Professor Mashaw’s story of the *State Farm* case uncovers the messy world of regulatory politics barely visible in the rational-analytic pages of judicial decisions. In that world opportunistic congresses routinely over-promise in regulatory legislation and under-fund regulatory bureaucracies, powerful economic interests use and abuse legal and political processes for financial advantage, presidents attempt to bend regulatory mandates to suit their own ideological predispositions, fickle publics simultaneously demand perfect security and total freedom, and courts intervene in ways that preserve valued constitutional symbols while wreaking havoc on the development of sensible regulatory policy.

What are we to make of the Supreme Court’s iconic decision in the State Farm case? At one level State Farm represents a triumphant vindication of reason as administrative law’s core value and of independent judicial review of administrative action as the keystone of the rule of law in the administrative state. In State Farm a unanimous Supreme Court blocked the Reagan administration’s attempt to rescind the centerpiece of the federal government’s ambitious program to make American automobiles safer for their occupants—Federal Motor Vehicle Safety Standard 208, the so-called “airbags” or “passive restraints” rule. Although ideologically committed to deregulation, and elected in part on the basis of its promise to provide economic relief for the American automobile industry, the Reagan team at the Department of Transportation (DOT) was instructed by the Supreme Court that politics was not enough. The administration had presented no “adequate basis and explanation for rescinding the passive restraint requirement.” DOT was sent back to think again. Through the force of independent judicial review politics and ideology were required to take a backseat to administrative law’s demand for reasoned policy judgment. In the great Weberi-

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2. 463 U.S. at 33.
an bureaucratic tradition, the *State Farm* decision demanded that administrative legitimacy be premised on the transparent demonstration that power is being exercised on the basis of knowledge.

Of such interpretations are legal icons made. But this triumphalist account of *State Farm* may miss much of the action. What if the Reagan administration's rescission efforts were feasible only because earlier, and obtuse, rounds of judicial review had delayed promulgation of the passive restraints standard for over a decade? What if the scientific underpinning for the passive restraints rule was uncertain, even problematic? What if the Reagan team's actions were a better approximation of the contemporary preferences of voters for policymaking under the Motor Vehicle Safety Act of 1966's vague statutory mandate than was the imposition of unproven, new, and costly safety requirements on the production of motor vehicles? What if the *State Farm* decision itself produced, not a new and better rationalization for administrative action, but a creative political compromise that shifted the locus of decisionmaking from the domain of NHTSA's traffic safety engineers to something like a national referendum conducted in the oblique form of state legislation? What would we think of *State Farm* then?

To get some perspective on these questions we must become time travelers. We must traverse the extraordinary history of motor vehicle safety regulation both before and after the *State Farm* decision. For *State Farm* was but a high-visibility legal event in an administrative, political, and legal donnybrook spanning now nearly four decades. Examining that story will take us from the heyday of public support for energetic federal regulation to the increasingly common vision of government as a problem rather than a solution; from the 1960s and early 1970s reformation of administrative law to its counterreformation in the 1980s and beyond. It is a story of high drama and low comedy; of high-visibility actors—figures such as Ralph Nader, Richard Nixon, and Lee Iacocca—and of subterranean bureaucratic warfare; and, as the *State Farm* decision itself suggests, of constant competition between scientific understandings and political and legal imperatives. The *State Farm* story thus provides a microcosmic glimpse of the development of the administrative state, and of the shifting visions of administrative law, in late 20th century America.

**The Revolution of 1966**

The National Traffic and Motor Vehicle Safety Act of 1966⁴ was a dramatic attempt at legal transformation. Indeed, it represented the

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convergence of two revolutionary movements: The first was a decisive shift in the intellectual conception of motor vehicle safety law; the second was a broad-based campaign to reform federal administrative regulation.

The New Science of Accidents. The use of law to regulate automobile safety was hardly novel in 1966. Traffic rules backed by legal sanctions were not just traditional; they were, and are, probably the most often encountered, and most often violated, legal norms ever enacted. Our streets and highways are alive with legal communication. Stripes and arrows, broken and solid lines adorn the pavements. Signs and flashing lights provide constant reminders of required speeds, required stopping places, areas of caution, required and prohibited turns, and so on, and on. The law encouraged good driving behavior in other ways as well. All states licensed drivers; many required or strongly encouraged driver education courses. These routine forms of vehicle safety regulation were punctuated by episodic, high-visibility enforcement campaigns, often on holidays, during which police cracked down on speeders, drunk drivers, and other vehicular malefactors. Much of this activity was given heavy play on television and in the press.

Yet, decades after the private motor vehicle had become the dominant mode of personal transportation, this gargantuan effort at legal control and motor vehicle safety had had limited success. In 1965 the number of vehicular deaths per year on American highways topped 50,000—an awesome figure that was expected to double within the next decade.

In 1966 Daniel Patrick Moynihan, then Assistant Secretary of Labor, described the traditional and generally accepted law enforcement approach to traffic safety with a disdain bordering on contempt:

The entire pattern of state police management of the automobile complex is derived directly from the model of the prevention detection, and punishment of crime. From the cowboy hats, to the six guns, to the chase scene, the entire phenomenon is a paradigm of the imposition of law on an unruly and rebellious population... There is not much evidence that this works. More to the point, the police have almost no tradition of controlled inquiry that would find out... Their response to the gentlest criticism is simply wholesome Hibernian apoplexy.\(^5\)

As Moynihan (but few others) understood, two sets of professionals had begun to take a dramatically different approach to automobile safety—an approach that downplayed the importance of controlling

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driver behavior in favor of other, engineering-based strategies. One group was the highway engineers who were deeply involved in the construction of President Eisenhower’s cherished, post-war interstate highway system. It was clear by the early 1960s that their conscious efforts to design highways for safety had produced results: interstates were three times safer than other highways.

But for purposes of the State Farm story a second group was more important. Its leaders were the medical profession, especially the members of that profession concerned with epidemiology and public health. From a medical standpoint, the mayhem on American highways looked statistically like an epidemic. Automobiles were not only the leading cause of accidental death; they were, for the population below age 44, the leading cause of death, period. The efforts of these individuals to understand and control the epidemic of motor vehicle injuries and fatalities produced an entirely new way of thinking about automobile safety.

Epidemiologists analyze problems of injury or illness in terms of a conceptual triad that includes the host (the person who becomes injured or ill) the agent (the cause of the injury or illness), and the environment (the setting within which the host and agent interact). In an automobile accident, epidemiologists see a host—the occupant of a motor vehicle—coming into contact with an agent—rapid energy transfer—caused by the occupant’s collision with a particular environment—the interior of the automobile. The epidemiologist thus sees an injury or death in an automobile accident as caused not by the accident itself, but by the occupant’s collision with the various features of the interior of the vehicle. From this perspective, preventing accidents is only one of many strategies for preventing deaths or ameliorating injuries. An alternative route would be to interdict the energy transfer from the vehicle’s interior to the occupant after an accident has occurred—the so-called “second collision” approach to automobile safety.

William Haddon, who became the Motor Vehicle Safety Act’s first administrator, was a part of this epidemiological fraternity. He had written extensively on the etiology of accidental injury and had become increasingly active in the field of automobile accidents. Like all epidemiologists, Haddon had a professional bias in favor of interventions that did not rely on changing human behavior. In a 1962 paper Haddon

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wrote, “It has been the consistent experience of public health agencies concerned with the reduction of other causes of morbidity and mortality that measures which do not require the continued active cooperation of the public are much more efficacious than those which do.”

By “proven measures” Haddon was referring to more than the increasing evidence of the efficacy of highway safety design. Building on Hugh DeHaven’s pioneering research at the Cornell Medical School, and borrowing engineering techniques from aeronautical engineers, teams of doctors and safety engineers had by 1962 designed or redesigned the interior of experimental automobiles to make them much more forgiving of their human occupants in the event of a crash. This research was widely known within the automotive engineering fraternity and by some state and federal officials, like Moynihan, who were particularly interested in automobile safety. (Moynihan had cut his teeth on automobile safety issues while an aide to Governor Averell Harriman of New York.) These ideas were also coming to be understood by the insurance industry, by medical professionals who dealt with automobile trauma, and by the American Trial Lawyers’ Association.

For reformers the epidemiological approach suggested a radically new role for automobile safety law. Rather than attempting to modify the law, the law should attempt to modify the motor vehicle. Yet nothing much seemed to be changing in the design of automobiles—at least not in their safety design. In the 1950s and early 1960s automobile “design” still meant automobile “styling.” The urgent design questions seemed to be concerned with tail fin height and the shape of the grill, not with occupant safety.

Regulatory Reform. When the revolution in the substantive conceptualization of motor safety came to be translated into law, it converged with a concurrent revolution in the form of legal regulation. The 1966
Motor Vehicle Safety Act created the first of a new breed of federal regulatory agencies, the National Highway Traffic Safety Administration (NHTSA). Like other familiar regulatory actors, such as the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA), NHTSA was the institutional offspring of a distinctive political-intellectual union. The first parent of regulatory reform was the "liberal" political activism of the 1960s and early 1970s. Its central political heuristic was the development of civil rights law from Brown v. Board of Education to the Civil Rights Act of 1964. This was an activism that viewed most social issues, whether civil rights, poverty, pollution, or product safety, as problems to be solved by the application of federal governmental power. The second parent of reform was an intellectual climate created by critiques of government from both the left and the right. These mostly academic, analysts described some of the existing venerable federal agencies—such as the Interstate Commerce Commission (ICC), Federal Power Commission (FPC), and Federal Trade Commission (FTC)—as "captured" bureaucracies, institutions that had failed to make effective public policy because they had been too busy serving the economic interests of their regulatory clientele.\(^\text{12}\) The reform agenda generated at the intersection of liberal political activism and skeptical intellectual criticism of federal bureaucratic performance included, therefore, two elements: The need to move the federal government forcefully into new areas of activity to solve pressing social problems; and the need to provide this federal action in a new organizational form that would avoid the administrative lethargy of the past.

There were many diagnoses of the structural problems of the old agencies. The vagueness of their statutory mandates, their collegiate form, their broad prosecutorial discretion, their imperviousness to the interests that they were designed to protect, their independence from executive direction, and their ponderous and inefficient adjudicatory techniques, were all indicted as contributing to their ineffectiveness.\(^\text{13}\) Most of the new regulatory agencies created in the 1960s and early 1970s were to be different: Their mandates were to be more specific; their

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\(^{12}\) Two early and influential works were M. Bernstein, Regulation by Independent Commission (1955), and G. Kolko, The Triumph of Conservatism (1963).

\(^{13}\) See, for example, Senate Comm. on the Judiciary, 86th Cong, 2nd Sess., Report on the Regulatory Agencies to the President-Elect (James M. Landis) (1960); Louis L. Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105 (1954) (listing critiques of the contemporary administrative state, including agency capture, a presumption in favor of regulation, and overly conservative policies).
powers more concentrated in a single administrator; their enforcement discretion more circumscribed; their processes more open to the participation of putative beneficiaries; and their powers more focused on the establishment of mandatory policy by general rule.

This last change was the most significant legal innovation of the new era of regulation. From the perspective of the legal reformers of this period, rulemaking was vastly superior to adjudication as a regulatory technique.\textsuperscript{14} General rules could be made through informal, and presumably more expeditious, procedures. Policy would thus apply immediately to whole areas of regulated activity. Any person or organization, not just the “regulated interests,” was entitled to participate in informal rulemaking proceedings under the federal Administrative Procedure Act (APA). General rulemaking would, therefore, also foster broadly informed policy making rather than ad hoc decisions in the context of particular adjudications. Agency initiative, or lack of initiative, would be transparent and subject to political debate and direction.

Hopefully judicial review would afford regulators wide latitude in shaping policies while avoiding the courts’ prior preoccupations with adjudicatory formalities—formalities that had often paralyzed individualized enforcement and licensing proceedings. Judicial review of rules might also be structured to include review of agency failures to act. Hence, potential beneficiaries would be able to back their demands for action with credible threats of legal recourse, a reform promise that \textit{State Farm}, in part, redeems. The virtues of regulation by rulemaking seemed endless.

Operating at the forefront of this public health and regulatory reform movement, the Motor Vehicle Safety Act of 1966 defined the regulators’ central task quite simply. The National Highway Traffic Safety Administration was to promulgate rules that would force manufacturers to build vehicles that better protected their occupants in case of a crash. The agency’s mandate also included rulemaking authority to promote crash avoidance and adjudicatory authority to force manufacturers to recall and repair defective automobiles. The National Highway Safety Act, passed in the same year, gave the new agency authority to attempt to coordinate and improve state programs aimed largely at driver behavior. But the big safety payoff was thought to lie in the agency’s central mission of forcing the development of technology that protected vehicle occupants.

Activists who supported the MVSA foresaw public health benefits from redesigning the automobile that rivaled the most significant public health breakthroughs of the past, including such staggering successes as

\textsuperscript{14} See, e.g., \textsc{Kenneth Culp Davis, Discretionary Justice. A Preliminary Inquiry} 65–66 (1969) (describing rulemaking as “one of the greatest inventions of modern government”).
the protection and treatment of water supplies. Proponents of the new science of accidents also often drew their supporting political images from the technological and managerial accomplishments of the space program.\textsuperscript{15} With a NASA-like combination of political will and technical sophistication, success in the battle against vehicle injury and death seemed inevitable. The Motor Vehicle Safety Act was grounded in these beliefs, law and science would combine to produce major improvements in American life.

These political symbols proved politically powerful. Safety proponents characterized the vehicle safety problem as a problem of social irresponsibility. Fixated on styling and power, the manufacturers of automobiles were said to have failed to provide the public with safer vehicles to which they were entitled. Regulation was essential to shift the industry’s design priorities from tail fins to passenger protection. Acting out an apparent consensus that rarely attends legislative programs more controversial than the declaration of National Crocus Week, Congress passed the National Traffic and Motor Vehicle Safety Act\textsuperscript{16}—for the first time directly regulating at the federal level the largest industry in the United States—without a single dissenting vote in either house.

