.[192]

Consequently, agency action can result from any one of five different categories of proceedings: informal rulemaking, hybrid rulemaking, formal rulemaking, informal adjudication, and formal adjudication. Judicial review of such agency action involves a series of interrelated but distinct questions.[193] This section of the article examines two of those questions. First, what is the appropriate standard of review? Second, what is the appropriate scope of review?

An argument can be made that these two questions are really the same, the premise being that the important question is the scope of review question. Standards of review are nothing more than mere labels attached to the appropriate scope of review.[194] The problem with this premise is that case law, particularly case law in the Court of the Appeals for the District of

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190. Federal courts began to impose hybrid rulemaking requirements in the early 1970s. *See, e.g.*, Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238 (D.C. Cir. 1973). Congress then began to enact statutes that contained hybrid rulemaking requirements. At least twelve different federal agencies operate under such statutes. *See* S. Wood, *supra* note 189, at 27.

191. For a discussion of the procedure to be found in an informal rulemaking proceeding, see *supra* notes 182-87 and accompanying text.

192. The procedural requirements of formal rulemaking are listed in sections 556 and 557 of the APA and include: (1) an unbiased person or persons to preside at the taking of evidence; (2) an oral hearing; (3) the opportunity to submit rebuttal evidence; (4) the opportunity to conduct cross-examination; (5) a transcript; (6) the opportunity to submit proposed findings and conclusions, the opportunity to submit exceptions, and the opportunity to submit supporting reasons for the proposed findings or conclusions; and (7) a decision that includes "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record." *See* 5 U.S.C. §§ 556-557 (1982).

193. There are at least three such interrelated but distinct questions. One includes the appropriate standard of review. Six possible standards of review for federal agencies are found in the APA. *See infra* note 198 and accompanying text. Another question concerns the appropriate scope of review, which turns on the nature of the decision the agency has taken or proposes to take. The final question is that of the appropriate degree of deference the court should accord the agency's decision. Deference turns on the courts' assessment of the quality of the decision making process at the agency.

For an excellent discussion of all three questions, see Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

194. *See, e.g.*, Pacific Legal Found. v. Department of Transp., 593 F.2d 1338, 1343 n.35 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

Columbia Circuit, rebuts the argument.[195] Unlike the standard of review question, which has been free from controversy in recent years, there has been considerable controversy about the appropriate scope of review, resulting in an evolution from a less to a more rigorous scope of review.[196]

Section 10(e) of the APA[197] tends to blur the distinction between standard of review and scope of review. Although entitled "Scope of review," section 10(e) actually sets forth standards of review under which a reviewing court may hold agency action unlawful and set such agency action aside. Agency action may be set aside if:

> (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 sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[198]

Prior to the "Age of Deregulation," the question of the appropriate standard of review was answered. Two of section 10(e)'s standards of review—the "arbitrary and capricious" standard and the "substantial evidence" standard—emerged as the dominant standards of review. The "arbitrary and capricious" standard became the accepted standard for review of informal rulemaking[199] and appears to have been recognized as the standard for review of informal adjudication.[200] The "substantial evi-

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195. *See infra* notes 203-04 and accompanying text.

196. *Id.*

197. 5 U.S.C. § 706 (1982).

198. *Id.* § 706(2).

199. *See* ADMINISTRATIVE LAW AND PROCESS, *supra* note 178, § 7.3.2, at 360.

200. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). In *Overton Park*, petitioners argued that either the "substantial-evidence" standard of review or the "unwarranted by the facts" standard of review in section 706 of the APA applied. *Id.* at 414-15. The Supreme Court rejected both of the proffered standards of review and opted instead for the "arbitrary and capricious" standard of review. *Id.*

dence" standard became the accepted standard for review of formal rulemaking[201] and formal adjudication.[202]

The question of scope of review also was answered, but the answer has changed over time. In the Court of Appeals for the District of Columbia Circuit in particular, and more generally throughout the courts of appeals, what had been a "rational basis" scope of review[203] has evolved into a "hard look" scope of review.[204]

As America moved into the "Age of Deregulation," uncertainty arose about whether the same standard of review and scope of review should apply to deregulation as regulation, and three options have emerged.[205] One is to continue using the same standard of review and scope of review. Because most of the cases in the "Age of Deregulation" have involved informal or hybrid rulemaking, this option would result in choosing the "arbi-

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201. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.6, at 465 (2d ed. 1978).

202. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.01, at 527 (1972).

203. *See* S. Wood, *supra* note 189, at 17. The rational basis scope of review is "extremely narrow." Agency findings of fact and policy choices will be upheld under this scope of review unless they are irrational. *See* Garland, *supra* note 193, at 532.

204. Initially, agencies were the entity required to take the "hard look." *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Subsequently, courts became the entity required to take the "hard look." *See, e.g.*, Natural Lime Ass'n v. EPA, 627 F.2d 416, 451-52 n.126 (D.C. Cir. 1980).

Professor Sunstein contends that the "hard look" scope of review has both procedural and substantive components. There are four procedural components, "[a]ll of [which] can be understood as an effort to ensure that the agency's decision was a reasoned exercise of discretion and not merely a response to political pressures." Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 182.

> The procedural components include four "central" requirements. First, agencies must offer detailed explanation for their decisions . . . .
>
> Second, agencies must justify departures from past practices . . . .
>
> Third, agencies must allow effective participation in the regulatory process by a broad range of affected interests . . . .
>
> Finally, agencies must give consideration to possible alternative measures . . . .

Id. at 181-82.

There is also a "rarely exercised" substantive component to the "hard look" scope of review. This substantive component "is a judicial willingness to overturn decisions that appear unjustified in light of the evidentiary record." *Id.* at 183.

Judge McGowan, Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, contends that courts apply a three-level "sliding scale" scope of review to agency decisions: "The first, and most intense, level of scrutiny, applies to procedural errors. The second, a middle level of scrutiny, involves alleged errors in statutory interpretation . . . . Finally, in reviewing substantive policy decisions, a court operates under the greatest measure of constraint . . . ." McGowan, *supra* note 24, at 220.

205. *See* State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206 (D.C. Cir. 1982), *vacated and remanded sub nom*, Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

trary and capricious" standard of review for informal rulemaking, and the standard of review, if any, that is set forth in the statute authorizing a hybrid rulemaking proceeding for hybrid rulemaking.[206] The particular scope of review invoked would vary, ranging from "reasonableness" to "hard look," depending on the jurisdiction where the suit is brought. The principle argument in favor of this option is that section two of the APA defines rulemaking as the "process for formulating, amending, *or repealing* a rule."[207] Most of the courts confronting this question prior to 1983 have chosen this option.[208]

The second option is more stringent.[209] Under this option, the less stringent "arbitrary and capricious" standard of review is discarded for the more rigorous "substantial evidence" standard of review, and the less stringent "reasonableness" scope of review is discarded for the more rigorous "hard look" scope of review. Proponents of this option argue that there ought to be a presumption not only in favor of an agency's existing course of action but also the consistency of that course of action with congressional intent. Thus, any deviation from this course of action through deregulation ought to be viewed as a strong "danger signal" that the agency has run, or is about to run amok.[210]

The final option is less stringent.[211] Under this option, the "arbitrary and capricious" standard of review is replaced with a less rigorous standard of review, and the existing scope of review is replaced with a less rigorous scope of review. Proponents advance two arguments in favor of this option. They first argue that there should be two presumptions: (1) a presumption in favor of private autonomy, and (2) a presumption against regulation.[212] As a result of these presumptions, judicial review

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206. Most statutes authorizing hybrid rulemaking proceedings specify the standard of review for reviewing rules that have been promulgated. They frequently specify no standard of review for reviewing rules that have been amended or revoked. *See* S. Wood, *supra* note 189, at 25.

207. 5 U.S.C. § 551(5) (1982) (emphasis added).

208. Not many courts had confronted the question prior to 1983. Fewer still "explained their choice in any detail." Garland, *supra* note 193, at 513 n.35.

209. For a more detailed discussion of this option, *see* Garland, *supra* note 193, at 520-24.

210. *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

211. For a more detailed discussion of this option, see Garland, *supra* note 193, at 513-20.

212. The presumption against regulation has not fared well in the courts. *See infra* note 264 and accompanying text.

should be least rigorous when an agency has taken action that "eliminat[es] burdens upon private parties."[213] The second argument is that inaction and deregulation are analogous because "both result in a unregulated marketplace."[214] Because inaction is typically subject to less rigorous judicial review than agency action, deregulation should be given the same treatment.[215]

Which of the three options is likely to prevail? Two recent Supreme Court decisions suggest the type of regulatory environment that is emerging in the "Age of Deregulation." One case, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[216] involves "active" deregulation and arose when an agency partially revoked a regulation. The other case, *Heckler v. Chaney*,[217] involves "passive" deregulation and arose when an agency chose to take no action with respect to regulating a certain activity.

1. State Farm

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA)[218] in an attempt to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[219] Congress directed the Secretary of Transportation or his delagee, the Administrator of the National Highway Traffic Safety Administration (NHTSA),[220] to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."[221] In issuing motor vehicle safety standards, the Secretary of Transportation is to consider "relevant available motor vehicle safety data," the reasonableness, practicability and appropriateness of the proposed standard for the particular type of motor vehicle, and the "extent to which such [safety]

213. *Active Judges and Passive Restraints*, 6 REGULATION 13 (1982). This article was published anonymously but has been attributed to then-Professor and now-Justice Antonin Scalia.

214. Garland, *supra* note 193, at 515.

215. *Id.*

216. 463 U.S. 29 (1983).

217. 470 U.S. 821 (1985).

218. Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381-1431 (1982)) [hereinafter NTMVSA].

219. 15 U.S.C. § 1381 (1982).

220. The Secretary of Transportation has delegated his general authority under the NTMVSA to the Administrator of the National Highway Traffic Safety Administration (NHTSA). *See* 49 C.F.R. § 1.50(a) (1980).

221. 15 U.S.C. § 1392(a) (1982).

standards will contribute to carrying out the purposes" of the NTMVSA.[222]

The motor vehicle safety standard at issue in *State Farm,* Standard 208, had been involved in approximately sixty rulemaking proceedings by the time the case was decided by the Supreme Court in 1983.[223] In those rulemaking proceedings, Standard 208 "ha[d] been imposed, amended, rescinded, reimposed, and now rescinded again."[224]

a. Standard 208 The original Standard 208 was promulgated by NHTSA in 1967 and required the installation of seatbelts in all automobiles.[225] Such seatbelts were activated by the affirmative actions of the occupants of the vehicle.

NHTSA subsequently concluded that there were significant limitations in seatbelts requiring such affirmative action and decided to study "passive occupant restraint systems."[226] Two types of passive restraint systems emerged from these studies: automatic seatbelts[227] and airbags.[228]

In 1969, NHTSA proposed to amend Standard 208, requiring the installation of passive occupant restraint systems.[229] This was done in 1970.[230] Standard 208 was amended again in 1972 to require mandatory passive restraint systems for all front seat occupants of motor vehicles manufactured after August 15, 1975.[231] The 1972 amendment further provided that manufacturers were to offer two options in motor vehicles built between August 1973 and August 1975: passive restraint systems or lap and shoulder belts coupled with an ignition interlock that prevented the vehicle from being started unless the lap and shoulder belts were connected.[232]

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222. 15 U.S.C. §§ 1392(f)(1), (3), (4) (1982).

223. *State Farm,* 463 U.S. 29, 34 (1983).

224. *Id.*

225. 32 Fed. Reg. 2,415 (1967) (amended and codified at 49 C.F.R § 571.208).

226. 463 U.S. at 34-35.

227. An "automatic seatbelt is a traditional safety belt, which when fastened to the interior of the door remains attached without impeding entry or exit from the vehicle, and deploys automatically without any action on the part of the passenger." *Id.* at 35.

228. An airbag is "an inflatable device concealed in the dashboard and steering column. [It] automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces." *Id.*

229. 34 Fed. Reg. 11,148 (1969).

230. 35 Fed. Reg. 16,927 (1970) (to be codified at 49 C.F.R. § 2571.21).

231. 37 Fed. Reg. 3,911 (1972) (to be codified at 49 C.F.R. § 571.208).

232. *State Farm,* 463 U.S. 29, 35 (1983).

NHTSA's 1972 amendment was upheld by the Sixth Circuit Court of Appeals in *Chrysler Corp. v. Department of Transportation*,[233] but the two options outlined in the amendment, particularly the ignition interlock option, proved to be highly unpopular. Hence, Congress, when enacting the Motor Vehicle and Schoolbus Safety Amendment of 1974,[234] prohibited the use of an ignition interlock option[235] and provided that any system, other than seatbelts, would be subject to a one-house legislative veto.[236] NHTSA, in 1975, changed the effective date for the mandatory passive restraint systems from August 15, 1975 to August 31, 1976.[237]

In 1976, Secretary of Transportation William T. Coleman, Jr., concluded there would be widespread public resistance to the mandatory passive restraint systems.[238] He, therefore, initiated a new rulemaking proceeding.[239] The mandatory passive restraint systems requirement was suspended, and Secretary Coleman proposed instead a demonstration project involving as many as 500,000 motor vehicles installed with passive restraint systems in order to achieve public acceptance of such systems.[240]

Secretary Coleman's misgivings about mandatory passive restraint systems, however, were not shared by his successor, Secretary Brock Adams. Secretary Adams discontinued the demonstration project and issued Modified Standard 208, a new mandatory passive restraint systems regulation, requiring either use of airbags or passive belts.[241] The choice of which system to install was left to the automobile manufacturers.