The Dance of Legislation

Congress seemed to back its voting enthusiasm with substantive powers. Epitomizing the new regulatory reform paradigm, the Motor Vehicle Safety Act provided for administration by a single chief administrator, who was not merely empowered, but required, to establish “appropriate federal motor vehicle safety standards” that would “meet the need for motor vehicle safety.” The legislation demanded that initial standards be in place by January 31, 1967, and new and revised standards by the same date the next year. These standards were to be

\textsuperscript{15} See, for example, Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong. 208 (1966) (remarks of Robert F. Kennedy) (urging application of “same imaginative techniques that we are using to win the race to the moon to eliminate the most deadly features of today’s cars”); National Traffic and Motor Vehicle Safety Act: Hearings on H.R. 13,228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong. 450 (1966) (remarks of N.Y. State Rep. Edward Spence) (“[I]f we can send a man to the moon and back, why can’t we design a safe automobile here on earth?”); id. at 781 (remarks of Col. John P. Stapp) (urging that “most completely regulated form of transportation by the federal government is space flight” and that “the international record in space flight today” is “17 flights, 733 orbits, 1,163 hours, 31 minutes, 28 seconds” and “19,033,250 miles covered without a single injury or fatality”). Amazement over the nation’s progress toward reaching the moon subdued concern over the costs of auto safety regulation. See Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong. 211 (1966) (remarks of Robert F. Kennedy) (arguing that the country could afford to spend $150 million on auto safety, if NASA was spending several billion dollars to ensure astronauts’ safety).

\textsuperscript{16} 15 U.S.C. §§ 1381 et seq.
performance, not design standards, but the agency was given wide latitude. When prescribing “objective” performance standards, regulators were required to consider relevant data, to consult to the extent “appropriate” with state officials, and to consider whether their proposed standards were “reasonable, practicable and appropriate” for the particular type of motor vehicle or equipment for which they were prescribed. This statutory language seemed redolent with discretion. Discretion to be wielded by an activist administrator in pursuit of motor vehicle safety. The statute made it a civil offense for manufacturers to offer for sale or introduce into interstate commerce any automobile or automobile equipment not conforming to the new agency’s standards. Violations were subject to a civil penalty of $1,000.00, with each vehicle or item of equipment constituting a separate offense. In addition, the agency could seek injunctions prohibiting the sale of any non-complying products.

Yet, notwithstanding unanimous legislative consent and the statute’s broad powers, the depth of the political will behind the Motor Vehicle Safety Act of 1966 was always questionable. Like any “revolution” worthy of the name, it was strongly against the grain of history. Ever since the development and mass marketing of the private automobile, motor vehicle law had promoted three paramount values: mobility, choice, and freedom. Although the ubiquity of traffic rules and the prominence given to their enforcement may have suggested a nation fixated on safety, those rules actually mostly promoted mobility. Without traffic rules to coordinate driver behavior, the progress of automobiles on the roads would probably be so lethargic that collisions between them, or anything else, would produce little damage to either automobile or occupant. And, the common law of liability had always acted on the common sense notion that “accidents” were either just that, or the fault of one or another motorist. To be sure, manufacturers had been held liable for defective products, but liability for design defects—particularly designs which failed to protect the occupant of the vehicle—had been firmly rejected.

Indeed, the notion that manufacturers should be liable for failing to protect occupants in collisions was almost laughed out of court. As one judge put it, “automobiles might be driven into lakes or rivers, but that did not impose any responsibility on manufacturers to equip them with

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17. As the First Circuit has explained: “A performance standard establishes a test for a certain aspect of a vehicle’s performance, without mandating how the vehicle should be designed to comply with the test. In contrast, a design standard mandates how a vehicle or item of vehicle equipment should be designed, and does not dictate how the product should perform in response to certain tests.” Wood v. General Motors Corp., 865 F.2d 395, 416 (1st Cir. 1988).

The job of manufacturers was to produce more and better cars so that more Americans could enjoy the freedom of the open road. Had a population that viewed motor vehicles as expressions of their own personalities, and that viewed the injury and deaths from automobile accidents as primarily the fault of bad drivers, really come to see their “freedom machines” as a public health hazard? The peculiar series of events that led to the adoption of the Motor Vehicle Safety Act certainly were not themselves evidence of any broad-based change in the popular culture.

**Competition for the Limelight.** When Senator Abraham Ribicoff tried to generate interest in the new second collision approach to automobile safety regulation just a year before the Motor Vehicle Safety Act was passed, he could hardly get anyone’s attention. Like most ambitious and effective politicians, Ribicoff had achieved some of his electoral success by becoming identified with a popular issue. For him the issue was traffic safety. Indeed, it was Governor Ribicoff of Connecticut’s 1950s crack down on unsafe driving that was the subject of Moynihan’s scathing critique of the crime and punishment model of automobile safety regulation.

But since moving to the Senate, Ribicoff had become aware of the new epidemiological approach to automobile injury and death. He was determined to reframe the automobile safety debate, and to take credit for doing so. But with automobile safety ranking behind crime, disease, unemployment, poverty, environmental degradation, racial discrimination, and a host of other issues as problems in the public mind, he could gain little traction.

Political help appeared in an unexpected form. In November, 1965, Ralph Nader, then a recent graduate of the Harvard Law School, released his book, *Unsafe at Any Speed.* Nader’s research seemed thorough, his story was well-written and his message was compelling—cars could and should be made safer. This was, of course, the same story that the epidemiologists and safety engineers had been telling for years, to no effect. But Nader had made a discovery of momentous political

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19. Evans v. General Motors, 359 F.2d 822, 825 (7th Cir. 1966). Ironically, perhaps one should say perversely, manufacturers had been held liable for safety improvements that were advertised to consumers but failed to work perfectly. See Baxter v. Ford Motor Co., 168 Wash. 466 (1932).


significance. He had found a villain. Nader claimed that General Motors was marketing Corvair automobiles although the company knew that they had a propensity to go out of control on turns. The New York Times gave Nader’s book front page coverage, and reviewers around the country embraced it. Nader’s stock soared, and so did automobile safety as a political issue.

Sensing that a political groundswell was in the making, politicians began to compete to stake out the territory. Ribicoff had been running his safety campaign from his perch as chair of the relatively obscure Subcommittee on Executive Reorganization of the Senate Government Operations Committee. But federal regulation of interstate commerce was the traditional jurisdiction of the Commerce Committee. Senator Warren Magnuson of Washington state, whose staff had warned him that he was suffering from a “visibility” problem back home, quickly opened hearings on automobile safety before the Senate Commerce Committee. The Committee had before it a transportation package introduced by President Johnson, which included giving federal regulators authority to set vehicle safety performance standards. Seldom slow off the political mark, Johnson’s presidential message in support of his bill declared that the time had come to “replace suicide with sanity and anarchy with safety.”

Still the Johnson proposal was for a weak bill by comparison with the one that ultimately emerged from the legislative process. That proposal (or an even weaker version) would have been compromised to overcome industry objections, and might have been the legislative outcome—had not Nader’s villain turned villainous.

Ribicoff reclaimed the automobile safety issue by generating another scandal. Acting on reports that General Motors had placed Ralph Nader under surveillance, he called a special hearing before his subcommittee. At the hearing, General Motors President, James Roche, had to admit that his company had hired a law firm to conduct a “routine investigation” of Nader. But further committee prodding revealed that more had taken place. As Ribicoff described it, the investigation “had to do with trying to smear a man, the question of his sex life, whether he belonged to left wing organizations, whether he was anti-Semitic, whether he was


an odd ball, whether he liked boys instead of girls. The whole investigation was to smear an individual.”

An issue that had been slowly heating up boiled over. Representatives and Senators tripped over each other in the stampede to express their outrage. The press’ response was equally powerful. The story of General Motors versus Ralph Nader provided a perfect media melodrama—a spry David against an oafish Goliath. A pro-Nader, pro-safety, pro-federal-intervention mood swept the country. On April 1, Time ran one of its periodic editorial essays, entitled “Why Cars Must—and Can—Be Made Safer.” The magazine continued its campaign for auto safety with articles in each of its next three issues.

The remainder of the legislative action on the 1966 Act proceeded in accordance with this revised script. Nader’s expertise and credibility seemed to be viewed as limitless. Every Senator or Representative with plausible jurisdiction over the issue called a hearing. And they competed with each other to strengthen the provisions of the Johnson proposals. Apparently hoping to limit their reputational damage, the Automobile Manufacturers’ Association went in the space of three weeks from demanding voluntary, industry-established vehicle standards, to embracing federally mandated safety requirements. An industry that had never been regulated at the federal level, and that had paid little attention to Washington politics, capitulated to the combined forces of political entrepreneurs and the Nader phenomenon.

Was the Motor Vehicle Safety Act a Fluke? Although peculiar events gave life to the Motor Vehicle Safety Act of 1966, the Act was not an anomaly. The zeitgeist of the mid-1960s—a combination of egalitarian ethical judgment, scientific enthusiasm and activist national politics—produced a prodigious outpouring of additional legislation. From 1964 to 1966 Congress not only generated 1,000 bills, it enacted 650 of them. The “Great Society” congresses—the second session of the 88th and both sessions of the 89th—produced law at a volume and at a rate matched only in the early years of the New Deal and the first half of the Wilson administration. The Motor Vehicle Safety Act, while contradicting decades of automobile law, was clearly not flying in the face of the contemporary national mood.

26. An account in Fortune Magazine ascribed the automobile industry’s weakness in the political process to the insularity of top management, a group described as utterly confounded by problems whose nature was sociological or political rather than technological or economic. Cordtz, “The Face in the Mirror at General Motors,” 74 Fortune 117 (1966).

27. This account of the legislative milieu is drawn largely from the weekly reports of the Congressional Quarterly Almanac for the years 1964–1966.
It remained to be seen, however, whether this outpouring of reformists legislation could sustain itself as it moved from legislative exhortation to administrative action. Over time, interest and resources matter. The automobile industry may have been, as Elizabeth Drew proclaimed, a "paper hippopotamus" in 1966, but it was nevertheless a very big animal with at least the usual instincts for self-preservation. If that animal was to be bent to the collective will, its keepers would have to be both vigilant and powerful. Such a posture is particularly difficult to maintain, however, in a democratic polity committed to limited government. As the president and committee chairs competed to strengthen the 1966 Act, the system of checks and balances may well have looked more like a system of ratchets and amplifiers. But American institutions do not routinely operate that way. In designing our particular zoological garden, the architects seem to have been more intent on avoiding the criticisms of the SPCA than on allowing the zoo keepers to keep the animals restrained. The preference for private or decentralized state and local control of most social decisionmaking is a structural feature of the American polity generally, not just a peculiarity of preexisting automobile law.

The Realities of Regulation

The 1966 Motor Vehicle Safety Act was an exercise in energy and idealism, fueled by outrage and scientific discovery. But transforming its legislative mandate into operational requirements turned out to be a much more complicated process than any one had imagined.

The statute demanded that NHTSA issue its first set of rules, based on the existing public and private standards, by January 31, 1967. That deadline, a hallmark of the new "action-forcing" forms of federal regulation, was wildly ambitious. William Haddon was appointed head of the agency less than 4 months before the deadline, and NHTSA did not receive an appropriation to begin work until November 15, 1966.

Even so, working with a borrowed staff and temporary offices in the Department of Commerce, Haddon issued an Advance Notice of Proposed Rulemaking (ANPRM) on October 8, 1966, informing the public of his agency’s intent to issue standards and inviting proposals and suggestions. The response was a blizzard of paper, mostly from the automobile industry. By December 3, 1966, the agency had digested this material and formalized its proposal into a Notice of Proposed Rulemaking (NPRM) setting forth 23 separate standards for possible adoption. These rules, as the Act commanded, were based on existing standards that had already been established by the General Service Administration for the purchase of government vehicles, the Society of Automobile Engineers,

as well as some requirements drawn from the Post Office, the National Bureau of Standards, the Uniform Vehicle Code, and the Swedish National Road Board. Another blizzard of comments descended on the Agency, but it met the January 31, 1967, deadline.

This flurry of activity seemed to redeem the reformers’ hopes, but hyperactivity is not necessarily progress. To be sure, many members of the automobile industry thought the new standards outrageous. Henry Ford II complained that many of their requirements were unreasonable, arbitrary, and technically infeasible. Volkswagen predicted that it would no longer import vehicles into the United States. Checker Motors Corporation declared that compliance was absolutely impossible.29

Yet, of the 20 standards issued, eight had been significantly modified in response to these criticisms and three had been withdrawn altogether. Ralph Nader and other safety advocates were apoplectic—in their view the regulators had caved in the face of pressure from the manufacturers. According to Nader, who complained about the administration in some forum almost weekly, Haddon was a timid administrator who operated under a host of self-imposed restraints because he was "petrified of a court test." At one point Nader described Haddon as so sensitive to criticism that he could be "blistered by moonbeams."30

There was something to Nader’s complaint, but the world of standard setting looked quite different from the regulators’ perspective than it had from the halls of Congress. The action-forcing provision of the legislation that required that standards be applied uniformly to all manufacturers turned out to be a major liability. For the automotive world was not just made up of the big three, but of dozens of other small producers for whom compliance with proposed standards, particularly the cost of destructive testing and sophisticated test instrumentation, posed insuperable burdens. Many of the proposed standards would not be "practicable" or "reasonable" given these manufacturers’ situations. And Congress’ injunction that "vigorous competition in the development and marketing of safety improvements must be maintained" could hardly mean that the agency should drive all small manufacturers out of business.

Uniformity plus practicability plus firm deadlines thus led to a lowest common denominator approach that massively weakened the standards adopted. Moreover, the agency discovered that many existing governmental or "consensus" standards were not based on significant scientific investigation. And the statute’s demand that the agency’s standards be “objective” reinforced the feeling among Haddon’s research

30. Id. at 235.
scientists that anything the agency put out should be based on unimpeachable data.

Standard 101, for example, which originally required that controls in passenger cars be located within comfortable reach of a “fifth percentile adult female restrained by a lap and upper torso restraint seat belt,” was modified to simply require that instrument controls be within the reach of “a person.” The change was based not only on the vituperative objections of the automobile industry, but also on Haddon’s discovery that the underlying science defining the size of a “fifth percentile adult female” had been based on an unrepresentative sample of the female population. But, of course, the standard as issued was utterly meaningless from the standpoint of providing safety.31 Shaquille O’Neal, after all, is “a person.”

Proposed Standard 105 met a similar fate. Prepared originally under the supervision of William Stieglitz, an MIT trained aeronautical engineer and a fierce partisan of automobile safety, Standard 105 required that every motor vehicle have a dual braking system and that the backup brakes be capable of stopping the vehicle within 160 feet at an initial speed of 60 mph. Over Stieglitz’s objections, the proposal was modified to call for a stopping distance of 194 feet, a distance that was greater than the stopping distance of most existing production automobiles.

Even so, manufacturers complained that the standard was an engineering “impossibility,” and that the dual braking system would make the automobile less safe under normal operating conditions. They further objected that the standard was not “objective”: What exactly was the surface on which this car was to be stopped, and under what conditions? After further revision, the standard demanded only that residual brakes “stop a car on a clean, dry, Portland cement, concrete pavement.” After resigning from the agency in disgust, Stieglitz testified to the Congress that no car could fail this test. In neutral it would eventually stop, and even in gear, it would stop when it ran out of gas. The standard could be met by a car with no brakes at all.

And so it went with standard after standard. The agency proposed, the industry objected, and in the absence of clear scientific evidence, the agency downgraded the standards. If making sure that automobile safety standards were reasonable, practicable, and objective involved a high degree of scientific certainty concerning both safety benefits and production feasibility, rulemaking was going to be a very laborious process—even though these standards were based on existing requirements and, often, even on widespread industry practice. What would happen when regulation moved on to topics not embodied in existing standards?

31. Id. at 175.
The answer seemed to be more of the same. The agency’s second generation of safety standards, issued between November 1967 and December 1970, was no more innovative than its first generation had been. A study by the National Commission on Product Safety (NCPS) found that virtually all the rules issued during this period were of little or no significance. Most simply incorporated criteria that were already in widespread use in the industry.

A substantial part of NHTSA’s problem may have been its particular approach to standard setting. Rather than articulating broad performance criteria, such as that automobiles be constructed so that their occupants could survive a crash into a fixed barrier at 30 mph, the agency adopted the preexisting General Services administration technique of equipment-specific regulations. These quasi-design standards were much more time consuming to develop and specify in performance terms. But NHTSA seemed to believe that only by taking this piecemeal approach could it justify its rules against the manufacturers’ consistent assertions that they were “infeasible,” “impracticable,” “unreasonable,” and “non-objective.”

The practical difficulties of regulating the automobile piece by piece might have been solved with a generous dollop of additional manpower and money. But instead of acquiring more rulemaking resources, NHTSA during the late 1960s and early 1970s ended up with substantially less than had been envisioned when the Motor Vehicle Safety Act was passed. The Johnson Administration’s resistance to a guns-and-butter trade-off had given way to the Nixon Administration’s determination to stay the course in Vietnam, while cutting back on domestic programs enacted by prior Democratic congresses. Nixon imposed a series of personnel freezes that brought Haddon’s recruiting efforts to a standstill. Many agency sections were staffed by only one or two employees; others were empty.

The Congress that unanimously passed the Motor Vehicle Safety Act in 1966 suddenly turned fiscally cautious. Its Expenditure Control Act of 1968 required that federal employment be reduced to levels in effect on June 30, 1966. And, although the 1966 Act envisioned a major research facility to support NHTSA’s rulemaking, Congress appropriated no funds for even a test facility until 1972. Nor was Haddon able to garner much support from his colleagues in the Department of Transportation. NHTSA was located in the gargantuan Federal Highway Administration (FHWA), where it was both a pigmy and an orphan. The FHWA was dominated by the old style “three Es” safety philosophy—engineering


(meaning "highway engineering"), enforcement, and education. FHWA focused on highways and drivers. It had little interest in NHTSA's "second collision" regulatory mission to reengineer the automobile. Indeed, Haddon reported that personnel in FHWA were more interested in "sabotaging" NHTSA than giving it assistance. 34

The Promise of Passivity

Mired in regulatory trench warfare with the industry; starved for revenues, personnel, and facilities; under constant attack by its putative public interest friends; flanked by protean bureaucratic bedfellows; and trapped in part by its own sense of professionalism, in a staggeringly laborious regulatory approach, NHTSA faced the decade of the 1970s desperately in need of some new ideas and allies. Federal Motor Vehicle Standard 208, the rule reviewed in the State Farm case, was the embodiment of NHTSA's third generation approach to regulation. It promised to make good on the epidemiological underpinnings of the 1966 statute, to break the agency out of its regulatory lethargy, and finally to provide some significant safety benefits to the motoring population.

Amid the many ideas for protecting vehicle passengers from the effects of the "second collision," one general approach stood out—keeping occupants in place during those crucial fractions of a second when the energy from a crash was absorbed and dissipated by the vehicle surrounding them. This was the basic logic behind seatbelts and shoulder harnesses, equipment that by 1970 was available on 75–80% of American motor vehicles. But availability was not enough. Agency studies showed that only 25–30% of motorists wore their seatbelts, and that figure was probably inflated. A much smaller proportion wore the more protective shoulder belt. As the epidemiologists knew, when public health measures require continuous active cooperation of the populace they are likely to fail. NHTSA, therefore, proposed in July 1969 that Standard 208 (which required lap and shoulder belts) be amended to switch from an active to a passive technology. 35 The technology it had in mind was the airbag.

The airbag is now a commonplace piece of equipment in American automobiles, but in 1969 the technology was viewed as at once simple and exotic. In truth, it was hardly novel. The first U.S. patent on a "safety cushion for automotive vehicles" was granted in 1953. 36 Major domestic manufacturers—particularly General Motors, which held several air cushion patents—had already conducted extensive research and development testing of the airbag. Component suppliers such as Eaton

34. C. McCraw, Citizen Nader 96 (1972).
Yale & Towne had also done significant research and development. Airbags were not an idea cooked up by wild-eyed safety engineers in the basement of the Department of Transportation. NHTSA's July 1969 Advanced Notice of Proposed Rulemaking (ANPRM) predicted that airbag technology was nearing production readiness. More importantly, it predicted that the switch to passive restraints would save ten to twelve thousand lives a year—thousands more than all of the agency's prior 49 rules combined.

The airbag proposal was not only epidemiologically sound and scientifically innovative, it contained a legal novelty as well. The proposed amendments to Standard 208 presumed the existence of a particular type of equipment, the airbag, but did not mandate its use. Instead it permitted the use of any "passive" technology that would meet the standard's performance criteria. "Automatic" belts, for instance, were an alternative that might comply with Standard 208. So might "passive interiors." Moreover, the revised Standard 208 did not specify performance criteria in terms of equipment characteristics. Rather than speaking of airbag inflation times, belt anchor strengths, or the like, the proposal was framed in terms of the effects produced on an anthropomorphic dummy in frontal barrier crashes at 30 mph. Here, at last, was a true performance standard. The industry was told what to accomplish, not how to accomplish it. The choice and design of specific equipment would be the industry's responsibility.

The usual trench warfare ensued, although with one notable exception. The General Motors Corporation decided not to fight the agency on the passive restraints rule. It held many of the basic patents on airbag technology and believed that the airbag would actually give it a significant advantage over its competitors. Even so, the usual objections to cost, lead times, and production feasibility battered the rulemaking process through three years and 24 separate rulemaking notices. In the process the deadline for compliance was pushed back three years as well, from January 1, 1972 to August 15, 1975. Having provided that generous grant of leadtime, the agency stood fast in its conviction that manufacturers should bear the remainder of the research and development burdens necessary to implement the standard. But before Standard 208 could be implemented, both law and politics intervened.

**Engineering Science in Court**

On December 2, 1972, the U.S. Court of Appeals for the Sixth Circuit enjoined the implementation of Standard 208 in *Chrysler Corp. v. DOT*. The *Chrysler* decision would not be the agency's last loss in court, nor was the opinion as broadly critical of NHTSA's rulemaking

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37. 472 F.2d 659 (6th Cir. 1972).
efforts as some future decisions would be. Yet its effects on NHTSA’s new regulatory strategy were devastating. It was this case, more than any other, that taught the agency how precarious its legal position in rulemaking really was—a lesson that surely was not lost on its perennial antagonists, the vehicle manufacturers, who had had the good sense to initiate their challenge in a judicial circuit that might be described as their “home court.”

The plaintiffs’ briefs in Chrysler threw the book at Standard 208. They urged that NHTSA lacked statutory authority to force technology and that the agency was limited to issuing requirements based on available equipment; that the standard was neither “practicable” nor “reasonably related to the need for motor vehicle safety,” in part because seat belts (when worn) were more effective than airbags in some crash modes; that the standard’s test procedures were flawed; that dummies meeting the standard’s specifications were not readily available; that various procedural errors had been committed; and that many logical, judgmental, and evidentiary failings rendered the standard “arbitrary and capricious.”

In peppering the court with reasons for invalidating the standard, Chrysler and the other plaintiffs were behaving like any other litigant seeking to overturn an agency’s discretionary exercise of broad statutory authority. It was thought to be an uphill fight, and one never knew what line of reasoning a court might find persuasive. The comprehensive, scattershot attack also reflected the automobile manufacturers’ customary strategy in attacking NHTSA’s rulemaking efforts: to defend the status quo at every point with every available stratagem, and to keep up a relentless pressure via petitions, objections, comments, and criticisms.

The agency, for its part, played the familiar role of passive defendant, meeting the plaintiffs’ claims and letting the latter’s arguments provide the organizing principle for its brief. Thus were the issues in the Chrysler litigation framed. No mention was made of the agency’s new systems approach to rulemaking, the strategic impossibility of equipment-specific rules, the research and development and other informational burdens that the agency had shouldered in prior rulemaking efforts, or any of the other considerations that had led NHTSA to reform its rulemaking approach. The Chrysler court addressed the objections to a specific rule, Standard 208, not the broader issue of how technology-forcing regulation could be made both reasonable and effective.

After considering the appropriate standard of judicial review, the court turned to the principle issue in the case. Was NHTSA legally empowered to force automotive technology? Unequivocally (or so it seemed) the court resolved the issue in NHTSA’s favor. In sweeping language, Judge Peck wrote:
The explicit purpose of the Act, as amplified in its legislative history, is to enable the federal government to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as rapidly as possible ... [The agency is empowered to issue safety standards which require improvements in existing technology or which require the development of new technology, and it is not limited to issuing standards based solely on devices already fully developed. This is in accord with the Congressional mandate that “safety shall be the overriding consideration in the issuance of standards.”]

One by one, the court rejected the plaintiffs’ other arguments. Standard 208 was “practicable,” reasonably related to the need for motor vehicle safety, procedurally irrefutable, and in all other respects legal—save one.

The court believed the testing procedures by which the crashworthiness of vehicles was to be judged were inadequate. Specifically, Judge Peck found that the test dummy specified by Standard 208 did not provide an “objective” standard, as required by the Motor Vehicle Safety Act. The dummy criteria were deficient in at least three respects: the flexibility criteria for the dummy’s neck, the “dynamic spring rate” for the dummy’s thorax region, and the construction criteria for the dummy’s head were all said to be incompletely specified. Differently constructed dummies, which met the literal requirements of Standard 208, might thus yield substantially different results in performance tests measuring the forces applied to the dummy in a crash. The court concluded that these possible variations offended the statute: “Objective, in the context of this case, means that tests to determine compliance must be capable of producing identical results when test conditions are exactly duplicated, that they be decisively demonstrable by performing a rational test procedure and that compliance is based upon the readings obtained from measuring instruments as opposed to the subjective opinions of human beings.”

The Sixth Circuit’s demands for “objectivity” were carefully articulated in its opinion. Where the court had found the requirement of identical results as an element of objectivity, however, was much less clear. The Senate Report on the 1966 Act did not elaborate on the statute’s requirement that standards be framed in “objective terms,” and the House Report merely stated that “in order to ensure that the question of whether there is compliance with the standard can be answered by objective measurement ... every standard must be stated

38. 472 F.2d at 671-672.
39. 472 F. 2d at 676 (emphasis added).
The performance criteria of Standard 208 plainly were "objective" in this sense. The court's demand for "repeatability," meaning "identical results," in "exactly duplicated" tests that "decisively demonstrated" their conclusions without the necessity for human judgment was a heavy gloss on the statute.

The court's analysis and its order both took NHTSA almost completely by surprise. The agency had not anticipated that the suit would turn on "objectivity"; it had devoted a scant three pages of its 123-page brief to the issue. This position was understandable. General Motors had expressed no serious reservations about the standard's objectivity and had publicly announced that it could meet the compliance deadline with little difficulty. Airbag suppliers, who arguably had the most to lose if their products did not comply, had also indicated that they could provide airbag systems satisfying Standard 208 by August 1973, as long as purchasing commitments were received by July 1971. Those involved also knew that, at the time the suit was filed, three years remained before passive restraints were required. If the dummy were indeed inadequately specified, there was adequate time to iron out the details, without upsetting the implementation schedule.

The delay and disruption of agency rulemaking caused by the holding seemed wholly unnecessary for several additional reasons. At the heart of the court's analysis was a fairness-of-expectations test: manufacturers could not fairly be subjected to the uncertainty (financial risk and legal liability) that variable test results would create. But in fact the standard would not expose manufacturers to such risks. The requirements for the test dummy were set out in specification SAEJ963 and had been developed by engineering committees composed of the automobile industry's own technical personnel. As the agency explained in its brief, "So long as a manufacturer's dummy complies with the specifications of SAEJ963, it can use any form of dummy it pleases, and if its cars meet the requisite injury criteria, they will not be determined to be out of compliance with Standard 208." It was possible, of course, that manufacturers might exploit the looseness of the dummy's specifications in order to take engineering short cuts, if doing so would cut costs. That might be a questionable regulatory policy, but it was not unfair to the manufacturers. Underspecification actually worked to their advantage. NHTSA's assurance that it would not take enforcement action where variation could be tied to the dummies should have quieted any residual concern. The agency's position could be taken as a binding statement of policy that the court itself could enforce.

Similarly, the plaintiffs’ own treatment of the “objectivity” issue should have alerted the court that it was not a serious problem. The manufacturers seemed to concede that airbags would save thousands of lives, and the court in Chrysler flatly stated that the agency’s predictions of airbag effectiveness were supported by “substantial evidence.” If variations in test procedures were in fact material, how had the agency come to make and support these predictions? If based on subjective, nonreproducible tests, the agency’s predicted benefits should have been attacked as premised on insubstantial evidence. But the life-saving potential of airbags was challenged by no one.

The court’s conclusion that variable test results would make compliance turn on “subjective determinations” seemed to reflect its own technical illiteracy. The court was confusing “objectivity” with mechanical measurement. Qualified engineering personnel reviewing test results could in fact come to a principled (“objective”) determination of whether variable results were attributable to dummy differences rather than to the airbag itself. Indeed, a performance test that requires no engineering judgment is an impossibility.

Nor was the Sixth Circuit’s attachment to an unachievable level of scientific certainty its only display of technological naiveté. The court also treated it as “axiomatic” that “a manufacturer cannot be required to develop an effective restraint device in the absence of an effective testing device which will assure uniform, repeatable and consistent test results.” The realities of automotive manufacturing were just the opposite. Manufacturers routinely proceeded along several parallel paths in developing new technologies. Standard 208 required no different development process. Much of the critical work on installing airbags—such as redesign of the dashboard, retooling, perfection of the sensor, quality-control measures to ensure against inadvertent deployment, and a host of other technical issues—could proceed in tandem with refinement of the dummy—provided manufacturers had the incentive to do so. And yet, without discussion of schedule or other intricacies of production planning, the court simply declared that “implementation of passive restraints be delayed until a reasonable time after such test specifications are issued.”