Modified Standard 208 was challenged both in the courts and Congress. The Court of Appeals for the District of Columbia Circuit upheld Modified Standard 208 in *Pacific Legal Foundation v. Department of Transportation*.[242] Neither house of Congress chose to veto Modified Standard 208 under the legislative

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233. 472 F.2d 659 (6th Cir. 1972).

234. Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482 (codified as amended at 15 U.S.C. § 1410b (1982)).

235. 15 U.S.C. § 1410b(b)(1)(B) (1982).

236. *Id.* at 1410b(d).

237. 40 Fed. Reg. 16,218 (1975) (to be codified at 45 C.F.R § 571.208); 40 Fed. Reg. 33,977 (1975) (to be codified at 49 C.F.R § 571.208).

238. *State Farm*, 463 U.S. 29, 36-37 (1983).

239. 41 Fed. Reg. 24,070 (1976).

240. 463 U.S. at 37.

241. Modified Standard 208, 42 Fed. Reg. 34,289, 34,296-97 (1977) (codified as amended at 49 C.F.R. § 571.208).

242. 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

veto provision contained in the Motor Vehicle and Schoolbus Safety Amendment of 1974.[243]

Secretary Adams' successor, Secretary Drew Lewis, reopened the rulemaking proceeding on Standard 208 in February of 1981 because of changed economic circumstances, particularly in the automobile industry.[244] In April of 1981, NHTSA ordered a one-year delay in the application of Modified Standard 208 to large motor vehicles, extending the deadline to September of 1982,[245] and proposed the possible revocation of Standard 208 in its entirety.[246]

NHTSA subsequently promulgated a final rule, revoking the passive restraint systems requirement contained in Modified Standard 208.[247] NHTSA's action in part was based on its judgment that automatic passive restraint systems were no longer reasonable or practicable because of the minimal safety benefits they provided.[248] NHTSA also feared many consumers would regard Modified Standard 208 as an instance of ineffective regulation, adversely affecting the public's view of safety regulation and, in particular, "poisoning . . . popular sentiment toward efforts to improve occupant restraint systems in the future."[249]

b. Judicial response The revocation of the Modified Standard 208 passive restraint systems requirement was challenged in *State Farm Mutual Automobile Insurance Co. v. Department of Transportation.*[250] The Court of Appeals for the District of Columbia Circuit held the revocation was arbitrary and capricious. The Supreme Court vacated this judgment and remanded the case for further consideration consistent with its opinion.[251]

In reviewing the revocation of the passive restraint systems

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243. No action was taken on Modified Standard 208 by the House of Representatives. *See State Farm*, 463 U.S. at 37 n.7. The Senate tabled a resolution of disapproval of Modified Standard 208. *See* S. Con. Res. 31, 95th Cong., 1st Sess., 123 Cong. Rec. 33,332 (1977).

244. 46 Fed. Reg. 12,033 (1981).

245. 46 Fed. Reg. 21,172 (1981) (to be codified at 49 C.F.R. 571.208).

246. *Id.* at 21,205.

247. 46 Fed. Reg. 53, 419 (1981) (to be codified at 49 C.F.R. 571.208).

248. *State Farm*, 463 U.S. 24, 39 (1983).

249. 46 Fed. Reg. 53,424 (1981).

250. 680 F.2d 206 (D.C. Cir. 1982), *vacated and remanded sub. nom*, Motor Vehicle Mfr. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

251. 463 U.S. at 29. For a discussion of the importance of both the Court of Appeals and Supreme Court decisions in *State Farm* by the author of the court of appeal's decisions, *see* Mikva, *supra* note 13, at 122-40.

requirement, the Court of Appeals for the District of Columbia Circuit and the Supreme Court examined in considerable detail the standard of review question and the scope of review question.

(1) Standard of review Both the court of appeals and the Supreme Court characterized the agency proceeding to revoke Modified Standard 208's passive restraint systems requirement as an informal rulemaking proceeding. Based on this characterization, both courts reached two conclusions. First, the standard of review for revocation ought to be the same as the standard of review for promulgation (the revocation conclusion). Second, the appropriate standard of review is the "arbitrary and capricious" standard (the standard of review conclusion).

The fundamental problem with this analysis is that both courts mis-characterized the agency proceeding as an informal rulemaking proceeding. Consequently, the soundness of both the revocation and the standard of review conclusions is questionable.

Apparently, the court of appeals reached its standard of review conclusion on the basis of two statutory provisions in the NTMVSA because the conclusion immediately follows a citation to these two provisions. The court of appeals initially cited section 103(b) of NTMVSA, a section that applies to all motor vehicle safety standards. Section 103(b) provides that the APA "shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard."[252] The court of appeals then cited section 109(c) of the Motor Vehicle and Schoolbus Safety Amendment of 1974, which applies only to occupant restraint systems standards. Section 109(c) provides that "Section 553 of Title 5 shall apply to [an occupant restraint systems] standard."[253]

The court of appeals acknowledged that the revocation conclusion was more "troublesome" than the standard of review conclusion.[254] Although its discussion of the appropriate standard of review in revocation cases tends to merge with its discussion of the appropriate scope of review,[255] the revocation conclu-

252. 15 U.S.C. § 1392(b) (1982).

253. *Id.* § 1410b(c)(2).

254. *State Farm*, 680 F.2d at 218.

255. Immediately after announcing that "[t]he appropriate scope of judicial review remains the most troublesome question in this case," for example, the court of appeals compares and contrasts promulgation and revocation before deciding what the appropri-

sion made by the court of appeals is that the revocation ought to be judged in terms of the "arbitrary and capricious" standard, the same standard that would apply were the agency action promulgation rather than revocation.[256]

Neither the characterization question nor the standard of review conclusion was particularly difficult for the Supreme Court. With respect to the characterization question, the Court noted that "[b]oth the Act and the 1974 Amendments concerning occupant crash protection standards indicate that motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of the Administrative Procedure Act."[257] The Court's discussion of the standard of review conclusion consists of a single sentence: "The agency's action in promulgating such standards therefore may be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "[258]

The revocation conclusion was more difficult for the Supreme Court. The Department of Transportation (DOT) accepted the arbitrary and capricious standard as the appropriate standard in revocation cases.[259] DOT's argument in *State Farm* focused on a court's function under the arbitrary and capricious standard. DOT argued that the court's function was to decide whether an agency rule "is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."[260]

Unlike DOT, the Motor Vehicle Manufacturers Association (MVMA), one of the petitioners in *State Farm*, did not accept the arbitrary and capricious standard of review as the appropriate standard in revocation cases.[261] MVMA argued that the Supreme Court could choose between two standards: the promulgation standard, an "arbitrary and capricious" standard, or the inaction standard, which MVMA contended was "considerably narrower" than the arbitrary and capricious standard. MVMA maintained that the appropriate standard in revocation cases was the inaction standard.[262] Apparently, MVMA's argument in

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ate standard of review is in cases of revocation. *Id.* at 218-19.

256. *Id.* at 220.

257. 463 U.S. 29, 41 (1983).

258. *Id.*

259. *Id.* at 42.

260. *Id.* The Supreme Court "d[id] not disagree with this formulation." *Id.* at 42-43.

261. *Id.* at 41.

262. *Id.*

favor of the inaction standard was based in part on the notion that there should be a presumption against regulation.[263]

The Supreme Court rejected both MVMA's presumption[264] and its argument in favor of the inaction standard.[265] The Court concluded that the "arbitrary and capricious" standard is the appropriate standard of review in cases involving revocation.[266] This conclusion was based on the language of the NTMVSA,[267]

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263. For a discussion of the presumption against regulation, *see supra* notes 212-13 and accompanying text.

264. The Supreme Court rejected a presumption against regulation:

> [T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not *against* safety regulation, but *against* changes in current policy that are not justified by the rulemaking record.

463 U.S. at 42.

265. The Supreme Court distinguished deregulation and inaction:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. 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. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to . . . ." Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 41-42 (citations omitted).

Deregulation differs from inaction. Professor Sunstein has identified four differences. First, the inquiry ("review of deregulation involves an inquiry into a well-defined, actual decision, one that is ordinarily based on a record"). Sunstein, *supra* note 204, at 203. Second, agency resources ("[a] judicial decree that deregulation not take place does not divert agency resources in the same way as an order that an agency initiate rulemaking in the first instance"). *Id.* Third, established practice ("[D]eregulation, unlike inaction, is a departure from established practices"). *Id.* Fourth, expectations ("[a] departure from the *status quo,* even in the form of deregulation, may disrupt the expectations that regulation has built up and impede planning on the part of regulatory beneficiaries"). *Id.* at 204.

While deregulation differs from inaction, the two do possess "three common features . . . that might be thought to justify a deferential judicial role":

> First, a decision to deregulate may be, at least in part, based on a belief that the agency's limited resources should not be devoted to the problem at hand . . . .
>
> Second, regulation imposes costs on the admittedly limited resources of the regulated class . . . .
>
> Third, to the extent that the distinct role of the courts is thought to be the promotion of private ordering, deregulation and inaction are indistinguishable.

Id. at 202.

266. 463 U.S. at 41.

267. "The [NTMVSA] expressly equates orders 'revoking' and establishing' safety

the APA,[268] and the judgment that "revocation of an extant regulation is substantially different from a failure to act."[269]

The Supreme Court, however, did distinguish legislation from regulation. The former enjoys a presumption of constitutionality, the latter enjoys a presumption of regularity: "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate."[270] The presumptions are different, and the Court left little doubt that a presumption of constitutionality is qualitatively superior to a presumption of regularity.

Both the court of appeals and the Supreme Court correctly concluded that the appropriate standard of review is "easily formulated" as an "arbitrary and capricious" standard if the rulemaking proceeding is an informal rulemaking proceeding.[271] However, their characterization of the rulemaking proceeding as being an informal proceeding is questionable.

Their analysis of not only the statute but also its legislative history is sloppy. Both the court of appeals and the Supreme Court cited only a portion of section 109(c), omitting some key language. Section 109(c) provides that "[s]ection 553 of Title 5 shall apply to such standard; except that the Secretary shall afford interested persons an opportunity for oral as well as written presentation of data, views, or arguments. A transcript shall be kept of any oral presentation."[272] Proceedings under section 109(c) differ in two significant respects from proceedings for informal rulemaking under the APA. First, oral presentations are mandatory under section 109(c); they are optional under the APA in informal rulemaking proceedings.[273] Second, transcripts of any oral presentation are mandatory under section 109(c); there is no such requirement under the APA in informal rulemaking proceedings.[274]

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standards . . . [and does not suggest] that revocations are to be treated as refusals to promulgate standards." *Id.*

268. *Id.*

269. *Id.* According to Judge Mikva, who authored the court of appeals decision in *State Farm*, "*State Farm* stands for the proposition that deregulation is a kind of agency action, nothing more and nothing less." Mikva, *supra* note 13, at 126.

270. 463 U.S. at 43 n.9.

271. *See supra* note 199 and accompanying text.

272. 15 U.S.C. § 1410b(c)(2) (1982).

273. *See supra* note 185 and accompanying text.

274. *See supra* notes 182-87 and accompanying text.

The standard of review in informal rulemaking proceedings is the "arbitrary and capricious" standard. The legislative history of NTMVSA, however, suggests Congress intended a different standard of review for motor vehicle safety standards. Both the Senate Report and the House Report contain language indicating that agency findings under the NTMVSA should be supported by "substantial evidence on the record considered as a whole."[275] The court of appeals ignored this legislative history; the Supreme Court cited the legislative history but failed to perceive its importance.

Both the statute and its legislative history refute the characterization of the rulemaking proceeding at issue in *State Farm* as an informal rulemaking proceeding. Consequently, the rulemaking proceeding cannot be characterized either as an informal[276] or a formal[277] rulemaking proceeding but is properly characterized as a "hybrid" rulemaking proceeding.[278]

Because the court of appeals and the Supreme Court both mis-characterized the rulemaking proceeding in *State Farm*, their revocation and standard of review conclusions are questionable. Each of these conclusions will be explored briefly.

The revocation conclusion in cases involving hybrid rulemaking is difficult. The APA treats all three phases of rulemaking—formulating, amending, or repealing—the same[279] and applies the same standard of review to each phase. The same approach could be adopted with regard to "hybrid" rulemaking. A careful analysis of the "hybrid" rulemaking statutes reveals that this approach has not been frequently adopted.[280] In a majority of "hybrid" rulemaking statutes, the statute states the standard of review for formulating a rule but is silent with respect to the standard of review for amending or

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275. *See* S. REP. No. 1301, 89th Cong., 2d Sess. 8 (1966); H.R. REP. No. 1776, 89th Cong., 2d Sess. 21 (1966).

276. The Modified Section 208 rulemaking proceeding is not an informal rulemaking proceeding because procedures—mandatory oral presentation and a transcript—are required in a Modified Section 208 rulemaking proceeding but are not required in an informal rulemaking proceeding.

277. The Modified Section 208 rulemaking proceeding is not a formal rulemaking proceeding because the full range of procedures required in formal rulemaking proceedings by the APA are not required in a Modified Section 208 rulemaking proceeding. *See* 5 U.S.C. §§ 554, 556, 557 (1982).