In practical effect, Chrysler cast NHTSA’s technology-forcing mission in procedural terms that made it extraordinarily difficult to complete. As the dissenting judge in Chrysler stated:

If the statutory concepts of motor vehicle safety standards and compliance testing are not separated, the effect is substantially to undermine the legislative scheme. . . . New testing procedures prog-

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42. 472 F.2d at 678.
43. 472 F.2d at 681.
ress only as they are needed by advancing technology... If the rationale of the majority is adopted, industry is in effect relieved from the responsibility of developing a concomitant part of new automotive safety technology since without a previously developed testing device and procedure the agency is powerless to press industry toward this end.44

The Chrysler ruling was thus an automobile manufacturer's dream. The decision articulated no limits on how objective the test device had to be, but demanded that the agency withhold regulatory action until every detail had been worked out. Given the nature of the technical task at hand, regulation under these conditions was ideally suited for the manufacturers' full-court press. There were an almost infinite number of characteristics that might come into play in the biomechanics of injury. Regulators could not reasonably be expected to specify them all.46

It is important, nevertheless, not to overstate the specific problem that Chrysler created. The agency was able to reissue dummy specifications nine months later because General Motors had a competitive incentive to come to its rescue. General Motors was ready to produce airbag-equipped cars, while its competitors were not. The delay in Standard 208's compliance deadline directly attributable to the court's decision was little more than a year. The major significance of the decision was the way that it interacted with political events that were beyond the agency's control.

The New Politics of Automobile Safety

NHTSA's trouble in court was being simultaneously compounded by trouble from the White House. That trouble ultimately produced a fateful decision that virtually destroyed the agency's political base in Congress and derailed passive restraint regulation for an additional decade.

Nixon Intervenes. In the extensive rulemaking proceeding leading up to the rule that was invalidated in Chrysler, NHTSA had rejected a Ford petition for a declaration that the passive restraint requirements could be satisfied by forcing seat-belt use through an ignition interlock, a device that disabled the vehicle unless the passengers were buckled up. The agency argued that "forced action" was not the "no action" required for a truly passive system. The industry would not be permitted

44. 472 F.2d at 691-92 (Miller, J., concurring in part and dissenting in part).
45. Ralph Nader reported to the Congress that the effects of judicial review had so demoralized the NHTSA staff that people were predicting that there would be no significant new standards imposed on motor vehicles until well into the 1980s. Amendments to the National Traffic and Motor Vehicle Safety Act of 1966: Hearings on H.R. 7605, H.R. 5529, and S. 355 before the House Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce, 93d Cong. 196 (1973).
to substitute $40 interlocks for $400 airbags. NHTSA, however, soon reversed its position.

On April 27, 1971, Henry Ford II and Lee Iacocca met in the Oval Office with President Richard Nixon and Domestic Affairs Advisor John Ehrlichman. Although Nixon promised that the auto executives’ remarks would be held in complete confidence, his secret office taping system, excerpts from which would later drive him from office, was running.46

The conversation was in fact pretty tame. In typically garbled fashion Nixon made it “perfectly clear” at the outset that he was one of the boys: “[O]ur views are, are, are frankly, uh, whether it’s the environment or pollution or Naderism or Consumerism, we are extremely probusiness.” That was certainly encouraging to Ford and Iacocca, who had come to ask for help. Their pitch was essentially the same as the industry’s testimony would be before Senator Vance Hartke’s oversight committee in 1973. Uncoordinated regulatory burdens were adding frightful costs to car prices. The regulators threatened to cripple the domestic auto industry. Ford and Iacocca claimed that compliance with some of the proposed regulatory requirements, particularly the airbag, was simply beyond the industry’s technical capacity within the deadlines specified. They needed time to phase in new technology in an orderly fashion. If they didn’t get it, they were in trouble.

At times the president and chairman of one of the world’s largest corporations sounded pathetic. “We’re not only frustrated,” said Iacocca, “but, uh, we’ve reached the despair point. We don’t know what to do anymore.” And again, “[W]e are on a downhill slide, the likes of which we have never seen in our business. And the Japs are in the wings ready to eat us up alive.” Nixon’s intervention with the Department of Transportation was apparently their only hope. They wanted relief from environmental requirements too (fuel economy regulation was yet to come), but they knew that was impossible. They had already talked to William Ruckelshaus at the Environmental Protection Agency (EPA) and had been given a lesson in statutorily mandated regulation. The Congress had put EPA emission control criteria under a strict statutory timetable that neither the agency nor industry could evade for long. Under that statute manufacturers might get a year’s relief, but only if they could demonstrate their own failure in a good faith effort at compliance.

Nixon was ideologically sympathetic. “It’s true in, in the environmentalists and it’s true of the consumerism people. They’re . . . [not] one really damn bit interested in safety or clean air. What they’re interested

in is destroying the system. They’re enemies of the system.” But he was also ignorant of the issues and cautious in his promises. At the very end of the meeting, after apparently agreeing with everything Ford and Iacocca had said, Nixon warned them not to expect too much—or perhaps anything. “[U]jh, particularly with regard to this, uh, this airbag thing. I, I don’t know, I, I, may be wrong. I will not judge it until I hear the other side.”

What transpired at the White House and the Transportation Department after this exchange is not known in detail by anyone who is willing to talk for the record. In a Los Angeles television interview, Ehrlichman stated that he and Peter Flanagan ordered the Department to go along with the ignition interlock. Indeed, Ralph Nader later charged that Nixon, Ehrlichman, Iacocca, and Ford, and perhaps Flanagan as well, had concocted a devilishly clever plan to defeat passive restraints by requiring a mechanism (the interlock) so obnoxious to the American people that Congress would rise up and rescind the rule entirely.

If so, the strategy was not developed on April 27, 1971: no one at the meeting in the Oval Office mentioned the interlock. But that a memorandum subsequently went to the Transportation Department is not seriously disputed. Authors of a Senate Commerce Committee investigative report in 1976 describe John Volpe, then Secretary of Transportation, returning dejectedly from White House meetings at which he had failed to save the airbag. The Commerce Committee staff further reported that the “notorious [but never revealed] memorandum” demanded delay on passive restraints and adoption of the interlock.48

In any event, the Department complied. In October 1971 it issued a notice delaying passive protection until August 15, 1975.49 In the interim, compliance with Standard 208 could be achieved with an ignition interlock system. That choice then became the single option available when the Chrysler decision enjoined enforcement of Standard 208’s passive restraints timetable on December 5, 1972. Because the interlock system was attached to normal belts, interlocks were not subject to the dummy-testing criteria in Standard 208 that were invalidated in Chrysler. Interlocks were an enforceable technology even though all other passive techniques had to be delayed. It was thus the interlock that found its way into new cars for model year 1974.

The Public Speaks and Congress Listens. Although with the interlock NHTSA had an enforceable rule, evidence quickly mounted that the public’s opinion of it was at least as low as NHTSA’s. In reissuing

47. Transcript of interview by Byron Block, KABC-TV, Los Angeles, with John Ehrlichman, President Nixon’s Domestic Affairs Advisor, November 9, 1982.
Standard 208 in March 1974, with the dummy now “fully” specified, the agency noted that the interlock had improved belt usage enormously in model year 1974. But storm clouds were on the horizon. NHTSA’s investigations found that usage rates of lap and shoulder belts in 1974 models equipped with the interlock were below 60 percent. In other words, over 40 percent of those who had bought 1974 cars presumably had disabled the interlock equipment.

Motorists interested in defeating the interlock were about to get some help. If the 1966 Act marked a legislative revolution in legal control of automobile safety, the counterrevolution might be said to have erupted on the floor of the House on August 12, 1974. During the course of a one-hour open debate on H. R. 5529, the House’s version of the recall and school bus safety amendments, Congressman Louis Wyman rose to introduce his “citizens’ rights amendment,” which would repeal the interlock, outlaw any continuous light and buzzer system to “remind” motorists to buckle up, and make any subsequent passive restraints system only an “option.” Wyman explained: “All this amendment does is to provide that in the future automobiles can have seat belts and harnesses, but they are not going to be tied to any sequential warning system with lights and buzzers. They can have a red warning light on the dash which says, ‘seat belts are not fastened,’ but that is all they can have. Anyone who wants to buy a car in America can have a car with seat belts and harnesses. That is his privilege. He will not have to buy the interlock.”

Wyman, it seemed, spoke for many. NHTSA’s ignition interlock was “universally despised,” as one press account put it, and thousands of letters from constituents attested to the fact. As representatives skinned their mail, it was obvious something was up. This was no orchestrated letter-writing campaign by a trade association or other pressure groups. It looked more like the firestorm that had followed Nixon’s dismissal of Archibald Cox as Special Prosecutor a few months before. One congressman reported that 85 percent of those responding to a questionnaire circulated in his district opposed “compulsory” seat belts. The Wyman amendment caught safety activists by surprise. Some hurriedly returned from long-planned August vacations to heed the call to arms; all were perhaps still bleary-eyed from the long television vigil that had culminated only three days earlier in the President’s resignation. But there was reason to believe that the skirmish would be

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53. Id. at H. 27817.
shortlived. A compromise amendment requiring that motorists have the
option of purchasing a seat-belt ignition interlock system or a combina-
tion light and buzzer “reminder” had already been hammered out by
Congressman John Dingell and safety partisans on the House Commerce
Committee when it reported H. R. 5529 on July 11. Perhaps Congress-
man Wyman, who was a newcomer to vehicle safety matters, had failed
to recognize that he had already received satisfaction on the interlock,
light, and buzzer issues.

The committee’s concession in the Dingell amendment, however,
was not responsive to Wyman’s core concerns. Wyman was not interest-
ed in the “option” to buy one of two obnoxious systems. He was in favor
of motorists’ freedom to buy exactly as much safety equipment as they
wanted. As floor debate raged on, the safety activists steadily lost ground
to Wyman’s liberation army. The rhetoric of prudent paternalism was no
match for visions of technology and “big brotherism” gone mad.

Although the safety coalition that had mounted the 1966 revolution
fought back gamely, and from institutional positions that usually confer
overwhelming power, the 1974 legislative process was far from business
as usual. Committee discipline evaporated in the heat of a grassroots
rebellion.

On Liberty. Although the proposals surrounding the interlock, buzzer,
and other passive restraints were technologically and procedurally
complex, the rhetoric was sweeping and impassioned, as can be seen in
the statements of various participants:

Senator Buckley, on the rationale for his amendment: “I view such
coevasive measures as the interlock as an intolerable usurpation by
Government of an individual’s rights in the guise of self-protec-
tion.”

Congressman Wyman expostulated: “This is a most extraordinary,
most unfounded, most unreasonable, and most irrational position.
Actually it is un-American.”

And so it went as legislator after legislator rose to defend Americans’
freedom of choice.

The safety coalition leadership defended the interlock as best it
could. They noted that it had “brought about a dramatic increase in the
usage of current belt systems,” and that 50 percent of occupants in 1974
models were using their seat belts. Increased usage meant lives saved.

Was it not ironic that the interlock should be prohibited under these

54. 120 Cong. Rec. S. 30837 (daily ed. Sept. 11, 1974).
circumstances. The Department of Transportation estimated that the interlock system alone would save 7,000 lives per year and prevent 340,000 injuries.57

But this sober and "socially responsible" position crumbled before the freedom fighters' fusillades, which combined ideological defense of liberty with horror stories and broad farce. Malfunction stories became the order of the day. Ignition interlocks had stranded (or could strand) a motorist in the path of an oncoming train. Women were unable to flee rapists. Parking attendants, who had to buckle up no matter how short the trip, were going nuts. Housewives were buckling in their groceries. Hertz could not obtain sufficient towing services to retrieve malfunctioning vehicles. And in account after account, the family pet, usually a dog, set lights blinking, buzzers buzzing, and interlocks locking.58

Senator Cotten: The other day, I spent a half hour trying to get my car started simply because I had laid a pound of cheese and a loaf of bread on the seat next to me. [Laughter.59

Senator Eagleton: The cases are legion, Mr. President, of how nonsensical this system is. The distinguished Senator from Vermont (Mr. Stafford) and I exchanged some experiences on this subject on the Senate floor a few weeks ago. He told me of a personal experience of a rental car in his home state on a weekend visit. When he put his hand on the seat next to the driver's seat, the thing went berserk, and he had difficulty stopping it.

I responded by telling him about my hapless constituent who, on instructions of his wife, was sent to the supermarket to buy a turkey. He then had to strap in the turkey to drive home. As the poor constituent observed, it was the safest ride a turkey ever had on the way to the oven.

Then the distinguished Senator from Texas (Mr. Tower) happened into the Chamber. He has a dachshund. He puts his dachshund on the seat. It is hard to strap in a human being, Mr. President, but a dachshund is damnably hard to strap into one of those seat belts.60

There was merriment in the chambers. The members rocked with laughter. The United States Congress was about to enact legislation that experts told them would send seven thousand citizens each year to an early grave. Senator Hartke, who had become one of the safety act's staunchest defenders, was both indignant and bewildered:

60. Id. at S. 30840.
that the prevent

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\text{All the gaiety that we have heard on this floor about people who have had annoyance disappears very rapidly when you consider what we are talking about\ldots. Truthfully, you can talk about "big brotherism." But "big brotherism," as this is called, is not unique to this situation. Look at any type of effective disease immunization program. Whether we are right or wrong and whether human nature should be that way, we have to make it mandatory.}
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That is what we did about smallpox. That is what we did about the various childhood diseases, such as diphtheria. And that is also what we do in a manufacturing plant \ldots

In other words, in the whole field of safety human nature seems to require something to force us to do what is safe.

What everyone is saying here is that seat belts are a good idea, but we ought not have them. It is a paradox.\textsuperscript{61}

The paradox could be explained, perhaps, by attention to context. Safety was important, but it did not always trump liberty. And in Hartke’s examples the freedom fighters saw precisely the dangerous, progressive logic of regulation that they abhorred. The private passenger car was not a disease or a workplace, nor was it a common carrier. Those were images from 1966. For Congress in 1974, the passenger car was a private space. The automobile was still a freedom machine.

Liberty was not the only value instinct in the 1974 Amendments to the MVSA. Indeed, other parts of that statute suggest that the real lessons may have been lessons about the difference between technocratic and political cost-benefit analysis. The 1974 Amendments related to school bus safety played this tune in a decidedly different key, demanding security for children in school buses however small the problem and whatever the costs.