278. *See supra* notes 190-92 and accompanying text.

279. *See* 5 U.S.C. § 551(5) (1982).

280. *See* S. Wood, *supra* note 189 at 25.

repealing a rule.[281] Arguably, this scheme means that the same approach should be adopted with respect to "hybrid" rulemaking that already exists with respect to informal rulemaking. Such an argument presents two problems. First, symmetry should not be presumed. The APA illustrates that Congress knows how to cover all three phases of rulemaking. Congress has chosen not to cover all three phases in most hybrid rulemaking statutes. Second, symmetry may be unwise. There may be reasons to distinguish between the phases of rulemaking, particularly in the context of "hybrid" rulemaking, and to make one phase relatively more difficult or less difficult than other phases.

The standard of review conclusion in "hybrid" rulemaking cases is equally difficult. Section 109(c) of the statute is silent regarding the appropriate standard for review. The legislative history indicates that the appropriate standard—at least with respect to agency findings—is a "substantial evidence" standard.[282] Consequently, those favoring a "substantial evidence" standard might emphasize this history. This approach is problematic for two reasons. First, the legislative history is the legislative history for section 103 of the NTMVSA, which was enacted in 1966 and deals with all motor vehicle safety standards, and not the legislative history for section 109 of the Motor Vehicle and Schoolbus Safety Amendment of 1974, which deals exclusively with occupant restraint systems. Second, this approach requires legislative history from an earlier and more general enactment to override statutory language from a later and more specific enactment. Alternatively, those favoring an "arbitrary and capricious" standard might emphasize a portion of section 109(c). The obvious problem with this approach is the approach requires one to ignore not only another portion of section 109(c), calling for a transcript of oral presentations as well as an administrative record, but also expressions in the legislative history that agency findings of fact are to be supported by substantial evidence.

(2) Scope of review According to the court of appeals, the "most troublesome question in the case" was "the appropriate scope of judicial review."[283] The court indicated that all parties

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281. *Id.*

282. *See supra* note 275 and accompanying text.

283. *State Farm*, 680 F.2d 206, 218 (D.C. Cir. 1982), *vacated and remanded sub nom*, Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

agreed the "arbitrary and capricious" standard was the appropriate standard for review, but the parties disagreed markedly about "the intensity and rigor with which that standard should be applied."[284]

One of the petitioners, the National Association of Independent Insurers, urged a scope of review that involves the most intense scrutiny, contending that NHTSA's burden was the heavy burden' of explaining why its rescission of Standard 208" was "rational and supported by substantial evidence."[285] Another petitioner, State Farm Mutual Automobile Insurance Company, urged an "intensive and exacting" scope of review.[286] While "welcom[ing] the most intense scrutiny" because the decision to revoke the passive restraint systems requirement in Modified Standard 208 was 'supported by the evidence in the record,' " NHTSA urged the court to 'exercise a high degree of deference to the agency's determination.' "[287]

After answering its own question about why the same verbal standard of review—the "arbitrary and capricious" standard—should be given different scopes of review in different contexts,[288] the court of appeals concluded that the appropriate scope of review turned on the legislative reaction to the passive restraint systems requirement.[289] The court of appeals determined that three separate periods in the legislative history warranted close attention: Congress' reaction to passive restraint

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284. *Id.* at 220.

285. *Id.* (citation omitted).

286. *Id.*

287. *Id.* (citation omitted).

288. *Id.* The court of appeals concluded that the same verbal standard of review—the "arbitrary and capricious" standard—should be given different scopes of review, depending on whether an agency was adopting a new policy position or was changing an existing policy position. The Court justified that result on the basis of the following reasoning that federal "agencies derive their power from . . . Congress" and "have no authority to act inconsistently with their statutory mandate." *Id.* at 222. "[S]udden and profound alterations in an agency's policy constitute 'danger signals' that the will of Congress is being ignored." *Id.* at 221. What this reasoning suggests is that changes in agency policy, particularly "sudden and profound" changes, ought to be skeptically treated by reviewing courts: the more sudden and profound the change, the more intense the level of scrutiny by the reviewing court.

Justice Scalia, a former member of the court of appeals, disagrees that a change in policy position is a "danger signal." *See* Scalia, *supra* note 13, at 192. He expresses some conceptually difficulty in distinguishing between adopting new policy positions and changing existing policy position and describing the former as no change and the latter as change. *Id.* at 191. Both are changes from his perspective. *Id.* at 191-92.

289. 680 F.2d at 222.

systems in 1974, 1977, and again in 1980.[290] Based on congressional reaction in these three periods, the court of appeals concluded the decision to revoke the passive restraint systems requirement in Modified Standard 208 must be subjected to "thorough[,] probing, in-depth review."[291] The court characterized this scope of review "as 'searching and careful' as the judicial review in *Pacific Legal Foundation v. Dep't of Transportation* [was], where the issue was the promulgation rather than the rescission of Modified Standard 208."[292]

The purpose of such review was to prevent "the congressional will [from being] ignored."[293] Under this scope of review, NHTSA could revoke the passive restraint systems requirement but "has the burden of explaining why it has changed course, and of showing that rescission of Modified Standard 208 was reasonable."[294]

The Supreme Court did "not find the appropriate scope of judicial review to be the 'most troublesome question' " in the case[295] and concluded that court of appeals had "erred in intensifying the scope of its review based upon its reading of legislative events."[296] The Supreme Court characterized this path of analysis as "misguided" and its inferences as "questionable."[297]

The Supreme Court disagreed with the court of appeals about the effects of inchoate legislative action on the appropriate scope of review. While acknowledging that an "agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation," the Supreme Court concluded that "unequivocal ratification[298] . . . would not connote approval or disapproval of an agency's later decision to rescind the regulation."[299] The Court also noted that respondent, State Farm Mutual Automobile Insurance Company, "expressly agree[d] that the post-enactment legislative

290. *Id.* at 222-28.

291. *Id.* at 228.

292. *Id.* (citation omitted).

293. *Id.*

294. *Id.* at 229.

295. *State Farm*, 463 U.S. at 40.

296. *Id.* at 44.

297. *Id.*

298. The Supreme Court's conclusion is subject to an important qualification: "short of statutory incorporation." *Id.* at 45.

299. *Id.*

history of the Act does not heighten the standard of review of NHTSA's actions."[300]

Even if the Supreme Court were inclined to agree with the court of appeals about the effects of inchoate legislative action on the appropriate scope of review, the Court indicated its disagreement with the court of appeals' inferences drawn from the three separate time periods in the legislative history. With respect to the 1974 time period, the Court pointed out that a mandatory passive restraint systems requirement was not in effect.[301] Congress, therefore, had no reason to foreclose that option. While the court of appeals had drawn the inference that Congress supported a mandatory passive restraint systems requirement because of Congress' decision that such a requirement be subject to disapproval by resolutions of disapproval in the House of Representatives and the Senate, the Supreme Court noted that this inference was neither the only nor the most plausible inference under the circumstances.[302]

The court of appeals also had drawn positive inferences of support for a mandatory passive restraint systems requirement from Congress' decision to table resolutions of disapproval that had been introduced in 1977. According to the Supreme Court, "no mandate can be divined from the tabling of resolutions of disapproval."[303] Congress, moreover, like NHTSA, was free to reach a different judgment, based on changed circumstances, even if a mandatory passive restraint systems requirement had been favored in 1977.

With respect to the 1980 time period, the Supreme Court chided the court of appeals for reading too much into floor action on the 1980 authorization bill. The Supreme Court noted that "[o]ther contemporaneous events could be read as showing equal congressional hostility to passive restraints"[304] and pointed out that the 1980 authorization bill never became law.[305]

The Supreme Court concluded that the scope of review normally associated with the "arbitrary and capricious" standard

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300. *Id.* at 44-45.

301. *Id.* at 45.

302. *Id.*

303. *Id.*

304. *Id.* at 45-46.

305. *Id.* at 45.

should be used in this case.[306] Under that scope of review, Modified Standard 208 would be arbitrary and capricious

> if [NHTSA] ha[d] relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[307]

Applying this scope of review under the "arbitrary and capricious" standard of review, the Supreme Court determined NHTSA's decision to revoke Modified Standard 208 had been arbitrary and capricious for two reasons. First, and the "most obvious" reason was that "NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized."[308] Such consideration was required because the 1970 amendment[309] to Modified Standard 208, which "contemplated the installation of [airbags] in all cars,"[310] was a "de facto" airbag amendment.[311] This fact required NHTSA to "cogently explain"[312] its decision to eliminate the airbag option. There were at least two possible approaches to this explanation requirement. Both were tried.

One approach acknowledged the existence of such a requirement and offered a variety of arguments to satisfy the requirement. NHTSA, for example, argued the automatic seatbelt option would not achieve the anticipated safety results. The Supreme Court responded that this argument justifies "[no] more than an amendment of [Modified] Standard 208" to eliminate the automatic seatbelt option and casts "[no] doubt on the need for [the airbag option] or [its] efficacy."[313] NHTSA argued that the automobile industry favored the automatic seatbelt option over the airbag option. The Supreme Court characterized the automobile industry as having "waged . . . war against the airbag and lost"[314] and responded that NHTSA "may not revoke

306. *Id.* at 43.
307. *Id.*
308. *Id.* at 46.
309. *See supra* note 230 and accompanying text.
310. 463 U.S. at 46.
311. *Id.* at 46 n.11 (citing Graham & Gorham, *NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation*, 35 ADMIN. L. REV. 193, 197 (1983)).
312. *Id.* at 48.
313. *Id.* at 47.
314. *Id.* at 49.

a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design."[315] Petitioner, Motor Vehicle Manufacturers Association of the United States, Inc., argued there were a number of difficulties with the airbag option.[316] The Supreme Court responded "[t]he short—and sufficient—answer . . . is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action."[317]

Another approach denies the existence of such a requirement. The denial was based on the argument that mandating consideration of "an airbags-only alternative" "dictate[s] . . . the procedures [NHTSA] is to follow"[318] and is inconsistent with *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*[319] The Supreme Court rejected this approach as "misread[ing] *Vermont Yankee* and misconstru[ing] the nature of the remand" in *State Farm.*[320] The remand did not require NHTSA to follow any specific procedures or to consider all policy alternatives[321] in reaching its decision.[322] The remand did require NHTSA to consider an airbags-only alternative, "given the judgment made in 1977 that airbags are an effective and cost-beneficial life-saving technology."[323]

The other reason for concluding that NHTSA's decision had been arbitrary and capricious was that NHTSA "was too quick to dismiss the safety benefits of automatic seatbelts."[324] The

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315. *Id.*

316. *Id.* at 49-50. These difficulties ranged from "questions concerning the installation of airbags in small cars to that of adverse public reaction." *Id.* at 50.

317. *Id.*

318. *Id.*

319. 435 U.S. 519 (1978).

320. 463 U.S. at 50.

321. *Id.* at 50-51. The Supreme Court borrowed the following language from Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978), to discuss policy alternatives: "[R]ulemaking cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . ." *See also supra* note 204.

322. 463 U.S. at 51.

323. *Id.*

324. *Id.* When must an alternative be investigated? According to Professor Sunstein that depends on:

> (1) the amount of work already done on the proposed alternative, (2) the proximity between the matter under review and the alternative, (3) the costs of investigating the advantages and disadvantages of the alternative, and (4) the strength, in light of existing information of the claim that the alternative is a good one.

court of appeals, noting the lack of probative evidence that directly supported NHTSA's decision, had taken the position that "only a well justified refusal to seek more evidence could render rescission non-arbitrary."[325] Petitioners objected to this conclusion. The Supreme Court agreed with petitioners[326] that "serious uncertainties if supported by the record and reasonably explained" are a sufficient reason to revoke a rule.[327]

The Supreme Court began its analysis by noting "the safety benefits of wearing seatbelts are not in doubt."[328] Because the benefits of automatic seatbelts were not at issue, the critical questions were whether usage rates would increase if detachable automatic seatbelts were installed and whether the costs in a cost/benefit analysis of detachable automatic seatbelts would exceed the benefits.

On the usage question, NHTSA had committed two mistakes. Its first mistake was one of omission. NHTSA had taken the position that "it cannot reliably predict even a 5 percentage point increase as the minimum level of expected increased usage."[329] This finding was based on surveys of drivers of automobiles equipped with passive seatbelts. Those surveys "reveal[ed] more than a doubling of the usage rate experienced with manual [seat]belts."[330] NHTSA was skeptical that a doubling of seatbelt usage could be extrapolated from the surveys.[331] The Supreme Court accepted NHTSA's assessment, indicating that this issue "is precisely the type of issue which rests within the expertise of NHTSA,"[332] but concluded the assessment was flawed because NHTSA had failed to take into account a "critical difference" between detachable automatic seatbelts and manual seatbelts: an inertia factor that works against manual seatbelts.[333] In contrast, that same factor works in favor of automatic seatbelts because "[a] detached [automatic seat]belt does require an affirm-

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Sunstein, *supra* note 204, at 207.

325. *State Farm*, 680 F.2d 206, 232 (D.C. Cir. 1982), *vacated and remanded sub nom*, Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

326. 463 U.S. at 51-52.

327. *Id.* at 52.

328. *Id.*

329. *Id.* at 53-54.

330. *Id.* at 53.