NHTSA had studied the issue of school bus safety very carefully, and from a dispassionate view of the data it seemed relatively clear that the proposed amendments made no sense. Motor vehicle accidents had reached an all-time high in 1972 and 1973; accidents in those years claimed 54,589 and 54,052 lives, respectively. But of these, only 150 fatalities (and 4,600 injuries) resulted from school bus accidents. And 60 of the 150 fatalities, plus a more indeterminate number of injuries, were adults who had the misfortune of finding themselves, as pedestrians or motor vehicle occupants, in the path of an oncoming bus. Of the remaining 90 fatalities, moreover, 60 were children who perished after they had disembarked. The children were run over either by the bus itself or by another vehicle. Yet the school bus amendments, ignoring 80 percent of the fatalities, did not mention pedestrian protection as one of

\textsuperscript{61} Id. at S. 30846–47.
the eight areas for mandatory rulemaking. The rules that Congress wanted NHTSA to promulgate would, therefore, only address the remaining 30 fatalities, plus some fraction of associated injuries.

The cost side of the equation reinforced regulatory caution. The average purchase price of a school bus was then $8,000. The vehicles’ useful life was nine to ten years. The manufacturers’ data indicated that improvements in seats, body structure, and frontal barriers would add approximately 2,000 pounds in weight and $1,500 in cost. The added weight, in turn, would require other improvements—a larger chassis, heavier front and rear axles, and larger tires—that would further magnify weight and cost increases. The total tab could come to 2,430 pounds in increased weight and $2,070 in added costs, roughly 25 percent of the vehicle’s base price, not including extras. Work on emergency exits, windows, and windshields, for example, would cost an additional $112. And the economics of retrofitting buses were even more unappealing. Vehicles depreciated 15 percent the first year, and 10 percent annually thereafter. The resale value of a nine-year-old bus was $600. Retrofit costs would probably exceed $4,000, more than twice the amount required to incorporate safety features in new buses.

Some legislators seemed to think that the price tag might be less, about $1,000, and the president of Ward Manufacturing testified that “the cost will not be as great as many suggest.” But whatever figures were used, it was obvious the costs were so substantial that the regulations Congress was demanding might actually reduce school bus safety. At the Senate oversight hearings in 1974, before the provisions were enacted, the agency’s chief rulemaking engineer conceded that regulators could “make a schoolbus as safe as a Greyhound bus” but that doing so would drive up procurement costs by 41 percent. “If you increase the cost by 40 percent, these people will have to drive the buses at least 10 to 12 years,” he cautioned. “If we are not careful,” the engineer continued, “if we try to put too much safety into a new bus, we will be counterproductive in that older, unsafe buses will be on the road for a much greater period of time.”

This sort of careful attention to costs, benefits, and priorities was, of course, exactly what the courts, the executive branch, and Congress itself had been urging on the agency. Yet on the school bus issue, Representative Les Aspin apparently spoke for a majority in both houses when he complained that “Given the comparatively low accident rates on school-

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buses, the Department of Transportation—DOT—argues that the schoolbus safety regulation is an extremely low priority item. DOT maintains that in terms of a cost-benefit analysis, it is worth neither the time nor the effort of DOT to protect our school children from shoddily constructed schoolbuses. DOT is misusing the concept of cost-benefit analysis. 64

Other members were far less charitable. As Congress lurched toward adoption of the amendments, it was obvious that regulatory officials had badly botched their assessment of the costs and benefits of school bus safety. They had confused economics with politics. In the political process and in the media, sober cost-benefit calculations are about as popular as rich, absentee slumlords.

The media weighed in as well. ABC News calculated that the added cost per pupil per day of a far safer schoolbus would be 1/2 cent. 65 An "investigative" report by Metromedia News produced similar provocative (and misleading) revelations of NHTSA's "cavalier attitude." Only one of the Department of Transportation's 72,000 employees, it reported, worked full time on school bus safety matters.

The space program metaphor that had figured in the original passage of the MVSA returned, but in a new guise. The mayor of Lomita, California, testified: "[Senator Percy] mentioned the millions of dollars that were rightfully spent to create a better safety situation for the astronauts—many millions of dollars. I know it's pretty far up there. As he said, don't we owe our children the same protection as we owe these astronauts? They are all American lives, human lives, and we do owe them the same protection." 66

Heated political and media rhetoric notwithstanding, the demand for regulation might have sputtered out. After all, exhortation of this general sort was a daily staple of political life and there was no end to the domestic programs that might be justified by reference to the costs of going to the moon. As the school bus safety amendments leapfrogged over thousands of other legislative proposals on Congress's crowded agenda, however, it was obvious that some deep resource of political will was being tapped.

In some sense, the demand for more protection in school buses appears to have been tied to the national furor surrounding "forced"


66. Id. At 864.
busing to achieve school integration. In an article in the *Washington Post* on April 14, 1972, entitled "The Other Schoolbus Problem," the reporter Coleman McCarthy alluded to the connection: "As if schoolbuses weren't getting enough national attention already—on school integration—the recent crash in Valley Cottage, New York, suggests there is another kind of attention schoolbuses ought to be getting, on safety." Busing was not upheld definitively as a means of school desegregation until the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*\(^\text{67}\) in 1971. The decision was not popular. A 1971 poll found that 77 percent of the nation opposed busing.\(^\text{68}\) Antibusig pressures peaked in Congress in 1972, when they reached the proportions of a "national uproar," as the Congressional Quarterly put it.\(^\text{69}\)

But in Congress, majorities do not always prevail. On August 18, 1972, the House, by a vote of 283 to 102, adopted H.R. 13915, which would have banned busing except to the school closest or next-closest to the students' homes. In the Senate, however, pro-busing forces filibustered the measure and withstood three votes to invoke cloture. The bill died on the Senate floor. Looking back, the Congressional Quarterly called busing "one of the most bitterly fought congressional battles in 1972."\(^\text{70}\) And although the controversy quieted in 1973, the politicians' torment continued. The Senate held hearings on a proposed constitutional amendment to prohibit busing, but took no action.

The "involuntariness" of school bus ridership may explain, in part, the distinctive perspective on costs and benefits that the school bus amendments generated. School bus safety could tap reservoirs of concern about equality and freedom simultaneously. If the state was responsible for children being in buses, it surely had the responsibility to compensate their loss of freedom by providing the safest possible involuntary trip. It was essential to "fairness" that these involuntary riders be as safe as those who freely chose to ride commercial buses. A Congress that had participated vigorously in civil rights lawmaking, which in turn had led to a vast increase in involuntary school bus ridership, and that had refused to deny the courts busing as a remedy, could at least try to make the ride safe. It could do something about "busing," even if "safe busing" was at best a distant second on the busing agenda of angry parents around the nation.

It is also true that the vision of protection children gives any measure that can be so characterized a considerable degree of political appeal. But the overall motor vehicle safety problem would very nearly

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70. Id. At 1075.
bear that characterization. The epidemic that Haddon and his colleagues had described was largely a health problem of children and youth. If Congress wanted to protect the lives of children, it would have done better to reenergize NHTSA’s lagging standard-setting enterprise as it applied to the passenger car. Even modest safety enhancement there would decrease the risk of death or serious injury for tens of thousands of children who were involved in motor vehicle accidents each year.

But that sort of analysis of the problem is more reminiscent of the legislative agenda of 1966. The 1974 amendments gave a new and highly “political” twist to the concept of federal motor vehicle safety regulation. Henceforth, it seemed, NHTSA’s information needs would run at least as much to political intelligence as to scientific data and analysis. If NHTSA was to understand its own regulatory mandate, it would have to understand the political mood of the country.

The Stage is Set for State Farm

As the Nixon Administration gave way to the Ford presidency, NHTSA’s Administrator, James Gregory, told Congress that he was anxiously searching for some “publicly acceptable” way to reissue Standard 208. But, after Gregory’s rapid exit from the scene, Department of Transportation Secretary William Coleman took charge of the proceeding. In fairly short order he decided not to issue any rule, even though he was convinced that airbags were both technically feasible and effective. Coleman’s approach instead was to negotiate a deal with the auto companies. He would not issue the rule if they would build a substantial fleet of airbag-equipped cars.71 The point of this exercise was to permit on-the-road experience to either confirm or overcome public and congressional doubts concerning the effectiveness and costliness of the technology. Those doubts clearly were Coleman’s, as they had been Gregory’s, preoccupation. The time had come for political prudence. References to the interlock episode run like a leitmotif through the order announcing Coleman’s decision.72

But Jerry Ford and Bill Coleman were not long for their respective offices either. Brock Adams, the new Secretary of Transportation under Jimmy Carter, reopened the passive restraints rulemaking docket almost immediately upon entering the DOT building. Adams’s notice of proposed rulemaking disagreed sharply with the Coleman decision.73 He believed that a demonstration program was inconsistent with NHTSA’s

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statutory responsibility to reduce highway deaths and injuries. He also disagreed with Coleman’s use of public resistance as a ground for decision. In his view, the airbag (and other passive restraints) was a vastly different technique from the interlock. The interlock had involved constant interference with automobile operation; by contrast, airbags were not even visible to automobile passengers, and automatic belts were supposed to operate without interfering with the operation of the automobile. Hence there was no reason to imagine that automobile owners would disable passive restraint equipment with anything approaching the frequency that they disabled the interlock device.

Secretary Adams decided quickly, on July 5, 1977, to require passive restraints—encompassing airbags, automatic belts, and other technologies—in all passenger vehicles. He thus demonstrated the Carter Administration’s political will. But the rule’s lead times left implementation to the early years of a second term that was not to be. And as it turned out, subsequent tinkering with the rule provided the rationale for the Reagan Administration’s abandonment of passive restraints.

Muddling in a Circle. NHTSA initially had required that passive belt systems be detachable by means of a push-button release mechanism. This requirement was adopted to quell consumer fears of being trapped in burning vehicles after a crash. Indeed, the rulemaking record on emergency exit technologies is replete with speculations about consumer preferences and consumer fears. The agency debates resolved themselves into a simple trade-off between acceptability and defeatability. The push-button system was likely to be acceptable to the public because it replicated the devices currently on manual belts. But, by the same token, it could be used to make passive belts into manual belts, thus defeating the basic purpose of passive restraints. Technologies such as the continuous spool, however, which did not reassure consumers that they would be able to exit from their belts on demand, might produce an even greater public reaction and a greater tendency to disable the belt entirely. Unless attached to an interlock, a passive belt system could, after all, be defeated with a pair of scissors. In the end the agency yielded to the imponderables and permitted manufacturers to choose their own emergency exit technology. This seemingly innocuous decision set the stage for the Reagan Administration’s rescission of the rule in 1981.

Connoisseurs of political irony might like to note that on February 2, 1981, NHTSA granted Ralph Nader’s petition for the initiation of rulemaking to raise the barrier-crash test speed in Standard 208 from 30

miles an hour to 40 miles an hour in model year 1984 and 50 miles an hour in model year 1986. Nader’s petition pointed out the expected increase in fatalities accompanying the shift to smaller cars and recent technical studies indicating that airbags could be constructed that would meet the injury criteria of Standard 208 at a barrier impact speed of 50 miles per hour. In granting Nader’s petition that the agency pursue the matter, NHTSA agreed with his basic position, but stated that it was in the process of analyzing accident data files to evaluate injury modes and injury distributions as a function of crash mode and crash speed. Only after it finished this analysis would the agency be in a position to reconsider the Standard 208’s injury criteria in a systematic way.

While this polite exchange was going on in the Federal Register, the Washington Post\textsuperscript{77} was reporting the deregulatory proposals and initiatives of the incoming Reagan administration. High on Reagan’s list of immediate targets were regulatory requirements affecting the automobile industry. The stagflation of the 1970s had been devastating for American automobile manufacturers and auto workers. It was actually not at all clear that regulatory relief would help reverse these trends. But candidate Reagan had promised that if he were elected, regulatory relief would be forthcoming. The Federal Register began to reflect the new political world reported in the Washington Post only ten days after the grant of Nader’s petition. On February 12, 1981, NHTSA proposed\textsuperscript{78} a one-year delay in the effective dates of its passive restraints requirements.

The stated reason for this proposal was to allow the agency to reconsider Standard 208 in the light of the major changes that had occurred since its adoption in 1977. The agency was particularly concerned that the current phase-in schedule, which began with large cars in 1981 and proceeded through mid-size to small cars in 1983, might exacerbate the economic troubles of the domestic automobile industry. In addition, the automakers’ plans for compliance with Standard 208’s demand for passive restraint systems had altered radically in the intervening years. Whereas airbags were the passive restraint of choice when Adams acted in 1977, it seemed clear that most manufacturers in 1981 would attempt to comply through the use of passive belts.

As usual, the commentary flooded in. The most comprehensive comments opposing the proposed suspension came from the insurance


\textsuperscript{78} 46 Fed. Reg. 12,033 (1981).
industry. Capitalizing on the government’s increasing enthusiasm for cost-benefit analysis, State Farm Insurance Company sponsored a cost-benefit analysis by William Nordhaus of Yale University. According to the Nordhaus analysis, the economic costs of delay were five times greater than the benefits.

The automobile manufacturers’ most telling argument in favor of the suspension was that the passive restraints standard might well be ineffective. The extremely high price of airbags per vehicle dictated that, under current economic conditions, the manufacturers would use passive belts. But passive belts were, in the manufacturers’ view, unacceptable to the public unless they were easily detachable. If they were easily detachable, then they would probably function essentially like manual belts. And if they functioned like manual belts, the industry and consumers were being asked to spend millions of dollars for no increase in safety. NHTSA’s earlier “flexibility” on the issue of detachment technology was thus turned against the passive restraints rule itself.

Predictably, the agency concluded that it should delay implementation for one year in order to reevaluate the passive restraints standard.\textsuperscript{79} In October 1981, having completed its reevaluation, the agency published a notice rescinding the passive restraints requirement entirely.\textsuperscript{80} The rescission order, essentially adopting the manufacturers’ assertions, explained that the agency could no longer conclude that passive restraints were reasonable and practicable. Because of uncertainty about public acceptability and usage rates for detachable passive belts, the passive restraints requirement might be adding substantial costs to motor vehicles without any attendant benefits. Events since 1977 that had changed the economic and political context of rulemaking were also significantly influencing the agency’s decision. There were less costly alternatives, such as public information campaigns and the Coleman demonstration project, which the agency had never seriously undertaken. NHTSA now believed that these efforts, combined with the possibility of manufacturers’ installation of passive belts as optional equipment, might better meet the need for automobile safety.

State Farm Insurance Company immediately sought judicial review of the rescission order in the D.C. Circuit Court of Appeals. The order was held invalid by a panel of the D.C. Circuit in a long, somewhat confusing, occasionally bizarre, opinion.\textsuperscript{81} The government immediately

\textsuperscript{79} Id.
appealed to the Supreme Court, which sustained the D.C. Circuit’s
determination, but on quite different grounds.