331. *Id.*

332. *Id.*

333. *Id.* at 54.

ative act to reconnect it, but . . . once reattached, [the seatbelt] will continue to function automatically unless again disconnected."[334]

NHTSA's second mistake was one of commission. NHTSA had equated two devices—ignition interlock and continuous belt—in its discussion of the "Option of Adopting Use-Compelling Features."[335] Use-compelling features, based on NHTSA's experience with ignition interlock, were rejected because they "could be counterproductive . . . [due to the] widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash."[336]

The problem with equating the two devices for purposes of evaluating usage rates is they are distinguishable in terms of extricability. Continuous belt, which "allows the occupant to spool out' the belt and create the necessary slack for easy extrication from the vehicle,"[337] "assure[s] easy extricability."[338] They also "may be" or "are" distinguishable in terms of public reaction. The Supreme Court adopted the "may be" formulation, noting that NHTSA "failed to offer any explanation why a continuous passive belt would engender the same adverse public reaction as the ignition interlock."[339] The court of appeals in *State Farm* took an even stronger position, adopting an "are" formulation and concluding that "every indication in the record points the other way."[340]

With respect to the cost question, the Supreme Court indicated NHTSA had been correct to consider "the costs as well as the benefits of Standard 208."[341] NHTSA's cost/benefit analysis, however, was flawed. NHTSA had treated the cost and benefit factors equally while the intent of Congress had been that "safety . . . be the pre-eminent factor under the

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334. *Id.*

335. 46 Fed. Reg. 53,424 (1981).

336. *Id.*

337. 463 U.S. at 55.

338. *Id.* at 56 (citing Option of Adopting Use-Compelling Features, 46 Fed. Reg. 52,493-94 (1981)).

339. *Id.*

340. 680 F.2d 206, 234 (D.C. Cir. 1982), *vacated and remanded sub nom,* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29 (1983).

341. 463 U.S. at 54.

[NTMVSA.]"[342] NHTSA also had understated the benefit factor.[343]

The appellate court's and the Supreme Court's language in *State Farm* suggests they approached the scope of review question from quite different perspectives. The court of appeals, after reviewing "the legislative reaction to the passive restraint [systems requirement],"[344] decided the appropriate scope of review was a "thorough[,] probing, in-depth review."[345] The Supreme Court indicated the court of appeals had "erred in intensifying the scope of its review based upon its reading of legislative events"[346] and concluded the scope of review normally associated with the "arbitrary and capricious" standard should be used.[347]

One might conclude from the different approaches to the scope of review question that the two courts employed different scopes of review: the court of appeals adopted a stringent scope of review, while the Supreme Court adopted a more relaxed scope of review. This conclusion is possible, but erroneous. If "[t]he essence of the contemporary hard look doctrine of judicial review is to compel explanations of methodology and identification of the criteria for judgment,"[348] both courts, regardless of their approach to the scope of review question, actually employed the "hard look" scope of review.[349]

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342. *Id.* at 55 (citing H.R. REP. No. 1776, 89th Cong., 2d Sess., 16 (1966)).

343. *Id.* at 54-55.

344. 680 F.2d at 228.

345. *Id.*

346. 463 U.S. at 44.

347. *Id.* at 43.

348. Rogers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision,* 11 ENVTL. L. 301, 316 (1981).

349. The authors of this article are not alone in drawing this conclusion. *See, e.g.,* Sunstein, *supra* note 204, at 196. Another commentator, however, warns that *State Farm* may be atypical rather than typical:

> [W]hat may be most noteworthy about *State Farm* is that it was atypical; it was apparently the first time in a decade that the Court had used a pure abuse-of-discretion rationale to strike down a federal agency's decision. Consequently, it is far too early to conclude that judicial scrutiny of the reasons agencies give for their discretionary choices has proved unworkable. Instead, the search for moderate, durable scope-of-review principles should continue.

Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith,* 1986 DUKE L.J. 258, 268.

2. Heckler

Congress enacted the Food, Drug, and Cosmetic Act (FDCA)[350] in an attempt to prevent "the adulteration or misbranding of any . . . drug . . . [or] [t]he introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded."[351] The Secretary of Health and Human Services or his delagee, the Commissioner of the Food and Drug Administration (FDA),[352] was directed by Congress to achieve this prevention goal. The Commissioner has used the "safe and effective" provision and the misbranding provision of the FDCA to achieve this goal.

The Commissioner of the FDA is responsible for assuring that all new drugs are "safe and effective" for use under the conditions prescribed, recommended, or suggested on the official label.[353] This "safe and effective" provision has been interpreted as imposing on the Commissioner the "obligat[ion]" to investigate and take appropriate action against unapproved uses of approved drugs where such unapproved use becomes widespread or endangers the public health.[354] The Commissioner also has the responsibility to prevent misbranding of any drug. A drug is misbranded if its label contains inadequate directions for the drug's use or inadequate warnings against unapproved uses or methods of administration.[355]

a. Lethal injections By 1983, five states, including Texas and Oklahoma, had enacted statutes adopting lethal injections as a means of human execution.[356] More than 200 inmates sentenced to death in the United States were housed in prisons in those five states.[357] Eight inmates sentenced to death in Texas and Oklahoma petitioned the FDA on December 19, 1980, to en-

350. Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-92 (1982)).

351. 21 U.S.C. § 331 (1982).

352. The Secretary of Health and Human Services has delegated his authority under the FDCA to the Commissioner of the Food and Drug Administration. *See* 21 C.F.R. § 5.10 (1987).

353. 21 U.S.C. §§ 331, 335 (1982); *see also* 21 C.F.R. § 201 (1987).

354. *See* Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration, 37 Fed. Reg. 16,503 (1972) [hereinafter Policy Statement].

355. 21 U.S.C. § 352(f) (1982).

356. Chaney v. Heckler, 718 F.2d 1174, 1177 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985). The other states are Idaho, New Mexico, and Washington.

357. *Id.*

force the "safe and effective" provision and the labeling provision against the states.[358] Their petition recited the known medical and scientific evidence concerning lethal injections[359] and suggested that the drugs used in administering the lethal injections posed a "substantial threat of torturous pain to persons being executed" by lethal injection.[360]

The inmates requested the Commissioner of the FDA to take the following actions:

> 1. Affix a boxed warning to the labels of the drugs specified for use in a lethal injection . . . that these drugs are not approved for use as a means of execution, are not considered safe and effective as a means of execution, and should not be used as a means of execution[;]
> 2. Prepare and send to the manufacturers of the drugs and to prisons and departments of correction . . . notices advising that the drugs . . . are not approved for use as a means of execution, are not considered safe and effective as a means of execution, and should not be used as a means of execution;
> 3. Place in the Drug Bulletin an article advising that the drugs specified for use in a lethal injection . . . are not approved for use as means of execution, are not considered safe and effective as a means of execution, and should not be used as a means of execution;
> 4. Adopt a policy and procedure for the seizure and condemnation . . . of drugs which are destined or held for use as a means of execution; [and]
> 5. Recommend the prosecution of manufacturers, wholesalers, retailers and pharmacists who knowingly sell drugs for the unapproved use of lethal injection and prison officials who knowingly buy, possess or use drugs for the unapproved use of lethal injections.[361]

The Commissioner declined to take any of the actions requested by the inmates' petition. His refusal was based both on a jurisdictional argument and on an agency discretion argument.

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358. *Id.*

359. Apparently, the known medical and scientific evidence concerning lethal injections consisted of the 1949 to 1953 Report of the Royal Commission on Capital Punishment and affidavits of medical and scientific experts. *Id.* The affiants contended that "there is no 'expert consensus' founded upon 'substantial evidence' that these drugs will produce death quickly and without pain and discomfort" and stated that "[they] were not aware of *any* published data or investigations that would establish the effectiveness of such drugs for lethal injection." *Id.* at 1177-78 (emphasis in original).

360. *Id.* at 1177.

361. *Id.* at 1178.

With respect to the jurisdictional argument, the Commissioner characterized the case law in the area of "unapproved use of approved drugs" as "far from uniform."[362] The Commissioner contended, therefore, that the jurisdictional argument should be resolved against the assertion of jurisdiction, particularly in cases involving regulation of state-sanctioned use of lethal injections.[363]

Even if resolution of the jurisdictional argument favored assertion of jurisdiction, the Commissioner stated his inclination to decline to assert jurisdiction in this case and the rationale for his inclination:

> [W]e believe we would be authorized to decline to exercise [jurisdiction] under our inherent discretion to decline to pursue certain enforcement matters . . . . Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions . . . ."[364]

b. Judicial response Both the Commissioner's jurisdictional argument and agency discretion arguments were challenged in *Chaney v. Heckler*.[365] However, neither the District Court for the District of Columbia nor the Supreme Court addressed "the thorny question of the FDA's jurisdiction."[366]

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362. Chaney v. Heckler, 470 U.S. 821, 824 (1985).

363. 718 F.2d at 1178.

364. 470 U.S. at 824-25.

365. 718 F.2d 1174 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

366. 470 U.S. at 828. Two of the three courts that heard *Heckler* did not address the jurisdictional argument. The District Court for the District of Columbia "declined to decide the jurisdictional issue." 718 F.2d at 1178. The Supreme Court also chose not to address the jurisdictional argument.

The court of appeals disagreed, concluding that the jurisdictional argument had to be addressed. Its resolution of this argument provoked a sharp response from dissenting Judge Scalia. *Id.* at 1192-200 (Scalia, J., dissenting).

In the district court, the FDA had argued that "the unapproved use of drugs for lethal injection is outside the general jurisdictional provisions of the [FDCA.]" *Id.* at 1179. The FDA altered its argument in the court of appeals, contending that the unapproved use of drugs for lethal injection fell under the "practice-of-medicine" exemption to its general jurisdiction or, alternatively, that its "jurisdiction depends upon the existence of misbranding under [Section] 331(k) . . ." and that the facts of *Heckler* did not establish misbranding. *Id.* at 1181.

The legislative history of the FDCA expressly prohibits the "FDA from regulating physicians' practice of medicine." *Id.* at 1179. The basis for the practice-of-medicine exemption, according to the FDA, is state action, i.e., physicians are licensed by the states to practice medicine. *Id.* at 1179-80. Since state prisons are also licensed by the states,

The district court granted FDA's motion for summary judg-

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the FDA took the position that the unapproved use of a drug for lethal injection fell under the practice-of-medicine exemption. *Id.* Both the court of appeals and Judge Scalia rejected the state action explanation for the practice-of-medicine exemption. *Compare id.* at 1180 *with id.* at 1198 (Scalia, J., dissenting). According to the court of appeals, this explanation could not be correct because the FDA regulates drugs used "in prison . . . clinical investigations" and "in veterinary practices." *Id.* at 1180. "The better explanation for the practice-of-medicine exemption is that Congress did not want to interfere with physicians' treatment of their patients" by requiring them "to follow the expensive and time-consuming procedure of obtaining FDA approval before putting drugs to new uses." *Id.*

Section 331(k) prohibits an act involving a drug "if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded." 21 U.S.C. § 331(k) (1982). The disagreement between the court of appeals and Judge Scalia on this argument turned on two issues. First, who is the ultimate customer for whom section 331(k) provides protection? Second, how broadly should the "held for sale" provision in section 331(k) be interpreted?

The court of appeals determined that the ultimate customer is "the last person to *consume* the drug—usually a patient . . . but in this case the prisoner who receives the lethal injection." 718 F.2d at 1182 (emphasis in original). Identifying the last person to consume the drug as the ultimate customer makes more sense than identifying the last person to purchase the drug as the ultimate customer because the latter approach "would free from the strictures of the FDCA any use to which the purchaser wished to put the drugs." *Id.* The court of appeals characterized such a reading as "thwart[ing] the ultimate purpose of section 331 of the FDCA—protection of those who consume drugs from the potential harm of misbranding by anyone in the chain of distribution." *Id.*

The court of appeals favored a broad interpretation for the "held for sale" provision in section 331(k). One source of support for this interpretation was the fact that section 331(k) invokes the commerce clause power. Section 331(k), therefore, should be interpreted in light of "the modern constitutional understanding of the breadth of congressional power under the commerce clause." *Id.* at 1181. Another and even more important source of support for a broad interpretation was the fact that the "held for sale" provision in section 331(k) had been added "to expand, not to limit" the jurisdiction of the FDA. *Id.*

Judge Scalia determined that the ultimate customer is the last person to purchase the drug. In his mind, "the majority's notion of an 'unwilling consumer' [as an 'ingester' rather than a purchaser'] does not compute." *Id.* at 1199 (Scalia, J., dissenting). The notion does not compute because 'consumer protection' refers to shoppers rather than gourmets, and the consumer price index to purchasers rather than eaters." *Id.*

Judge Scalia favored a narrow interpretation for the "held for sale" provision in section 331(k). He began his analysis by quoting the logic behind the broad interpretation: "The states' lethal injection statutes purport to mandate the use of certain prescription drugs for a purpose not listed on their label . . . . FDA *therefore* must have jurisdiction to regulate such activity." *Id.* at 1198 (emphasis in original). The problem with this logic is that an intermediate proposition—"using prescription drugs for a purpose not listed on their label is unlawful under the FDCA"—is missing and has not been established. *Id.* at 1198-99. That proposition has not been established because "[t]he FDCA is directed at the sale and distribution of drugs rather than their use." *Id.* at 1199.

Section 331(k), moreover, requires that the misbranding occur while such article is "held for sale." "Under no conceivable interpretation of the English language could [drugs in the possession of penal authorities for use as lethal injections] be deemed 'held for sale.'" *Id.*

ment, holding that "decisions of executive departments and agencies to *refrain* from instituting investigations and enforcement proceedings are essentially unreviewable by the courts."[367] The Court of Appeals for the District of Columbia Circuit vacated and remanded the case after determining that judicial review of agency inaction is possible because there is a presumption of reviewability of enforcement proceedings[368] where "there is 'law to apply.' "[369] The Supreme Court reversed, holding there is a rebuttable presumption of unreviewability of enforcement proceedings and the presumption had not been rebutted in *Heckler*.

All three courts addressed the agency discretion argument.[370] Both the Court of Appeals for the District of Columbia Circuit and the Supreme Court analyzed the agency discretion argument in terms of the standard of review question. The court of appeals also analyzed the scope of review question.

(1) Standard of review In examining the agency discretion argument, the court of appeals had to decide whether judicial review was possible and, if possible, what the standard of review should be. The court of appeals began its analysis by identifying a presumption[371] subjecting "all final agency action" to judicial review.[372] This presumption of reviewability is subject to the two exceptions found in section 10(a) of the APA. Section 10(a) provides that final agency action is not reviewable if: (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.[373]

In *Heckler*, the FDA had asserted "*absolute* discretion over decisions concerning investigation and enforcement."[374] The court of appeals believed that the section 10(a)(2) exception should be "narrowly" construed[375] since the reviewability presumption is "strong."[376] Citing *Citizens to Preserve Overton*

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367. *Id.* at 1178 (emphasis in original).

368. *Id.* at 1182-88.

369. *Id.* at 1185 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

370. *Id.* at 1178, 1183; 470 U.S. at 827.

371. The basis for this presumption is the judicial review section in the APA. *See* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (1982)).

372. 718 F.2d at 1183.

373. 5 U.S.C. § 701(a) (1982).

374. 718 F.2d at 1184 (citation omitted).

375. *Id.* at 1183.

376. *Id.* (quoting Dunlop v. Bachowski, 421 U.S. 560, 567 (1975)).

Park, Inc. v. Volpe[377] (a case involving agency action) and *Dunlop v. Bachowski*[378] (a case involving agency inaction), the court of appeals concluded that the section 10(a)(2) exception would be found applicable "only in those rare instances where there is no law to apply.' "[379]

Accordingly, a significant question before the court of appeals was whether there was law to apply. The court answered this question affirmatively, finding that the law to be applied consisted of the Policy Statement,[380] the precise terms of the FDCA,[381] and "a growing body of case law."[382] Although three different sources of law are mentioned, the court's discussion leaves no doubt that the pivotal source of the law to be applied was the Policy Statement.

Since there is law to apply, FDA's inaction "is *not* committed to agency discretion and *is* subject to judicial review."[383] The court of appeals acknowledged that judicial review of FDA inaction might appear to be at odds with "the venerable proposition that courts should not unduly interfere with prosecutorial discretion."[384] In defending its presumption of reviewability, the court of appeals observed that "the law has been in transition and that the case law . . . [is now] strongly on the side of reviewability"[385] and concluded that the appropriate standard of review "[w]hen reviewing informal agency action of this type" is the "arbitrary and capricious" standard.[386]

In its treatment of the agency discretion argument, the Supreme Court in *Heckler* indicated that the "second exception in [section 10(a) had not be interpreted] in any great detail" by the

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377. 401 U.S. 402 (1971).

378. 421 U.S. 560 (1975).

379. 718 F.2d at 1184 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

380. *Id.* at 1186. For further discussion of the Policy Statement, *see supra* note 354 and accompanying text.

381. 718 F.2d at 1186. The "precise terms of the FDCA" included 21 U.S.C. §§ 321¶(1), 331, 332(a), 333, 334(a), 336, 346a(j), 348(g), 355(h), 360(g) (1982). 718 F.2d at 1186 & n.29.

382. *Id.* The "growing body of case law" included "United States v. Evers, [643 F.2d 1043, 1044 (5th Cir. 1981);] United States v. Beuthanasia-D. Regular, [[1979 Transfer Binder] FOOD DRUG COSM. L. REP. (CCH) ¶ 38,265, at 39,129 (D. Neb. 1979);] Hoffmann-LaRoche, Inc. v. Weinberger, 425 F. Supp. 890 (D.D.C. 1975); American Public Health Ass'n v. Veneman, 349 F. Supp. 1311 (D.D.C. 1972)." 781 F.2d at 1186 n.30.

383. *Id.* at 1186-87 (emphasis in original).

384. *Id.* at 1188.

385. *Id.* at 1187.

386. *Id.* at 1188.

Court[387] and acknowledged that section 10(a) raised a number of troubling questions, such as "what difference exists between sections 10(a)(1) and 10(a)(2)"[388] and "how can section 10 provide for judicial review for 'abuse of discretion' and exempt from judicial review decisions committed to agency discretion?"[389]

The court of appeals extensively used *Overton Park*[390] in its analysis. The Supreme Court agreed that *Overton Park* provided the most helpful discussion of section 10(a),[391] and, according to the Court, the discussion in *Overton Park* clarified section 10(a) in the following respects:

> [Section 10(a)(1)] applies when Congress has expressed an intent to preclude judicial review; [Section 10(a)(2)] applies . . . if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion; and Judicial review for the "abuse of discretion" can take place only when there is a judicially manageable standard for judging how and when an agency should exercise its discretion.[392]

Although the Supreme Court and the court of appeals had basically agreed with each other so far, they separated company at this point. The court of appeals had identified a presumption of reviewability.[393] The Supreme Court determined that this presumption "broke with tradition, case law, and sound reasoning."[394]

The Supreme Court distinguished *Overton Park* from *Heckler*. *Overton Park* "involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given."[395] *Heckler* involved "an agency's refusal to take requested enforcement action."[396] These differences converted a presumption of reviewability into a presumption of unreviewability: "Refusals to take enforcement steps generally in-

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387. 470 U.S. 821, 828 (1985).
388. *Id.*
389. *Id.* at 829.
390. 401 U.S. 402 (1971).
391. 470 U.S. at 829-31.
392. *Id.* at 830.
393. *See supra* notes 371-72 and accompanying text.
394. 470 U.S. at 831.
395. *Id.*
396. *Id.*

volve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available."[397]

This presumption of unreviewability rests on "the general unsuitability for judicial review of agency decisions to refuse enforcement."[398] Decisions not to enforce are unsuitable for judicial review because they "often [involve] a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise,"[399] do not involve an "exercise . . . [of] *coercive* power over an individual's liberty or property rights,"[400] and they share "to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict."[401]

This presumption of unreviewability, however, is rebuttable.[402] The presumption was rebutted in *Dunlop v. Bachowski*[403] where the court of appeals "had found that the principle of absolute prosecutorial discretion [was] inapplicable, because the language of the [statute] indicated that the Secretary was required to file suit if certain 'clearly defined' factors were present."[404] The question the Supreme Court had to answer in *Heckler* was whether there was law to be applied that circumscribed the enforcement discretion of the FDA.

The Supreme Court identified the following three sources as possibly supplying law to be applied: the FDCA's substantive prohibitions on misbranding and the introduction of new drugs into commerce absent agency approval,[405] the Policy Statement,[406] and section 306 of the FDCA.[407] The Court dealt with two of the three summarily, describing the Policy Statement as "singularly unhelpful"[408] and stating that the FDCA's substantive prohibitions on misbranding and the introduction of new drugs into commerce absent agency approval supply no "law to apply."[409]

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397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at 832 (emphasis in original).
401. *Id.*
402. *Id.* at 832-33.
403. 421 U.S. 560 (1975).
404. 470 U.S. at 834.
405. *Id.* at 835-36.
406. *Id.* at 836.
407. *Id.* at 837. Of the three sources identified by the Supreme Court, only the Policy Statement was consistent with the sources identified by the court of appeals.
408. *Id.* at 836.
409. *Id.*

The section 306 argument received slightly greater attention. Section 306 provides: "Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or ruling."[410] The respondents wanted the Court to draw from section 306 "the negative implication that the Secretary is *required* to report for prosecution all 'major' violations of the Act."[411] The Court rejected such an implication because section 306 does not speak "to the criteria which shall be used by the agency for investigating *possible* violations of the Act."[412]

Both the court of appeals and the Supreme Court may be criticized for adopting simplistic approaches to the standard of review question in *Heckler*. The dissenting opinion of Judge, now Justice, Scalia for the court of appeals and the concurring opinions of Justices Brennan and Marshall for the Supreme Court powerfully illuminate the problems inherent in such an approach. Both the court of appeals and the Supreme Court either ignored the problems or relegated them to a footnote.

The court of appeals identified a presumption of reviewability that governs except in "those rare instances" where "there is no law to apply."[413] *Heckler* was not one of those rare instances because there was law to apply: a Policy Statement, the precise terms of the FDCA, and "a growing body of case law."[414] Since there was law to apply, FDA's inaction was subject to judicial review under an "arbitrary and capricious" standard of review. This resolution of the standard of review question troubled Judge Scalia for several reasons.

According to Judge Scalia, there is no presumption of reviewability for enforcement decisions: "The short of the matter is, that far from there being a 'presumption of reviewability' with regard to enforcement determinations, the well known presumption is precisely the contrary."[415] There is no presumption of reviewability for enforcement decisions because such a pre-

410. 21 U.S.C. § 336 (1982).

411. 470 U.S. at 837 (emphasis in original).

412. *Id.* (emphasis in original).

413. *See supra* notes 377-79 and accompanying text.

414. *See supra* notes 380-82 and accompanying text.

415. 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 470 U.S. 821 (1985).

sumption would be unwise both in terms of constitutional and APA policy. From Judge Scalia's perspective, such a presumption would be unwise as a matter of constitutional policy because "enforcement priorities are not the business of this Branch, but of the Executive—to whom, and not to the courts, the Constitution confides the responsibility to 'take Care that the Laws be faithfully executed.' "[416] A presumption of reviewability, moreover, would be unwise as a matter of APA policy because one of the purposes of the APA, embodied in its provision that excludes from judicial review "agency action . . . committed to agency discretion by law,"[417] is the desire to preserve a "sound allocation of responsibility" among the branches of government.[418]

The cases cited by the court of appeals to support a presumption of reviewability do not support such a presumption. In Judge Scalia's view, the most important of the Supreme Court cases cited by the court of appeals in support of its presumption of reviewability was *Dunlop v. Bachowski*.[419] His reading of that case convinced him that the case did not support such a presumption but actually "reaffirm[ed] the principle of general unreviewability of enforcement decisions."[420] In addition, other Supreme Court[421] and court of appeals[422] cases did not support a presumption of reviewability for enforcement decisions.

If the presumption is a presumption of unreviewability rather than reviewability, the relevant question according to Judge Scalia is "whether there are any special circumstances [in the case] justifying a departure from that general rule." He found no special circumstances.[423]

Judge Scalia's discussion focused on the Policy Statement.[424] Even if the Policy Statement was a "rule," Judge Scalia argued that "it is impossible to see how that 'rule' has been vio-

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416. *Id.* at 1192.

417. 5 U.S.C. § 701(a)(2) (1982).

418. 718 F.2d at 1192 (Scalia, J., dissenting).

419. 421 U.S. 560 (1975).

420. 718 F.2d at 1193 (Scalia, J., dissenting).

421. The Supreme Court cases were Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

422. The two circuit cases are Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), and Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969).

423. 718 F.2d at 1196 (Scalia, J., dissenting).

424. *Id.* at 1196-98 (Scalia, J., dissenting).

lated here."[425] The Policy Statement, however, is not a rule, according to Judge Scalia. He noted that the "Policy Statement"—a title assigned the statement by the court of appeals—"was part of the policy justification set forth in a Notice of Proposed Rulemaking, *with respect to a proposal that was never adopted.*"[426] Judge Scalia characterized as "remarkable" the suggestion "that, although the text of the rule was rejected, the substance of that text was authoritatively adopted by the mere recital of it in the Notice of Proposed Rulemaking."[427] The court of appeals had sought to remedy this "patent deficiency"[428] by arguing that the "FDA still considers [this policy statement] binding and to have substantive effect."[429] "Not so," said Judge Scalia.[430]

The Supreme Court rejected a presumption of reviewability and identified instead a rebuttable presumption of unreviewability. This presumption of unreviewability rests on "the general unsuitability for judicial review of agency decisions to refuse enforcement."[431] The presumption is rebuttable where there is law to be applied that circumscribes enforcement discretion. The presumption, however, had not been rebutted in *Heckler* because none of the three sources that might supply law to be applied—the FDCA's substantive prohibitions on misbranding and the introduction of new drugs into commerce absent agency approval, the Policy Statement, or section 306 of the FDCA[432]—did, in fact, supply law to be applied. This resolution of the standard of review question troubled Justices Brennan and Marshall.