The Supreme Court Speaks

In its decision in State Farm, the Supreme Court found two major
faults with NHTSA’s rescission of Standard 208. First, it could not
understand why NHTSA believed that passive belts with an easy means
for detachment would function like manual belts. After all, as long as the
belts were not detached, they required no effort by motorists to provide
passive protection. Hence, by contrast with manual belts, inertia favored
use rather than nonuse. Given this inertial factor, how could NHTSA
conclude that no increase in belt usage should be predicted? If “detacha-
bility” was a problem, why not use General Motors’s preferred continu-
ous-spool technology?

Second, the Court was baffled by NHTSA’s apparent but unex-
plained abandonment of airbags. The agency might ultimately conclude
that it could not require a passive belt technology that was both
acceptable to the public and likely to increase belt usage. But that said
nothing about airbags, devices that the agency had maintained for over a
decade were technologically available and cost-beneficial. Why had the
agency not simply eliminated passive belt systems as a means of satisfying
Standard 208, leaving airbags as the only feasible means for compli-
ance? Finding no answer to that question in the agency’s rationale for its
decision or in the immediate rulemaking record, the Court remanded the
question to the agency for redetermination.

In many respects the State Farm opinion broke no new ground. By
the time it was decided the lower federal courts had ruled on the legality
of a host of rules promulgated by the new social regulatory agencies—
principally NHTSA, OSHA and EPA. Although many of those judicial
decisions might be criticized, like the Chrysler decision, as technically
incompetent, they followed the broad outlines laid down in the first
review proceeding concerning a NHTSA crashworthiness standard.

The basic framework for judicial scrutiny of NHTSA’s efforts had
been established in 1968 in a careful and scholarly opinion by Judge Carl
McGowan of the D. C. Circuit Court of Appeals in Automobile Parts and
Accessories Association v. Boyd.82 Two aspects of that opinion are of
particular interest; both in some sense “proceduralize” the reviewing
court’s investigation of the reasonableness of the agency’s standard
setting. Although designed to protect agency substantive choice from
uninformed judicial meddling, Judge McGowan’s “restrained” approach
to judicial review may actually render judicial review more disabling.
Given the dynamics of notice and comment rulemaking, proceduraliza-

82. 407 F.2d 330 (D.C. Cir. 1968).
tion reinforces the agency's caution when dealing with an aggressive opposition.

Judge McGowan set forth what he perceived to be the basic scope of review under the "arbitrary and capricious" standard of the Administrative Procedure Act. In his words, "The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."\textsuperscript{83} So stated, whether an agency's rule is deemed arbitrary or capricious may turn as much on the agency's apparent reasoning process as on the good sense of the final judgment under review. This was precisely the Supreme Court's position in \textit{State Farm}. NHTSA may have had good reasons for its rescission order, but it had not cogently explained them.

In a similar vein, Judge McGowan addressed the question of whether NHTSA's "concise general statement of basis and purpose," which accompanied the challenged regulation, was sufficient to pass muster under Section 553 of the Administrative Procedure Act. The pertinent NHTSA statement was certainly concise and general. It stated in full: "This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions."\textsuperscript{84} The court viewed this statement as unnecessarily terse:

\textit{On the occasion of this first challenge to the implementation of the new statute it is appropriate for us to remind the Administrator of the ever present possibility of judicial review, and to caution against an overly literal reading of the statutory terms "concise" and "general." These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instances the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item \ldots in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of \ldots basis and purpose" mandated by Section 4 \textit{will} enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.}\textsuperscript{85}

Although Judge McGowan articulated this requirement in his \textit{Auto Parts} opinion as a necessity of judicial review, the demand for more

\begin{footnotes}
\item[83] 407 F.2d at 338.
\item[84] 33 Fed. Reg. 2916 (1968).
\item[85] 407 F.2d at 338.
\end{footnotes}
elaborate discussion of the major issues thrown up by the rulemaking proceeding has the equally important effect of reinforcing the participation of outside parties in an agency’s deliberations. The agency’s failure to respond to significant issues raised by participants can hardly satisfy the basic standard of reasonableness that the court had set forth: to perform its task in a manner “[c]alculated to negate the dangers of arbitrariness and irrationality.”

Judge McGowan’s approach highlights two consistent features of judicial review of agency rulemaking. First, the courts are there to see that administrators do their jobs. The teaching of our constitutional culture is that delegation of policy choice to administrators is constitutionally permissible, but it is a reluctant necessity. Delegation is justified primarily by the complexity of the regulatory tasks assigned and the need for a high level of expertise. It is hardly remarkable, then, that reviewing courts are on the lookout for agencies operating on the basis of hunches or bromides. NHTSA cannot respond to a judicial demand that it demonstrate the practicability of a rule by intoning, “Necessity is the mother of invention.” Such “experts” are viewed as having failed to execute their legitimate statutory mandate.

Second, our constitutional culture also teaches that keeping administrators within their delegated authority is an essential element of maintaining the rule of law, the separation of powers, and ultimately our liberal, democratic polity. Fears of arbitrary and undemocratic exercises of power make delegations of administrative authority reluctant in the first instance. From this perspective, any loss of effectiveness in substantive policy caused by judicial review is but a necessary cost to pay in the crucial project of maintaining the constitutional structure. These very general institutional considerations help explain why courts have taken rulemaking review seriously and why, far from relaxing the criteria for judicial review, congressional interest in the matter focuses almost exclusively on proposals to increase the judicial role in overseeing agency

86. 407 F.2d at 338.

87. For two of many developments of this theme, see James Freedman, Crisis and Legitimacy in the Administrative State (1978) (arguing that fair administrative procedure will supply legitimacy that agencies need to function efficiently); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975) (suggesting that current administrative process inadequately represents various interests). See also Richard B. Stewart, Administrative Law in the Twenty-First Century, 78 N.Y.U. L. Rev. 437, 438 (2003) (“The traditional core of administrative law has focused on securing the rule of law and protecting liberty by ensuring that agencies follow fair and impartial decisional procedures, act within the bounds of the statutory authority delegated by the legislature, and respect private rights.”); Thomas O. Sargentich, Reform of the American Administrative Process: The Contemporary Debate, 1984 Wis. L. Rev. 385, 397 (describing the “rule of law ideal” of administrative law).
rulemaking.88

Yet there is still a puzzle concerning the preferred judicial technique for policing NHTSA’s rulemaking efforts. That our most general constitutional presuppositions promote serious review of agency rules does not tell us why we find courts reshaping the issue of regulatory reasonableness into an issue of procedural rationality, or why courts have jealously guarded rights of notice and participation by insisting on responsiveness to issues raised during the rulemaking proceeding. It is, after all, this “proceduralized” form of judicial review that is particularly debilitating from an agency’s perspective. It is “proceduralism” that legitimizes and empowers the full-court press that was employed so effectively by the automobile industry in the Chrysler case. What cultural imperative has driven the courts in this direction?

The demand for a rational decision process is the judiciary’s response to a dislocation in the legal culture. The Motor Vehicle Safety Act, like most regulatory statutes adopted after 1966, permits immediate review of an agency rule, or of the withdrawal or amendment of a rule, by any party who may be adversely affected. Superficially this is only a change in the usual timing of review: without such a provision, an adversely affected party could nevertheless challenge a rule’s validity when the agency attempted to enforce it.89 The consequences of the legislative shift to pre-enforcement review, nevertheless, are profound. It allows affected parties to go to court without attempting to comply with the rule and, in the absence of any attempt to enforce it against them, to


89. One year after the enactment of the Motor Vehicle Safety Act, the Supreme Court gave hesitant approval to the pre-enforcement review of agency regulations under the Administrative Procedure Act. But it is far from obvious that many of the lawsuits contesting NHTSA’s rules would have been ripe for review without the specific statutory authorization provided by the National Traffic and Motor Vehicle Safety Act. Compare Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (holding pre-enforcement review of FDA drug-labeling requirements justified given substantial impact of regulations on petitioners), with Toilet Goods Ass’n v. Gardner, 387 U.S. 158 (1967) (holding pre-enforcement review of FDA inspection procedures unnecessary, since injury to petitioners was speculative). As a reading of Auto Parts reveals, the parties to the case recognized the novelty of the issues and put a wide variety of claims before the court. Judge McGowan was particularly troubled by the fact that the plaintiffs were attempting to have the rule overturned on the basis of arguments that directly contradicted the positions that they had taken in the rulemaking proceeding itself. Although unhappy with the plaintiffs’ “effort to analogize themselves to private attorneys general with unlimited right to expose all danger to the public interest,” the court seemed to believe that the judicial review provisions of the Motor Vehicle Safety Act demanded a judicial answer on the merits. Id.
obtain a declaration whether it is valid. Review in this form, like an
attack on the facial validity of a statute, addresses not the particular
circumstances of a rule’s application but the abstract legality of its
commands.

Put in this way, the traditional legal view is that such abstract
issues are usually nonjusticiable. The American legal culture has histori-
cally maintained that courts declare the law only as a by-product of the
adjudication of concrete controversies about the legal rights of particular
parties. This understanding is given constitutional status by Article III
of the Constitution, which limits the federal judiciary to the adjudica-
tion of “cases or controversies.” An enforcement action against Chrysler
for violating the passive restraints rule, in which Chrysler argues that it
could not comply because the dummy specifications were inadequate,
is a conventional case or controversy. The adjudication is about individual
rights and responsibilities on the basis of particular facts. The need to
address the validity of the rule is a mere by-product of the need to
determine individual rights. A suit by Chrysler to invalidate a rule on
any of a score of grounds before the rule’s effective date, and preceded
any attempt at compliance or threat of enforcement, is obviously not a
case cast in this same mold.

Without going further into the dense thicket of the federal jurispru-
dence of justiciability, we need only note here that this jurisprudence
renders the type of review contemplated by the Motor Vehicle Safety Act,
and pursued in the Chrysler case itself, problematic, if not downright
suspect. It makes a case like State Farm seem almost aberrational. The
insurance industry was neither the target nor the intended beneficiary of
Standard 208. Its only interest was in saving money—or more accurately
put, enhancing profits—during the period when passive restraints reduce
the costs of injuries and deaths, but before new actuarial data begin to
drive down insurance premiums. In order to square the congressional
command to decide cases in the abstract with the conventional and
constitutionally required judicial role of deciding concrete cases, courts
have been forced to identify some individual legal right that the Con-
gress has called upon the courts to protect. What could it be?

This was the question that Judge McGowan was required to answer
in the Auto Parts case. Repairing to the Administrative Procedure Act,
he found that the plaintiffs’ entitlement was to be free from “arbitrary”
exercises of administrative power. This again is, superficially, an un-
remarkable legal move. Reviewing courts have traditionally employed the
arbitrariness standard, and it has caused little difficulty when applied to

90. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically
the province and duty of the judicial department to say what the law is. Those who apply
the rule to particular cases, must of necessity expound and interpret the rule”).
the traditional forms of agency decision making—specific agency decisions to grant or deny a benefit or to impose a sanction. Adjudicatory decisions that are either against the preponderance of the evidence or contrary to customary policies are “arbitrary” in the straightforward sense of “not according to law.” For an appellate court to say so is only to treat an agency like a lower court which is, of course, the way in which an agency acts when adjudicating specific controversies. But the legally innovative aspect of the Motor Vehicle Safety Act and the revolution of 1966 was to abandon traditional adjudicatory forms. How should the arbitrariness criterion be applied to general policies embodied in rules that had never been applied?

The task of translation is rhetorically simple but, given the legal culture, profoundly transformative. By analogy to adjudicatory decision making, rules are said to be arbitrary in two situations: (1) if they have no adequate factual predicate, an evidentiary interpretation of “arbitrary”; or (2) if they violate existing legal norms, in particular the statute pursuant to which they were promulgated. So far so good; but let us now examine the application of these two grounds of arbitrariness in the context of rulemaking review.

First, conformity with the statute. The Motor Vehicle Safety Act requires that rules “meet the need for motor vehicle safety,” protect against “unreasonable risk,” be “practicable” and “appropriate,” and be stated in “objective” terms. All the quoted terms demand policy choices, not the application of legal rules. Is the court really to judge these questions? And, if so, how can it judge them without appearing to be merely substituting its policy preferences for those of the agency? For surely neither the Motor Vehicle Safety Act, the Administrative Procedure Act, nor the Constitution gives anyone the “right” to have motor vehicle safety policy set by federal courts.

In order to appreciate the judiciary’s dilemma more fully, focus for a moment on the statutory requirement that the agency’s rules eliminate “unreasonable risks.” Remember that the passive restraints rule was premised not on the superiority of passive restraints technology over manual lap and shoulder belts, when used, but on the agency’s despair that any significant number of Americans could ever be convinced to buckle up. Now suppose some litigant makes the following claim: to be “reasonable” in most common law contexts means to behave as an ordinarily prudent person would behave in similar circumstances. Ordinary Americans overwhelmingly decline to use restraint systems that they already own. Put another way, we know that most Americans elect to run the risk of being in an auto accident without the protection of a universally available and highly effective restraint system. In short, the risk that the passive restraints rule is designed to avoid has been demonstrated, by the very behavior upon which the rule is premised, to
be a reasonable one. It is, therefore, outside NHTSA’s statutory authority to regulate.

This straightforward claim of statutory violation presents all sorts of questions. The fundamental issue is one of determining how the Congress intended “reasonableness” to be judged. But there are many candidates for an appropriate methodology. Does the statute demand that the agency analyze its rulemaking proposals on the basis of common law standards of “reasonableness”? On the basis of the public health consequences of maintaining the status quo? On the basis of current social perceptions of the acceptability of particular risks? On the basis of predictions of what those perceptions might be after technology forcing has altered existing cultural presuppositions?

These questions and many similar ones are answered neither by the language of the statute nor by its legislative history. Yet choosing among them will have profound consequences for the policies actually chosen by NHTSA. And it is this prospect that poses the judicial dilemma. If the court chooses a particular construction of “unreasonable risk,” it has in a very substantial sense chosen the agency’s regulatory program. Nothing in our constitutional arrangements suggests that courts should play such a political role. Precisely this concern underlies the Supreme Court’s famous *Chevron* decision,¹ which story is told elsewhere in this volume.