Justice Marshall's concurring opinion, in particular, is critical of the Supreme Court for using an "easy case" to "produce bad law."[433] His hope is that *Heckler* "will come to be understood as a relic of a particular factual setting in which the full implications of . . . a presumption [of unreviewability] were neither confronted nor understood."[434]

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425. *Id.* at 1196 (Scalia, J., dissenting).
426. *Id.* (Scalia, J., dissenting) (emphasis in original).
427. *Id.* (Scalia, J., dissenting).
428. *Id.* at 1197 (Scalia, J., dissenting).
429. *Id.* at 1186.
430. *Id.* at 1197 (Scalia, J., dissenting).
431. *See supra* notes 398-401 and accompanying text.
432. *See supra* notes 405-12 and accompanying text.
433. *Heckler*, 470 U.S. 821, 840 (1985) (Marshall, J., concurring).
434. *Id.* (Marshall, J., concurring). Justice Marshall's concurrence offers "deferential

The presumption of unreviewability, according to Justices Brennan and Marshall, clearly cannot and does not apply to a series of cases where an agency decides not to take enforcement action.[435] The presumption of unreviewability does not apply to cases where an agency "flatly claims that it has no statutory jurisdiction to reach certain conduct, . . . engages in a pattern of nonenforcement of clear statutory language, . . . refuse[s] to enforce a regulation lawfully promulgated and still in effect, . . . or decides not to take enforcement action that violates constitutional rights."[436]

The presumption of unreviewability also may not apply in other cases where an agency decides not to take enforcement action. Both Justices Brennan and Marshall, for example, do not believe the presumption of unreviewability applies where there is "nonenforcement in return for a bribe."[437] In Justice Marshall's judgment, the presumption of unreviewability does not apply where the agency's allocation of finite enforcement resources rationale "is a sham, [or] enforcement is declined out of

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review" as an alternative basis on which to decide *Heckler*: "[R]efusals to enforce, like other agency actions, are reviewable in the absence of a 'clear and convincing' congressional intent to the contrary, but that such refusals warrant deference when . . . there is nothing to suggest that an agency with enforcement discretion has abused that discretion." *Id.* at 840-41 (Marshall, J., concurring).

Applying "deferential review," Justice Marshall would uphold the FDA's decision in *Heckler* for several reasons:

> First, respondents . . . neither offered nor attempted to offer any evidence that the reasons for the FDA's refusal to act were other than the reasons stated by the agency. Second . . . the FDCA is not a mandatory statute that requires the FDA to prosecute all violations . . . [so] the FDA clearly has significant discretion to choose which alleged violations . . . to prosecute. Third, the basis on which the agency chose to exercise this discretion— . . . [allocating finite enforcement resources]—generally will be enough to pass muster . . . [and] is enough to do so here, where the number of people currently affected by the alleged misbranding is around 200, and where the drugs are integral elements in a regulatory scheme over which the States exercise pervasive and direct control.

Id. at 842.

435. Alan B. Morrison, a well-known public interest lawyer, agrees with Justices Brennan and Marshall that the presumption of unreviewability does not apply to a series of cases where an agency decides not to take enforcement action. *See* Panel Discussion (Starr, Sunstein, Willard, Morrison & Levin), *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 386-91 (1987).

436. 470 U.S. at 839 (Brennan, J., concurring) (citing *State Farm*, 470 U.S. 821, 833 n.4 (1985); *see also id.* at 853 (Marshall, J., concurring).

437. *Id.* at 839 (Brennan, J., concurring); *see also id.* at 852 (Marshall, J., concurring).

vindictive or personal motives, [or] the agency has simply ignored the request for enforcement."[438]

Statutory guidelines, moreover, are not and cannot be the "sole source of limitations on agency [decisions] not to enforce."[439] There is, instead, a " 'common law' of judicial review of agency actions[,]" providing "standards by which inaction can be reviewed."[440] One source of this "common law" is the "principles of rationality and fair process" that antedate the APA. "Congress hardly could be thought to have intended to displace [these principles] in the APA."[441] Other sources of this "common law" include historical practices of the agency, its prior regulations, and its prior informal actions.[442] In Justice Marshall's view, these sources narrow the enforcement discretion an agency can exercise because the agency cannot depart from prior practice, regulation or informal action "in the absence of explanation."[443]

A presumption of unreviewability is inconsistent with "prior understanding[s]" of the APA. The APA "presumptively entitled any person 'adversely affected or aggrieved by agency action' . . . to judicial review of that action."[444] This presumption of reviewability "can be defeated if the substantive statute precludes review . . . or if the action is committed to agency discretion *by law*."[445] Supreme Court precedent, moreover, indicates that the presumption of reviewability is to be interpreted "hospitab[ly]" while the limitations in section 701(a) of the APA become operative "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent."[446]

With respect to the second limitation, the limitation for action committed to agency discretion by law, "the *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rational-

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438. *Id.* at 843 (Marshall, J., concurring).

439. *Id.* at 852 (Marshall, J., concurring). Justice Marshall characterizes as "far too narrow" reliance on positive law as the sole source of limitation on agency discretion not to enforce.

440. *Id.* at 853 (Marshall, J., concurring).

441. *Id.* at 852 (Marshall, J., concurring).

442. *Id.* at 853 (Marshall, J., concurring).

443. *Id.* (Marshall, J., concurring).

444. *Id.* at 843 (Marshall, J., concurring) (citing 5 U.S.C. § 702 (1982)).

445. *Id.* (Marshall, J., concurring) (emphasis in original) (citing 5 U.S.C. § 701(a) (1982)).

446. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

ize and make fairer the exercise of such discretion."[447] Discretion by agencies is necessary, "but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason '*the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion.*' "[448] In Justice Marshall's view, citing *United States v. Wunderlich,* "[l]aw has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat."[449]

A presumption of unreviewability is not based on "tradition." The presumption of unreviewability "flies in the face of" *Abbott Laboratories v. Gardner,* "perhaps the seminal case on judicial review under the APA,"[450] and is powerfully "refuted . . . by a firmly entrenched body of lower case law[,] . . . recogniz[ing] that an attempt[] to draw a line for purposes of judicial review between affirmative exercises of coercive agency power and negative agency refusals to act . . . is simply untenable."[451] As a result, the " 'tradition[al]' rationale . . . stands as a flat, unsupported *ipse dixit.*"[452]

The cases cited by the Supreme Court to support a presumption of unreviewability (*United States v. Batchelder,*[453] *United States v. Nixon,*[454] *Vaca v. Sipes,*[455] and the *Confiscation Cases,*[456]) "hardly support such a broad presumption."[457] Only one of the four cases, *Vaca,* involves an administrative action. In dictum, *Vaca* does suggest that the General Counsel of the National Labor Relations Board does have unreviewable discretion to refuse to initiate an unfair labor practice complaint. Subsequent cases indicate, however, that the source of that un-

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447. 470 U.S. at 848 (Marshall, J., concurring) (emphasis in original).

448. *Id.* (quoting L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 375 (1965)).

449. *Id.* at 848 (Marshall, J., concurring) (citing United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting)).

450. *Id.* at 844 (Marshall, J., concurring).

451. *Id.* at 850 (Marshall, J., concurring); *see also id.* at 850 n.7 (Marshall, J., concurring). Justice Marshall cited with approval Justice Frankfurter's observation that "any distinction . . . between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review [agency action] serves no useful purpose." Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939).

452. 470 U.S. at 844 (Marshall, J., concurring).

453. 442 U.S. 114 (1979).

454. 418 U.S. 683 (1974).

455. 386 U.S. 171 (1967).

456. 74 U.S. (7 Wall.) 454 (1868).

457. 470 U.S. at 844-45 (Marshall, J., concurring).

reviewable discretion is "the particular structure of the National Labor Relations Act and the explicit statutory intent to withdraw review"[458] rather than a presumption of unreviewability.

The three remaining cases—*Batchelder, Nixon,* and the *Confiscation Cases*—involve prosecutorial discretion to enforce the criminal law.[459] None of them stand for the proposition that prosecutorial discretion is unreviewable.[460] In addition, there are at least two reasons why reliance on notions of prosecutorial discretion to hold agency inaction unreviewable is misplaced. "First . . . the Court has made clear that prosecutorial discretion is not as unfettered or unreviewable as the half-sentence in *Nixon* suggests."[461] "Second, arguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act."[462] The interests at stake and the nature of the conduct to be judicially reviewed differ because the interests in the prosecutorial enforcement setting are "intangible[,] . . . common to society as a whole . . . [and] [t]he conduct at issue [in this type of setting] has already occurred."[463] In contrast, the interests in the administrative enforcement setting "run to specific classes of individuals whom Congress has singled out as statutory beneficiaries[,]"[464] and the purpose of the administrative enforcement is "to prevent concrete and future injuries that Congress has made cognizable."[465]

(2) Scope of review The court of appeals characterized the appropriate scope of review in *Heckler* as "a 'searching and care-

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458. *Id.*

459. *Id.*

460. *Batchelder* held that "the mere existence of prosecutorial discretion does not violate the Constitution." *Id.* In the context where the United States brings a criminal action that is "wholly for the benefit of the United States," the *Confiscation Cases* held that "a person who provides information leading to the action has no 'vested' or absolute right to demand, so far as the interests of the United States are concerned . . . that the action be maintained." *Id.* (citation omitted). *Nixon* held that an "attempt to exercise [prosecutorial discretion] contrary to validly promulgated regulation" is an abuse of discretion. *Id.* at 846 (Marshall, J., concurring).

461. *Id.* at 846 (Marshall, J., concurring). Justice Marshall cited six cases to support this argument: Wayte v. United States, 470 U.S. 598 (1985); Thigpen v. Roberts, 468 U.S. 27, 30 (1984); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Blackledge v. Allison, 431 U.S. 63 (1977); Blackledge v. Perry, 417 U.S. 21, 28 (1974); and Santobello v. New York, 404 U.S. 257, 262 (1971). He also cited Professor Davis: "the case law since 1974 is strongly on the side of reviewability." 2 K. DAVIS, *supra* note 201, § 9.6, at 240 (1979).

462. 470 U.S. at 847 (Marshall, J., concurring).

463. *Id.* (Marshall, J., concurring).

464. *Id.* at 847-48 (Marshall, J., concurring).

465. *Id.* at 847 (Marshall, J., concurring).

ful' review of both the administrative record, particularly the uncontroverted evidence submitted by appellant, and the agency's stated reasons for its action."[466] Applying this scope of review, the court of appeals determined that the FDA's decision had been arbitrary and capricious because the Commissioner of the FDA had not provided "an acceptable explanation of why his refusal to act in this case [was] . . . not in contravention of [the Policy Statement]."[467] The Commissioner also cited no evidence to support the proposition that "the use of drugs in lethal injections does not pose a 'serious danger to the public health.' "[468]

The Supreme Court never reached the scope of review question because the presumption of unreviewability under section 10(a)(2) of the APA had not been rebutted.

III. The Prognosis for Deregulation

The record of the "Age of Deregulation" has been described as "impressive" on four counts: "[The record] is comprehensive in terms of the number and age of the regulations affected; it involved politically influential and strongly entrenched vested interests; it required and received bipartisan support; and it elicited significantly more factual investigation and sophisticated analysis than had occurred in the past."[469] In spite of this record, the fundamental question still is whether the "Age of Deregulation" has been beneficial to the American public.

There is no shortage of answers to that question. One answer, provided by those who are proponents of deregulation, is to characterize the "Age of Deregulation" as a great success. For example, Professor Alfred Kahn believes that "something like ninety percent of the results [the proponents of deregulation] expected" has been achieved in the industries subject to deregulation.[470] Another answer, provided by opponents of deregulation, is to characterize the "Age of Deregulation" as a disaster. For example, Susan and Martin Tolchin, the authors of *Dismantling America: The Rush to Deregulate,* believe that regulation is the "connective tissue of civilized society."[471] Deregulation

466. 718 F.2d 1174, 1188-89 (D.C. Cir. 1983), *rev'd,* 470 U.S. 821 (1985).
467. *Id.* at 1185.
468. *Id.* at 1190.
469. ABA Regulatory Reform Report, *supra* note 7, at 13.
470. Kahn, *supra* note 9, at 177.
471. S. Tolchin & M. Tolchin, *supra* note 7. The Tolchins are not the only individ-

"signal[s] the destruction of our public life, a Thermidoerean reaction that is destroying liberalism's hard-won gains."[472] Still another answer, provided by those who were cautiously optimistic when the "Age of Deregulation" began, but are becoming increasingly pessimistic about the prospects for the success of the "Age of Deregulation" as time passes, is ambiguous. For example, both the *Wall Street Journal* and *Business Week* have recently published articles that raise serious questions about how beneficial deregulation has been for the American public.[473]

Although a number of possible answers to the question whether the "Age of Deregulation" has been beneficial to the American public are present, no consensus has emerged. This lack of consensus is nicely illustrated by two events occurring during the same week in August of 1987. Senator Robert C. Byrd of West Virginia, the Democratic leader of the Senate, who voted for airline deregulation in 1978, was quoted as saying that he "now believes that [airline deregulation] was a mistake" and that, "given the change, he would vote 'twice if [he] could'—to bring back federal regulation."[474] The FCC, meanwhile, seeking, in the words of its new chairman, Dennis R. Patrick, "to extend to the electronic press the same first amendment guarantees that the print media have enjoyed since our country's inception," continued its program to deregulate the broadcasting industry by voting four to zero to abolish the thirty-eight year old "Fairness Doctrine."[475]

Why is there no consensus? The obvious answer is because the results of the "Age of Deregulation" have been mixed. Proponents and opponents of deregulation can both find ample evidence to support their point of view. Results in the two industries that have been examined in this article—the airline industry and the broadcasting industry—illustrate this point.

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uals who have spoken up in favor of regulation.

472. Schuck, *The Deregulation Game,* Washington Post, Jan. 8, 1984, at 4, col. 1.

473. *See* McGinley, *Regulatory Revival: Job-Safety Agency is Firing Buckshot Again, and Industry Runs for Cover as Penalties Fly,* Wall. St. J., Apr. 22, 1987, at 70, col. 1; McGinley, *Regulatory Revival: Federal Regulation Rises Anew in Matters that Worry the Public,* Wall. St. J., Apr. 21, 1987, at 1, col. 6; Wells, Payne, Seghers & Ichniowski, *Is Deregulation Working?,* BUSINESS WEEK, Dec. 22, 1986, at 50 [hereinafter *Is Deregulation Working?*].

474. Conine, *Reregulation Time Not Yet at Hand,* Salt Lake Tribune, Aug. 4, 1987, at A-10, col. 3.

475. *FCC Votes 4-0 to Abolish the Fairness Doctrine,* Salt Lake Tribune, Aug. 5, 1987, at A-1, col. 1.

There has been a positive side to deregulation of the airline and broadcasting industries. For example, "[a]irline fares, when adjusted for inflation, have declined 13% since deregulation in 1978."[476] There also has been a negative side to deregulation of the airline and broadcasting industries. For example, there is danger of "softer competition" among competitors[477] because of increased concentration in the airline industry: "[t]he six largest carriers control 84% of the market [in 1986], vs. 73% in 1978[,]" and one consultant foresees "a 'tight oligopoly' with a share of more than 90%" of the market by 1990.[478]

The two preceding sections of this article have examined the "Age of Deregulation" from a legislative/executive perspective and a judicial perspective. A series of factors can be distilled from the preceding examination that determine whether attempts to deregulate will be successful. These factors make up what the authors will call the "calculus of deregulation." The attempt here is to highlight some of the obvious factors that make up this calculus rather than to provide the reader with an exhaustive list of the factors. These factors are grouped in terms of the three branches of government: legislative (the statutory framework), executive (the regulatory framework), and judicial (the judicial review framework).

A. The Statutory Framework

A statutory provision that explicitly authorizes deregulation is a relatively uncommon but not an unknown factor in the calculus of deregulation. Obviously, such a provision increases not only the likelihood that deregulation will take place but also the likelihood that deregulation, if challenged in the courts, will be upheld.

The ADA,[479] for example, contains such an explicit authorization. While the ADA is not unique,[480] statutes that explicitly

476. *Is Deregulation Working?*, *supra* note 473, at 50.

477. Why is there a danger of "softer competition"? Professor Kahn explains: "When you have the same six carriers meeting each other in market after market, there is danger of softer competition. It's not in their interest to insult one another excessively." *Id.* at 52.

478. *Id.*

479. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C. § 1301-1315 (1982).

480. The Antitrust Law Section's Report on Regulatory Reform contains an appendix that summarizes federal regulation authorizing deregulation. *See* ABA Regulatory Reform Report, A hybrid rulemaking proceeding contains more procedure than the pro-

authorize deregulation are rare even in an "Age of Deregulation."

A much more common factor in the calculus of deregulation is a statutory provision, with a discernible standard, that delegates authority from the legislative branch to an administrative agency.[481] With the exception of three cases decided in the mid-1930's,[482] the Supreme Court has been prepared to uphold delegations even where the discernible standard is couched in general terms. Congress, consequently, has frequently relied on amorphous standards like a "public interest" standard. To retain legislative control under these circumstances, Congress increasingly relied on the "legislative veto." That device was held unconstitutional in *INS v. Chadha.*[483] In *Chadha,* the Supreme Court encouraged Congress to enact more specific standards when delegating authority to administrative agencies.

The statutory delegation of authority from Congress to the FCC contains a "public interest" standard.[484] Unquestionably, that "public interest" standard has assisted the FCC in carrying out its program to deregulate the broadcasting industry.

B. The Regulatory Framework

Mood, meaning the converging moods of regulator, regulatees, public interest groups, and the general public, is a factor in the calculus of deregulation. This mood, which generally had favored regulation from the late 1800s, changed in the 1970s: regulation was "out"; deregulation was "in."

This change in mood is clearly reflected in the decision to deregulate the airline industry through enactment of the ADA in 1978. This change in mood also encouraged the FCC to take a bolder course with respect to deregulating the broadcasting industry than otherwise might have been taken.

The calculus of deregulation includes a leadership factor. Charismatic leaders do make a difference. No one can dispute, for example, that Alfred Kahn at the CAB and Mark Fowler at the FCC made a difference in terms of the scope and speed with

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cedure in an informal rulemaking proceeding. *supra* note 7, at Appendices.

481. *See* ADMINISTRATIVE LAW AND PROCESS, *supra* note 178, § 3.4.3, at 56-59.

482. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

483. 462 U.S. 919 (1983).

484. Communications Act of 1934, 47 U.S.C. §§ 151-610 (1982 & Supp. II 1984).

which deregulation of the airline and broadcasting industries occurred. Each of them had a vision of what deregulation should mean in their respective industries and had the will to overcome institutional inertia.

Agency reputation is another factor in the calculus of deregulation. The reputation factor ranges across a spectrum from positive to negative, may remain fairly constant for some agencies, but will fluctuate, perhaps wildly, for other agencies. Agency reputation is particularly critical when the agency must decide a controversial issue. If the agency's reputation is positive because of the quality of prior decisions and because of the perception that its personnel are competent, the likelihood that the agency's resolution of a controversial issue will stand increases.

The FCC has enjoyed and continues to enjoy a "positive" reputation. That reputation has permitted it to carry out certain decisions in deregulating the broadcasting industry that another agency might not have been able to accomplish.

The CAB did not enjoy a similar reputation. Indeed, the public perceived the CAB to be an agency simultaneously trying to perform two conflicting missions, and performing neither one of them competently. This perception contributed to the decision to dismantle the agency and to transfer certain remaining responsibilities to different agencies in the Department of Transportation. The questions now raised are whether these other agencies, like the FAA, are able to handle the shifting responsibilities and whether the positive perception continues despite problems in airline safety and scheduling.

C. The Judicial Review Framework

The nature of the agency action is a factor in the calculus of deregulation. Does the agency propose to regulate? Deregulate? Take no action?

Proponents of deregulation have lost an important battle. They had hoped that courts would facilitate deregulation by adopting a less rigorous standard of review and a less rigorous scope of review when reviewing agency deregulation decisions.[485] They argued that less rigorous judicial review is warranted because that approach is consistent with two presumptions: a presumption in favor of private autonomy and a presumption

485. *See supra* note 211 and accompanying text.

against regulation.[486] They also argued that less rigorous judicial review is warranted because deregulation is more closely analogous to agency inaction rather than agency action, and agency inaction, in their view, has been subject to less rigorous judicial review than agency action.[487]

Both of these arguments, favoring less rigorous judicial review for deregulation, were considered and rejected in *State Farm,* dashing the hope of proponents of deregulation that courts would facilitate deregulation. The Supreme Court explicitly rejected a presumption against regulation. According to the Court, there "is not [a presumption] *against* safety regulation, but [a presumption] *against* changes in current policy that are not justified by the rulemaking record.[488] The Court also distinguished agency inaction and deregulation, rejecting the inaction/deregulation analogy. The Court concluded that "the revocation of an extant regulation is substantially different than a failure to act."[489]

Proponents of deregulation did win a less important battle. They argued that an agency's decision not to undertake enforcement proceedings was entitled to a presumption of unreviewability. The Supreme Court accepted this argument in *Heckler.*[490]

State Farm and *Heckler* suggest that some forms of deregulation are more "court-resistant"[491] than others. First, if the agency "does things right, i.e. . . . its action is reasoned[492]

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486. *See supra* note 212-13 and accompanying text.

487. *See supra* note 213-14 and accompanying text.

488. Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983).

489. *Id.* at 41.

490. *See supra* notes 397-401 and accompanying text.

491. Judge Mikva of the Court of Appeals for the District of Columbia Circuit coined the phrase, "court-resistant." *See* Mikva, *supra* note 13, at 126.

492. According to Professor Sunstein, "reasoned decisionmaking" is a four-pronged notion:

> First, regulatory decisions should be based on a detailed inquiry into the advantages and disadvantages of proposed courses of action . . . and an examination of reasonable alternatives. Second, issues involving value judgments must be resolved consistently with the governing statute . . . .
>
> Third, to the extent that issues of value are to be resolved through an exercise of administrative discretion, the relevant considerations and the actual bases for decision must be explicitly identified and subjected to public scrutiny and review. Finally, the agency's resolution must reflect a reasonable weighing of the relevant factors. "Reasonable" is defined by reference to the governing statute and, if the statute offers no help, to an approach based on common sense and social consensus . . . .

[rather than] arbitrary or capricious,"[493] deregulation is more likely to withstand judicial scrutiny. Second, deregulation that takes the form of inaction rather than action similarly is more likely to withstand judicial scrutiny.[494]

The calculus of deregulation may also include a presumption factor. The term, "presumption," is not used here in the sense of a rule of evidence that "imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption,"[495] but is used more loosely to denote either "a rule of law that will guide decision[s] unless the opposing party adduces countervailing considerations"[496] or "an expression of generalized reluctance to set aside agency actions."[497]

Presumptions, at least superficially,[498] played an important role in both *State Farm* and *Heckler*. Petitioners in *State Farm* argued in favor of a presumption against regulation. The Supreme Court rejected such a presumption, opting in favor of "[a] presumption . . . *against* changes in current policy that are not justified by the rulemaking record."[499] Both the court of appeals and Supreme Court decisions in *Heckler* discuss at length the presumption that should be operative when an agency decides not to undertake an enforcement proceeding. The court of appeals concluded that the appropriate presumption was a presumption of reviewability;[500] the Supreme Court disagreed, concluding that the appropriate presumption was a rebuttable presumption of unreviewability.[501]

One of the contributing factors to the mixed results of the "Age of Deregulation" is the vagaries of the calculus of deregulation. A series of hypotheticals involving *State Farm* and *Heckler* illustrate this point.

Sunstein, *supra* note 31, at 284-85.

493. Mikva, *supra* note 13, at 126 (footnote added).

494. *Id.*

495. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 244 (1986).

496. *Id.*

497. *Id.* at 245.

498. *State Farm* rejected a presumption against regulation; *Heckler* recognized a rebuttable presumption of unreviewability when an agency decides not to undertake an enforcement proceeding.

499. *State Farm*, 463 U.S. 29, 42 (1983) (emphasis in original).

500. Chaney v. Heckler, 718 F.2d 1174, 1186 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

501. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

The "active" deregulation characterized by *State Farm* involved the following factors in the calculus of deregulation: a broad delegation of authority; an agency without a charismatic leader; an agency with no more than a mixed and possibly a negative reputation; a decision to deregulate; a presumption against changes in current policy unless those changes are justified by the rulemaking record. Under these circumstances, the Supreme Court decided that NHTSA's decision to revoke the passive restraint systems regulation could not be sustained.

Suppose that one of the factors in the calculus of deregulation in *State Farm* were altered. Suppose, for example, that a charismatic leader like Alfred Kahn or Mark Fowler, rather than a non-charismatic leader, had been Administrator of NHTSA. Would this change have altered the outcome in *State Farm?* Suppose, as a further example, that the decision to deregulate had been made pursuant to a Motor Vehicle Deregulation Act of 1983 rather than NTMVSA. Would this change have altered the outcome in *State Farm?*

The authors of this article believe that the first substitution—a charismatic leader rather than a non-charismatic leader—would not have altered the outcome in *State Farm* but that the second substitution—a statutory provision explicitly authorizing deregulation rather than a statutory provision containing a broad delegation of authority—might possibly have altered the outcome in *State Farm.* Why? Because the first change does not respond to the underlying deficiencies in *State Farm*, but the second change arguably responds to at least one and possibly both of those deficiencies.

In *State Farm,* the Supreme Court rejected the revocation of the passive restraint systems regulation for two reasons. First, NHTSA "was too quick to dismiss the safety benefits of automatic seatbelts."[502] Second, "NHTSA apparently gave no consideration whatever to modifying . . . [Modified Standard 208] to require that airbag technology be utilized."[503] Substituting a charismatic leader for a non-charismatic leader does not respond to these deficiencies. Substituting a statutory provision that explicitly authorizes deregulation for a statutory provision containing a broad delegation of authority arguably responds to the deficiencies, particularly the first deficiency.

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502. 463 U.S. at 51.

503. *Id.* at 46.

The "passive" deregulation characterized by *Heckler* involved the following factors in the calculus of deregulation: a statutory provision containing a broad delegation of authority; an agency without a charismatic leader; an agency with at least a mixed and possibly a positive reputation; a decision not to undertake an enforcement proceeding; a rebuttable presumption of unreviewability. Under these circumstances, the Supreme Court decided that the presumption of unreviewability had not been rebutted.