Yet if the court permits the agency to choose any approach to unreasonableness that is reasonable, it knows that any of the candidates just mentioned, plus perhaps a host of others, will pass muster. If that is the breadth of discretion provided the agency by the statute, then the notion that NHTSA operates under law and is subject to judicial review becomes the skimpiest of fig leaves over a naked reality that is itself constitutionally unacceptable: the complete delegation of legislative policy choice to administrators.²

The twin shoals of judicial policymaking on the one hand and unconstrained administrative discretion on the other are hardly novel landmarks when steering for the safe harbor of judicial legitimacy. They are traversed routinely by judicial navigators. But in the context of judging the abstract legality of rules under vague statutory criteria, the

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task of maintaining the confidence of passengers and crew is made more difficult by the absence of some important aids to navigation. The conventional lawyerly moves for separating law and policy or for camouflaging their inseparability are largely unavailable when reviewing agency regulations. When reviewing the abstract legality of rules it is simply preposterous to claim (1) that the court is addressing not these broad issues of policy but only the agency’s application of law to fact in an adjudication of narrowly focused claims of right, or (2) that these interpretive issues are routinely decided in agency enforcement proceedings and, therefore, have long legal histories that constrain both the agency’s and the judiciary’s roles.

Other obvious features of rulemaking review proceedings under the Motor Vehicle Safety Act belie the claim that the courts are here merely engaged in reviewing run-of-the-mill administrative dispute settlements. The parties look more like legislative claimants than ordinary litigants. As in *State Farm*, they often are tangentially affected business interests, such as the insurance industry, or ideological champions of the left or right, such as the Center for Auto Safety or the Pacific Legal Foundation. Even the directly affected manufacturers may be litigating for strategic competitive advantage (remember General Motors’s absence from the *Chrysler* litigation) rather than to protect any conventional form of property interest. And no matter who is litigating, the judgment usually will bind everyone. The question is the validity of the rule, not the propriety of its application. The litigant’s “rights” and the “rights” of the public are indistinguishable.

The line between law and policy can also disappear in judicial review of agency adjudication. The pre-enforcement review of rules facilitated by the Motor Vehicle Safety Act is but a recognition of the changing structure of federal administrative regulation. Yet no amount of scholarly celebration of this so-called public law litigation is likely to eliminate judicial anxiety in the face of a task that calls for repeated, transparent, and general policy choices. The task must be redefined to integrate it

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with a more conventional conception of judicial competence. For it is on that convention that the judiciary's political legitimacy depends.

From this strategic perspective the other, "evidentiary," interpretation of arbitrariness has much to recommend it. Yet here again the courts encounter an awkward gap between their traditional reviewing functions and the pre-enforcement review of rules. Judicial review of agency adjudication, like appellate court review of trial court proceedings, focuses on whether the trial record contains appropriate proofs to sustain the initial adjudicator's findings of fact. If not, the trier of fact has behaved arbitrarily. Rulemaking processes, however, are vastly different from trials. There are no obvious boundaries on the rulemaking record, no accepted standards of "proof" for policy judgments, and no procedural vehicles that sharply delineate the "issues" in a rulemaking proceeding. As Judge McGowan noted in Auto Parts, the agency is engaged essentially in a legislative activity. In our legal system legislatures may operate on the basis of any evidence that a majority is willing to credit or even on no evidence at all.

Notwithstanding these difficulties, evidentiary policing of agency rulemaking threatens judicial legitimacy much less than does outright policy revision. Agencies are not legislatures. Indeed, they are substituted for legislatures precisely in order that policy may be based on a more expert understanding of the problems addressed. Agencies are supposed to get the facts right. Hence, from Auto Parts on, courts have experimented with a series of techniques designed to sharpen issues, reveal factual assumptions, and thereby shape a record within which judicial review of rules for factual adequacy makes sense. This story of procedural innovation has been told elsewhere and need not be rehearsed in detail. The point here is only that the need to integrate a novel judicial role into the accepted legal culture helps explain the use of the particular techniques that the State Farm court viewed as the conventional approach to the review of NHTSA's rules.

Auto Parts creatively transformed the requirement of a "concise statement of basis and purpose" into a demand for the presentation of a rule's factual support and policy rationale. These materials constituted a "record" from which the court could judge means-ends rationality and thereby police for arbitrariness in its traditional forms: the inadequacy of the record or inconsistent or incoherent decision making. Of


course, the agency's presentation of factual material might be incomplete. The "record" therefore had to be expanded to include submissions of outsiders and the agency's responses to those submissions. As the record grew in importance, so did meaningful opportunities to participate in its formulation.

So structured, judicial review necessarily transforms the image of rulemaking from a legislative-political (which would be reviewed on the stunningly undemanding "rational basis" standard) endeavor into an analytic-policymaking enterprise (to be reviewed for the adequacy of the record and the cogency of explanation) — Judge McGowan's language about "essentially legislative" tasks to the contrary notwithstanding. Given this transformation, the judicial role is not to remake political choices, but instead to examine agency reasons and agency choices in the light of an appropriate factual record. This is, then, only a familiar role in a new context, or so it can be made to appear. As the conventional reviewing court remands for new trial upon discovering evidentiary gaps in the trial-court record, so the court reviewing administrative rules remands to the agency for reconsideration when the record seems inadequate to support the agency's policy choice. If this approach strongly reinforces the opposition tactic we have called the full-court press and severely burdens and delays the rulemaking process, that is perhaps unfortunate. But it is surely consistent with an adversary legal culture whose libertarian values have always given the advantage to the defendant and the status quo. 100

The translation of legislative-political questions into analytic policymaking issues through proceduralized judicial review, of course, never really fools the sophisticated regulatory players. Judicial review for process regularity was the opposition technique both of "conservatives" confronting the New Deal and "liberals" confronting the Reagan Administration's desire to deregulate. 101 Yet notwithstanding proceduralism's penchant for the status quo, such political shifts in some sense signal the legal culture's success in pursuing its aspiration to political neutrality. Judicial review in a proceduralist form, like lead ballast, tends to

99. See generally Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 933 (1981) (arguing that incremental decision making should be the norm except where irreparable harm will ensue).


101. See, for example, Shapiro, APA: Past, Present and Future, 72 Va. L. Rev. 447 (1986) (arguing that courts' demand of synoptic rationality in administrative decision making reflects judicial preference for status quo).
stabilize the ship of state whether the political winds blow from left or right. And as the history of FMVSS 208 amply illustrates, those winds can blow across administrative jurisdictions with tornadic intensity.

What was not entirely clear before State Farm was whether the Supreme Court would take this neutral, proceduralist approach in a situation in which an agency was deregulating rather than regulating. Indeed, the government argued that review in the State Farm case should be analogized to an agency’s decision to begin either an enforcement proceeding or a rulemaking process. These are matters about which an agency has complete discretion. But, the State Farm court saw the matter quite differently. There was a rule on the books. Rescinding the rule required the same procedures and actions as adopting it in the first place. Hence, if commentators made sensible objections to the agency’s decision, and the agency supplied no reasonable response, its actions were arbitrary and could not be upheld.

In a concurring (and partially dissenting) opinion, several members of the Court were at pains to point out, nevertheless, the limits of the judicial function. They made clear that the Court was not saying that new administrations must pursue and maintain the policies of old ones. Under uncertainty political values could be trump cards. The Reagan administration could act on a motto of “If in doubt, don’t regulate.” But its rulemaking agencies would have to demonstrate, in a rational-analytic fashion that was responsive to the complaining parties’ arguments, that those doubts were real, not trumped up excuses for promised regulatory relief. The line between law and politics would be maintained, at least in principle.

But principled judicial review has limited power to control events post-remand. The Reagan Administration’s response to the State Farm decision rapidly demonstrated the limits of the law in constraining political choice.

Passive Restraints After State Farm

The Dole Finesse. Responding to the remand order, in October 1983, NHTSA returned to the passive restraints rule. Elizabeth Dole, the new Secretary of Transportation, issued an NPRM requesting comment on various alternatives for amending Standard 208. After a lengthy discussion of the regulatory history leading to the Court’s decision in State Farm, Dole presented some of the data the department had gathered. That presentation demonstrated both how much and how little the agency had learned since 1969.

Secretary Dole's notice revealed an agency awash in data. Yet the critical uncertainties identified in State Farm remained. There was still no on-the-road experience with sufficient numbers of airbags or passive belt systems to determine their effectiveness when used and, more critically, their probable utilization rates. Nor was the agency any closer to answering the Supreme Court's apparently sensible questions: If detachable automatic belts might merely replicate the utilization rates of manual belts, why not make the belts nondetachable? What are the effects of inertia on the utilization rates of detachable passive belts? Why not use airbags?

There was, of course, an answer to some of these questions. Technologically there was no good reason to make belts detachable. The continuous-spool belt systems were thought to be reliable and to provide easy exit from the automobile after a crash. And airbags were considered
both reliable and effective. The problem was not technology. The problem was predicting consumer behavior, or, as the issue had come to be phrased, "public acceptability." Continuous-spool belts were removable with a pair of scissors, and a significant public outcry might motivate Congress to excise the vastly more expensive airbag requirement. The agency had hardly forgotten its experience with the ignition interlock. As the Secretary awaited comments on her NPRM, public acceptability loomed as the core issue in choosing among the regulatory alternatives that the agency had identified.

Comments flooded in, 7,800 of them. But, as usual, the commentators raised as many new issues as they answered. After preliminary analysis of the comments the agency felt compelled to issue a supplemental notice of proposed rulemaking requesting further information on prior issues and identifying some additional issues for comment. With all this information in hand, a special task force prepared a 700-page Final Regulatory Impact Analysis analyzing the costs and benefits, and the imponderables, of the agency's alternative proposals. On July 17, 1984, a final rule was issued. The statement of basis and purpose runs 50 pages in the Federal Register and incorporates the Final Regulatory Impact Analysis by reference. The core of the agency's decision, however, was captured in four paragraphs:

Effectively enforced state mandatory seat belt use laws (MULs) will provide the greatest safety benefits most quickly of any of the alternatives, with almost no additional cost.

Automatic occupant restraints provide demonstrable safety benefits, and, unless a sufficient number of MULs are enacted, they must be required for the most frequently used seats in passenger automobiles.

Automatic occupant protection systems that do not totally rely upon belts, such as airbags or passive interiors, offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives.

As a result of these conclusions, the Department has decided to require automatic occupant protection in all passenger automobiles based on phased-in schedule beginning on September 1, 1986, with full implementation being required September 1, 1989, unless, before April 1, 1989, two-thirds of the population of the United States are covered by MULs meeting specified conditions.

104. Id. at 28, 962-63.
How Could We Have Gotten Here from There? The July 17 decision was by any standard astonishing. Although the State Farm decision had been read by many as virtually assuring the requirement of airbags, the July 17 rule in effect left the question of whether any passive restraints would be required, and if so, what technology would be used, to the future decisions of state legislatures and automobile manufacturers. In addition, the preferred regulatory strategy now seemed to be the mandatory use law. Not only had such laws heretofore been unpopular with state legislatures and with the Congress, they were a return to the behavior modification strategies of the pre-1966 era. The agency was proposing to implement the 1966 Act by abandoning its animating intellectual vision.

Reaction to Secretary Dole’s new rule ranged from the ambivalent to the apoplectic. As Ann Cooper of the National Journal noted in an article entitled “Who Won?”, “even some insiders, who had reacted with passionate rhetoric to every twist in the 15-year air bag saga, seemed uncertain whether they should be celebrating [this] complicated plan or condemning it.” 105 The Ford Motor Company lavishly praised Dole’s endorsement of MULs, but said nothing about the portion of the rule that supported airbag installation. 106 Ralph Nader as usual was less circumspect: “It’s a bloody snare and a mischievous delusion. I didn’t believe [the government] could be so Machiavellian in giving the automobile manufacturers a chance to do in the airbag once and for all.” 107

The parties who historically had pressed passive restraints technology on the agency, the insurance companies in particular, found NHTSA’s rule not only astonishing but irrational. They were shortly back in court seeking review of the rule on numerous grounds. They were told by the D.C. Circuit Court of Appeals, however, that their suit was not ripe for review. 108 After all, their basic complaint concerned the substitution of MULs for passive restraints. That had not happened yet, and it might never happen, although a remarkable number of states had enacted MULs pursuant to the agency’s invitation and a massive lobbying effort by the automobile manufacturers. But, the court reasoned, these laws were quite diverse and the new rule left some discretion for NHTSA to determine how any of them might “count” toward the required minimum level of “effective” MUL coverage.

As we now know, the Court of Appeals was prescient. A major legislative campaign in the states by the automobile manufacturers, joined in many cases by safety advocates such as Mothers Against Drunk

106. Id.
107. Middle Lane: Bags, Belts—And a Loophole, Time, July 23, 1984, at 47.
Driving (MADD), generated mandatory use laws in virtually every state. While the manufacturers and the safety partisans both wanted MULs, however, they wanted quite different ones. And legislature after legislature, responding to the safety advocates' preferences, adopted statutes that failed to satisfy the requirements of revised Standard 208, and that therefore did not count toward the regulation's two-thirds threshold for dropping the passive-restraints requirement. As a consequence, the American public got both airbags and mandatory use laws.

The law's ultimate response, passive protection plus regulation of motorists' behavior, seems to have had stunning effects on consumer and driver preferences. Although MULs are mostly unenforced, seatbelt usage rose dramatically with the passage of state mandatory use laws and has remained high. And the same consumers who pelted their representatives with objections to the airbag, fearing that it would be both unreliable and dangerous, now seem so enamored of this safety device that manufacturers compete with each other to see how many of them they can cram into each automobile.\(^\text{109}\)

**Politics, Science and Regulation Under Law**

In 1966 politics embraced science. It chartered a federal agency to force the technology of automobile safety, an agency populated by safety engineers and headed by a man who had pioneered the epidemiology of accidents. Recognizing its own technical incompetence, Congress left virtually all substantive regulation to the experts at the National Highway Traffic Safety Administration. Their regulations would define the performance characteristics of new generations of motor vehicles—vehicles that would better protect their occupants in the case of an accident. This was a legislative pattern to be repeated in the chartering of other health and safety regulators, such as, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Administration.

These new and powerful forms of regulation would, nevertheless, be regulation subject to law. All of the social regulatory statutes of the 1960s and 1970s provided for immediate judicial review of final rules. In

109. See, e.g., Joseph F. Sullivan, "Law Signed Making New Jersey 2d State with Seat-Belt Rule," N.Y. Times, Nov. 9, 1984, at B4 ("The New Jersey Legislature amended its bill before final passage last month to insure that it would not meet the Federal guidelines. The lawmakers said the New Jersey statute could not be counted among the laws that might be used in place of requiring mandatory passive restraints.").

many ways this was an unfamiliar judicial task, and one that stretched the capacities of courts to maintain legality without invading the realms of administrative and legislative policy. The judiciary responded by proceduralizing rationality review in ways that vindicated the judicial role but that severely complicated the lives of the new social regulatory agencies. It was this vision of administrative, scientific policy making under law that the *State Farm* opinion crystalized. It is a vision that continues to structure the rhetoric of judicial review proceedings across the regulatory landscape.