Suppose that one of the calculus of deregulation factors in *Heckler* were altered. Suppose, for example, that the decision had been a decision to deregulate rather than a decision not to undertake enforcement proceedings. The FDA had been regulating lethal injections and now decided that further regulation of lethal injections was unnecessary. Would this change have affected the outcome in *Heckler*? Suppose, as a further example, that the operative presumption had been a presumption of reviewability. The APA contains a presumption favoring reviewability. That presumption is subject to only two exceptions: actions under a statute that precludes judicial review; actions that are committed to agency discretion by law. Neither of those exceptions apply here. Would this change have affected the outcome in *Heckler*?

The authors of this article believe that either substitution—a decision to deregulate rather than a decision not to undertake enforcement proceedings or a presumption of reviewability rather than a presumption of unreviewability—would have altered the outcome. Why? Because *Heckler,* while recognizing a presumption of unreviewability for decisions not to undertake enforcement proceedings, not only characterizes that presumption as rebuttable but also acknowledges that even the rebuttable presumption would not operate in a series of cases.

Another, and a largely ignored, contributing factor to the mixed results of the "Age of Deregulation" is the impact of an older and on-going debate, the "rights" debate,[504] on the regulation/deregulation debate. In the "rights" debate, which has been undergoing a continuing metamorphosis throughout most of this century and has passed through at least two and possibly three

504. For a discussion of the "rights" debate, see S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 699-851 (2d ed. 1985); W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW 545-656 (8th ed. 1987).

different stages, the domain of legally-recognized "rights" has significantly expanded. Interaction between the regulation/deregulation debate and the "rights" debate, consequently, is almost unavoidable because many, if not most, attempts to deregulate impact adversely on someone's "rights".

The first stage of the "rights" debate arose in the 1920s and continued until the 1960s. Prior to this first stage, the American world was a relatively simple place where under the common law there were "rights," a rather narrow concept, and "privileges," a much broader concept. "Rights" enjoyed legal protection, but "privileges" did not. This simple, sharp dichotomy came under increasing pressure as the state began to regulate activity and create interests in those activities, e.g., licenses to operate liquor stores, to operate motor vehicles, or practice a profession.[505] The question in this first stage was whether the simple, sharp dichotomy between "rights" and "privileges" made sense. The answer was a rejection of the "rights"/"privileges" dichotomy, and the recognition of a new category of interests—"entitlements"—that were created by statute and enjoyed some legal protection. According to Professor Cass Sunstein, rejection of the "rights"/"privileges" dichotomy with its accompanying reliance on political pressures to protect "privileges" resulted from two perceptions: "The . . . first . . . [involves the recognition that] the common-law catalog of private rights is an inadequate yardstick for judicial intervention in a heavily regulated society . . . . The second . . . involves the risk of capture of regulatory power by factions seeking to redistribute wealth to opportunities in their own favor . . . ."[506]

The second stage of the debate arose in the 1970s. The question in this stage was whether statutorily-created "entitlements" enjoyed the same degree of legal protection as common law "rights." Some argued that the applicable statute should be examined to determine not only whether there was an "entitlement" but also the applicable legal protections to be accorded that "entitlement"; others disagreed, arguing that the applicable statute should be examined *only* to determine the existence of the "entitlement." A constitution, federal or state, had to be ex-

505. Increasing regulation by the state has created an administrative state. For a discussion of the impact of this administrative state on property interests, see Van Alstyne, *"Cracks in the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

506. Sunstein, *supra* note 204, at 184-85.

amined to determine the applicable legal protections under the due process clause.

Arnett v. Kennedy[507] provided the Supreme Court with an opportunity to address this question, but the answer the Court provided was unclear. In a plurality decision, then-Justice, now-Chief Justice Rehnquist announced the so-called "bitter with the sweet" doctrine: the applicable statute not only determined the existence of the "entitlement" but also its protection. Only two other justices accepted this doctrine; it was rejected by the remaining six justices. Justice Powell rejected the "bitter with the sweet" doctrine on the following basis:

> [T]he origin of the right to procedural due process . . . is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards . . . .[508]

The Supreme Court subsequently had several opportunities to provide a clearer answer to the question of the legal protection of "entitlements."

Chief Justice Rehnquist still adheres to his position, but that position while appearing to gather some additional support,[509] never has commanded a majority of the Court. In its most recent statement on the question, the Court held in *Cleveland Board of Education v. Loudermill*,[510] that:

> The "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than

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507. 416 U.S. 134 (1974).

508. *Id.* at 167 (Powell, J., concurring).

509. *See* Bishop v. Wood, 426 U.S. 341, 355-61 (1976) (White, J., dissenting); Goss v. Lopez, 419 U.S. 565, 586-87 (1975) (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting).

510. 470 U.S. 532 (1985).

> can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee . . . ."[511]

Arguably, the "rights" debate now has entered a third stage. In the third stage, the question is whether the process through which public torts are identified and remedied itself confers entitlements. This third stage differs from the second stage not in terms of the source of the entitlement, but in terms of the scope of the beneficiaries. Beneficiaries in the second stage are regulatees; beneficiaries in the third stage include third parties as well as regulatees.

In a thought-provoking article, Professor Sunstein detects a shift from an administrative law that was dependent on private law principles to an administrative law that "is to a substantial degree independent of private law principles."[512] The elements of this emerging administrative law are still "tentative" and "ill-formed[,]"[513] but Professor Sunstein identifies two of its elements:

> The first is that courts have disciplined administrative decisions by requiring close justification in instrumental terms. The effort is to control the exercise of discretion . . . through requiring explanations that resemble those offered in the judicial process . . . .
>
> The second . . . is that the function of judicial review is no longer to protect private interests from governmental intrusion, but instead to facilitate the identification and enforcement of regulatory values . . . .[514]

This second element is critical. In the older administrative law, judicial effort was aimed at "aid[ing] private citizens in fending off unauthorized regulatory initiatives."[515] Judicial effort in the emerging administrative law is aimed at "facilitat[ing the] identification and implementation of the values at stake in regulation."[516] Under this emerging administrative law, "[f]ederal common law, statutory interpretation, and constitutional doctrines have been worked, individually and in concert, to turn regulatory protections into an entitlement enforceable by the

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511. *Id.* at 541.
512. Sunstein, *supra* note 204, at 187.
513. *Id.*
514. *Id.*
515. *Id.* at 178.
516. *Id.*

courts."[517] These entitlements are entitlements of "a special sort."[518] They are statutorily-based, and the beneficiaries of these entitlements are not restricted to regulatees.

The quality of legal protection and the number of persons entitled to that legal protection is what distinguishes the second and third stages of the "rights" debate from the first stage. The "rights" debate today is about the wisdom of extending legal protection akin to the legal protection common law "rights" enjoy to a much larger group of persons who possess "entitlements" rather than "rights." This juncture is the exact juncture at which the regulation/deregulation debate intersects with the "rights" debate.

A scholarly exchange illustrates this point. In 1983, Judge Frank Easterbrook wrote an article in the *Harvard Law Review,* entitled *Foreword: The Court and the Economic System,*[519] in which he critiqued the Supreme Court's performance in terms of economic reasoning. Professor Lawrence Tribe responded to Judge Easterbrook's article with an article in the *Harvard Law Review,* entitled *Constitutional Calculus: Equal Justice or Economic Efficiency?*[520] Ostensibly, the debate between Judge Easterbrook and Professor Tribe is about economic theory, but the debate really is a "rights" debate.

Implicit in Judge Easterbrook's article is the notion that merging the concept of "entitlements" into the concept of "rights" and calling this newly-merged concept, "rights," renders the concept of "rights" meaningless. This point is made explicit in an article by Judge Loren Smith:

> Government has a duty to protect the rights of its citizens; unsafe cars threaten to kill or injure individuals other than those who voluntarily purchased them, and additional costs are imposed upon society in the form of higher automobile and medical insurance rates, all because of technical defects in the less safe cars; therefore, government must take action to protect the "rights" of all drivers and insurance-premium payers by imposing stringent safety standards. The fallacy in this syllogism lies in the concept of "rights" that it implies. So broad a notion of rights would require the state to protect its citizens from all preventable harm, and that in turn would require it to

517. *Id.* at 177-78.
518. *Id.* at 178 n.4.
519. 98 HARV. L. REV. 4 (1984).
520. 98 HARV. L. REV. 592 (1985).

> abrogate freedoms whenever necessary to achieve that end . . . .[521]

Professor Tribe fundamentally disagrees with Judges Easterbrook and Smith. In his opinion, the law-and-economics school of thought disregards the "*distributional* dimension of any given problem."[522] Courts, in Professor Tribe's view, "not only [choose] *how* to achieve preexisting ends, but also [affect] *what* those ends are to be and *who* we are to become.[523] By focusing on the how question and overlooking the what and who questions, the law-and-economics school of thought tends either to ignore or understate "soft variables—such as the value of vindicating a fundamental right or preserving human dignity"—or to reduce entire problems "to terms that misstate their structure and that ignore the nuances that give these problems their full character."[524] The "basic flaw" in this analysis is that

> [i]t assumes that all of the "interests" it describes—special and general, private and public—*preexist* the enactment of laws, and that the players in the law "game" enter the public realm—be it marketplace or legislature—essentially to satisfy their private wants and needs. But freedom is cheapened if we conceive of it merely as a source of protection for our already defined private lives, rather than as a creative form of control over the lives we elect to define and lead. This central fallacy of much of liberal theory ignores the constitutive dimension of lawmaking—that, as we mold law to serve our interests, we simultaneously reshape those interests. In truth, to be free is to choose what we shall value.[525]

Both Judge Smith and Professor Tribe buttress their arguments by referring to freedom. The freedom to which they refer, however, is not the same freedom. Freedom for Judge Smith is the individual's freedom to be left alone by the his/her society; freedom for Professor Tribe is society's freedom to mold its laws to serve its interests.

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521. Smith, *Judicialization: The Twilight of Administrative Law* 1985 DUKE L.J. 427, 436-37.

522. Tribe, *supra* note 7, at 594 (emphasis in original).

523. *Id.* at 595 (emphasis in original).

524. *Id.*

525. *Id.* at 617 (emphasis in original).

IV. CONCLUSION

Given the American love affair with regulation for most of the last one hundred years,[526] the mixed results of the "Age of Deregulation,"[527] the vagaries of the "calculus of deregulation,"[528] the almost religious fervor of the regulation/deregulation debate,[529] the intersection of the regulation/deregulation debate with the "rights" debate,[530] the waning enthusiasm of legislators for deregulation,[531] the unwillingness of courts in general and the Supreme Court in particular to accept either a presumption against regulation[532] or the argument that deregulation should be subjected to a less intensive scope of judicial review because deregulation can be equated with inaction,[533] and the inclination of the courts to subject deregulation to a "hard look" scope of review,[534] the following conclusions can be drawn: deregulation is or soon will be "out";[535] no significant new deregulatory initiatives should be anticipated;[536] and agencies, sensing that some forms of deregulation receive more favorable treatment by the courts than other forms, will explore the contours of court-resistant deregulation and inaction as means of achieving their deregulatory agenda.[537]

The emerging pattern, as Professor Campbell has described it, is and will be a "patch-work" world.[538] In that "patch-work" world, there will be some deregulation, some unchanged regula-

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526. *See supra* notes 14-20 and accompanying text.

527. *See supra* notes 469-78 and accompanying text.

528. *See supra* notes 479-503 and accompanying text.

529. *See supra* notes 21-44 and accompanying text.

530. *See supra* notes 504-525 and accompanying text.

531. *See, e.g., supra* note 474 and accompanying text (statement of Senator Robert C. Byrd with respect to airline deregulation).

532. *State Farm*, 463 U.S. 29, 42 (1983).

533. *See supra* note 211-15 and accompanying text.

534. *See supra* notes 204 and 349 and accompanying text.

535. Deregulation became "in" because the concept enjoyed bipartisan support. *See* ABA Regulatory Reform Report, *supra* note 7, at 13. Deregulation no longer enjoys such support. *See, e.g., supra* note 474 (statement of Senator Robert C. Byrd with respect to airline deregulation).

536. No significant new deregulatory initiatives should be anticipated because of the mixed results of existing deregulatory initiatives and waning bipartisan support.

537. Since "court-resistant" deregulation is difficult to achieve both because of what is demanded—the agency must do "things right, i.e. . . . its action is reasoned [rather than] arbitrary or capricious"—and the ambiguities in what is demanded, agencies will be tempted to probe inaction more carefully than otherwise might be expected as a means of achieving their deregulatory agenda. Mikva, *supra* note 13, at 126.

538. *See* Campbell, *supra* note 12.

tion, and some re-regulation. All of these efforts probably will be rather modest in nature.

Is such a "patch-work" world desirable? Professor Kahn thinks not. He has described such a world as "the worst of all possible [worlds]."[539] Another commentator, Professor R. G. Evans, is more optimistic, viewing a "patch-work" world as preferable to a world where deregulation or regulation is blindly pursued:

> The two poles [regulation and deregulation] may, in a perverse way, meet. If, as seems likely, complete deregulation is not politically feasible, and if certain types of regulation—"self-regulation", for example, or those that serve particularly powerful constituencies—are much more resistant to removal, the net effect of a blind drive to deregulate everything may be a much less conspicuous, and perhaps reduced, level of regulation with substantially more harmful net effects.[540]

Whether desirable or not, the "patch-work" world is what we have and are likely to have for the foreseeable future.

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539. *See* Kahn, *supra* note 9, at 184.
540. *See* Evans, *supra* note 23, at 469.