Yet, the reality of this vision of the role of science and law in regulation was questionable in 1983, and is, perhaps, even more questionable today. As we have seen, the *State Farm* opinion can be read to overstate the capacity of judicial review to protect scientific regulation from political manipulation, while understating the contribution of judicial review to administrators' incapacity to make effective regulatory policy. Although the Reagan administration's particular attempt at rescission was rejected in *State Farm*, the pre-Reagan history of Standard 208 reveals a change of direction with virtually every administration that had a hand in that almost interminable rulemaking proceeding. And the rule that emerged after the *State Farm* remand has all the earmarks of a shrewd political compromise, wrapped in the rhetoric of reasoned policy analysis.

Congressional politics, of course, constantly played a role as well. Congress was initially guilty of imagining a scientific world in which answers were easy and discovered without cost. It then made clear, in its 1974 amendments forbidding the ignition interlock, that sound scientific approaches might be politically unacceptable, while politically necessary approaches were imperative even if scientifically silly. For in 1974 Congress not only repealed the passive restraints rule, it mandated a host of new safety features in school buses—features addressing such a minor safety problem at such great cost that the legislation arguably increased the risk that children would be killed or injured in a school bus accident. Meanwhile Congress kept NHTSA both understaffed and under-funded to play the techno-political game of standard setting envisioned by the revolution of 1966.

And while *State Farm* seems both pro-regulation and pro-science, the judicial demand for reasoned decisionmaking has not routinely functioned that way. Between *Auto Parts* and *State Farm*, most of NHTSA's even mildly innovative rules were challenged in court, and the agency lost half of those challenges.111 The usual reason was that the

111. NHTSA lost in six of the twelve rulemaking cases that were decided on the merits. Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of*
agency could not demonstrate that its requirements were reasonable and practicable. Why? Because there was no significant “on-the-road” experience with the engineering requirements embodied in the rules. But, if that were the requirement for legality, then the agency was legally impotent to force the development of automotive safety technologies. A statute, apparently designed to put safety on a par with style in the engineering of automobiles, had morphed into a statute that only permitted NHTSA to demand the dissemination of off-the-shelf equipment. The automobile industry could be required to improve its engineering performance only to the extent that some firm had already paved the way by demonstrating reasonableness and practicability through inclusion of new safety features in its own cars. The judiciary implicitly reinterpreted the statute as a civil rights regime. All Americans would be entitled to equal protection, that is, to the same safety engineering pioneered by Cadillac, Mercedes, and Volvo.

Meanwhile, the courts took a radically different approach to the agency’s demands that automakers recall a vehicle that contained some “defect related to automobile safety.” Whether recalling torsion bars on nine-year-old Cadillacs\textsuperscript{112} that could only break at speeds below three miles per hour, or protecting Ford drivers from windshield wipers that might fly off once every million miles traveled,\textsuperscript{113} the agency’s recall efforts were always blessed by the courts. And Congress happily funded the agency’s recall efforts, a political posture strongly supported by the ever-potent trial lawyers lobby. Unhappily, for reasons too complicated to go into here, there is essentially no evidence that mandated recalls contribute anything to motor vehicle safety.

With its rulemaking activity bludgeoned both by lawmakers and judges, and its recall efforts applauded by everyone, by 1990 NHTSA had turned into an agency dominated by lawyers, and awash in the “investigate and punish” regulatory culture that the Motor Vehicle Safety Act of 1966 was designed to suppress. With one notable exception, the eventual promulgation of the passive restraints rule, NHTSA had by the late 1980s gone out of the technology-forcing business—the unique province of its engineering staff. Indeed, it had virtually gone out of the rulemaking business. The \textit{State Farm} decision had a hand in preserving what has turned out to be NHTSA’s most important safety rule. But its effect in preserving the vision of energetic, scientific, and politically independent health and safety regulation has been very modest.


\textsuperscript{112} United States v. General Motors Corp., 518 F.2d 420 (D.C. Cir. 1975).

\textsuperscript{113} United States v. Ford Motor Co., 561 F.2d 923 (D.C. Cir. 1977).
This is hardly the place to write yet another monograph about automobile safety regulation. But a look at more contemporary answers to three questions that seem crucially related to NHTSA’s potential for success as a safety regulatory agency can provide further perspective on the balance between law, science and politics as regulators feel their way into the 21st century.

First, has the judiciary become more accepting of the realities of engineering (and most scientific) methodology, the need to proceed incrementally without necessarily having complete answers to all possible questions of efficacy and reliability at the outset of real world experience? Second, has rulemaking at the National Highway Traffic Safety Administration moved forward in directions that attack major vehicle safety problems that might be susceptible to engineering solutions? Finally, has Congress been willing to supply critical funding for NHTSA’s legal-scientific enterprise and to permit the agency’s policies to be guided by scientific criteria rather than political expediency?

In some ways, litigation about NHTSA’s rules over the past dozen years suggests judicial accommodation to the inherent uncertainties of the engineering-regulatory process. The Sixth Circuit Court of Appeals, for example, is the court that first derailed NHTSA’s passive restraints rule in 1972,114 and is an adherent to the so-called “hard look” approach to judicial review of agency rulemaking.115 Yet, in 1995, that circuit upheld NHTSA’s rejection of a petition to modify its rules on the safe transport of students in wheelchairs, rejecting a barrage of technical and legal arguments.116 The court affirmed the agency’s decision on the essentially prudential ground that the agency had behaved reasonably and was under no obligation to consider every conceivable alternative offered up by a litigant or rulemaking participant.

Similarly in the denouement of a rulemaking proceeding that had been on-going even longer than the passive restraints rule, the Court of Appeals for the Tenth Circuit upheld NHTSA’s anti-lock brake system performance standards for vehicles with air brakes (meaning generally large trucks and buses) without even permitting oral argument.117 The petitioner had claimed that because NHTSA’s standard presumed the use of automatic braking system technology, it was in effect a “design standard” rather than a “performance” standard, and therefore not

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authorized by the Motor Vehicle Safety Act. Recognizing that the distinction between performance and design is “much easier to state in the abstract than to apply,” the Tenth Circuit concluded with an affirmation of pragmatic problem solving: “We would, accordingly, be hesitant to invalidate this carefully developed safety standard solely on the basis of its indefinite place on the conceptual spectrum between performance and design.” Theoretical purity seems to be retreating before the armies of engineering practicability.

But not so fast. The wheelchair litigation involved a host of claims that skated dangerously close to sanctionable frivolity under Rule 11 of the Federal Rules of Civil Procedure. And the anti-lock brake system performance criteria were being applied to technology now in widespread use throughout the trucking industry. The Sixth Circuit exhibited considerably greater skepticism, if not quite its 1970s antagonism, toward NHTSA’s rulemaking in a 1990 case involving standards for the deflection of steering columns in front end collisions. In a decision reminiscent of Chrysler, the court invalidated NHTSA’s requirements applicable to a particular weight range of trucks because the agency had not provided any practicable testing procedure for manufacturers who built specialized vehicles on standard truck chassis supplied by major manufacturers. Crash testing of these limited production vehicles was obviously out of the question on economic grounds, and no simulation testing methodology had been developed. The agency’s plea that these specialty manufacturers could avoid compliance difficulties simply by requiring a certificate of compliance from the chassis manufacturer fell on unsympathetic judicial ears. NHTSA had not demonstrated that the manufacturers would be willing to supply the certificates.

Moreover, when NHTSA finally lost a recall case, the court’s rationale revealed that the case might as easily be understood as a rulemaking review proceeding. The ground for the court’s refusal to allow the recall was its belief that the agency’s rule had given inadequate notice to the manufacturer of the safety requirements that the agency claimed the manufacturer was violating. The recall was disallowed because the rule was incomplete.

Most other cases during the last decade involving NHTSA related to the non-safety aspects of its jurisdiction, particularly its power to adopt mileage standards for automobile fleets. The agency won all of these cases, but their posture is revealing. Almost all of them were suits

118. Id. at 1224.
119. Id.
attempting to force the agency to exercise regulatory authority that it had declined to use.\textsuperscript{122} In short, when subjected to substantive review, NHTSA still seems to do no better than chance in the courts of appeals—unless it doesn’t do anything. Then it always wins.

Nor has NHTSA launched new rulemaking initiatives with anything like the scope of Standard 208. Most of the agency’s recent rules merely extend requirements adopted in the late 1960s and early 1970s to new classes of vehicles, or update preexisting rules to deal with new technologies, such as electric braking systems. The few truly “new” standards seem unlikely to have major effects on the numbers of deaths and injuries in vehicle accidents. It may be important, for example, to have a fuel tank integrity standard for vehicles powered by compressed natural gas, but this is a pretty small fleet.

Moreover, even with the great majority of its resources devoted to updating its rule inventory, many of NHTSA’s rules remain in the same form that they had in the late 1960s or early 1970s. When the Firestone tire controversy broke in the late 1990s, for example, NHTSA’s 1969 standard did not even apply to the suspect equipment. Its rule covered only bias-ply tires—an outdated technology in an almost universally radial-tire world. Extension of passenger car rules to light trucks has made some progress, but is far from complete, even though that has been the fastest growing segment of the automobile industry for nearly 20 years.

To say that the agency has been engaged in updating old rules thus may not be to say much. Moreover, a review of both agency rulemaking issuances and the secondary literature suggests that a huge proportion of NHTSA’s energy over the last decade or so has been spent on two controversies—the problem of deaths and injuries from air bag inflation and the response to tire safety and rollover problems involving sport utility vehicles.\textsuperscript{123} In both cases the agency’s agenda and approach have been dictated by congressional politics, not safety engineering.


Indeed, both the agency’s modest rulemaking output and its choice of topics can be laid at the door of the Congress. NHTSA has continued to be understaffed and underfunded. The agency’s budget and staff were cut nearly in half by the Reagan administration and have never recovered.\textsuperscript{124} Adjusted for inflation, NHTSA’s budget at the turn of the century was one-third less than its budget in 1980. Its staff peaked at just over 900 employees in the late 1970s, but was down to just over 600 in 1982, and has hovered there ever since. Equally importantly, Congress has been willing to fund public information and recall activity at much higher levels than the development of safety standards. In the fiscal year 2002 budget NHTSA was authorized to spend twice as much on the development of front and side impact test ratings for new vehicles than it was on the development of safety standards. The budget for recall investigation and enforcement was six times the figure authorized for standards development. Congress has in essence required the agency to direct its energies in directions—recalls and consumer information—which have little, if any, scientific support as effective safety strategies.

In addition, congressional intervention into the agency’s rulemaking process has diverted its rulemaking energies, such as they are, to problems that are essentially of the Congress’s own making. In 1991, for example, the Intermodal Surface Transportation Efficiency Act\textsuperscript{125} required that all passenger cars manufactured on or after September 1997, and light trucks manufactured after September 1998, have both passenger and driver side air bags in addition to manual lap and shoulder belts. This legislation effectively took the agency’s performance requirements embodied in Standard 208 and transformed them into design requirements. But the design had some difficulties.

\begin{itemize}
\item[\textsuperscript{124}] NHTSA budget and personnel data referred to here and elsewhere have been compiled from the supplements to the annual Budget of the United States government. E.g., U.S. Office Mgmt. & Budget, Budget of the United States Government (Supp. 1989). Some numbers have also been compiled from NHTSA budgets in brief, which are available at NHTSA, Budget in Brief, at http://www.nhtsa.dot.gov/nhtsa/whatis/bb (last visited Apr. 18, 2002).

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By the mid-1990s it was becoming clear that, while air bags have substantial safety advantages, they also injure and kill passengers who would otherwise escape vehicle accidents with lesser injuries or no injuries at all. The problems have to do particularly with children and small adults.126

Congress responded, not by giving the agency back its discretion to trade off air bags against other technologies, but with the Transportation Equity Act for the 21st Century.127 That statute specifically required the agency to improve vehicle restraint protection for all sizes of occupants; to minimize air bag risks to infants and children; to maintain protections for unbelted occupants; to require advanced air bag technology; and to do so with rules that would be completed no later than September 2003 and phased in no later than September 2006. Is this doable? Sensible? Who knows, and NHTSA is now legally prohibited from asking those questions.

It also seems fair to say that the agency’s rulemaking activities since 1998 have largely been devoted to implementing this legislation and TREAD, the Transportation Recall Enhancement, Accountability and Documentation Act of 2000.128 As its acronym suggests, this latter statute was Congress’s response to the Ford-Firestone tempest of the late 1990s. As many readers will remember, evidence mounted during the late 1990s that Ford Explorer sport utility vehicles were involved in a substantial number of rollover accidents and that the failure of Firestone tires were implicated in many fatal Explorer rollovers. This episode took on the character of a morality play when it was discovered that Firestone had recalled these same tires in a number of other countries, that both Firestone and Ford had failed to keep NHTSA informed of the mounting evidence that the tires were unsafe, at least as used on Ford Explorers; and that NHTSA itself had received a number of warnings that somehow gotten lost in its antiquated data processing system.129 Congress responded once again by beefing up NHTSA’s recall authority and by requiring that it adopt a number of rules, all related to defect investigations and notifications (i.e., recalls). Once again the statute had a mandatory time limit that would commandeer the agency’s limited resources.

126. E.g., Ottaway & Brown, supra note 123.
The dog that is not barking in this scenario is the propensity for sport utility vehicles of all types to experience an excessive number of rollover accidents when compared with the passenger car vehicle fleet as a whole. Both NHTSA and industry testing have documented this propensity for over a decade. In the regulatory response, one might have thought, would be a stability standard for passenger vehicles that would require some redesign of the sport utility vehicle fleet. Yet, at the behest of the motor vehicle industry and its allies in Congress, NHTSA has rejected this solution, maintaining that such requirements would be impracticable. By that it means that redesign would add substantial economic cost to the most profitable segment of the American motor vehicle industry.

Meanwhile, the agency has done some work on the development of dynamic rollover tests for purposes of beginning a consumer information program on rollovers. The TREAD legislation cements this approach by requiring NHTSA to develop dynamic tests for motor vehicle rollovers, carry out a set of tests, and initiate a rulemaking proceeding to determine how best to disseminate these test results to the public. Dissemination will not be easy. Like NHTSA’s now-famous barrier crash tests for passenger restraint systems, the real world applicability of these test results will be problematic. Just as most cars do not crash into static barriers, stability measured on a single, well-specified slalom course is unlikely to mimic the behavior of automobiles maneuvering in highly diverse driving circumstances. In the end, the consumer information may be misleading, as the industry has long maintained concerning NHTSA’s (and the insurance industry’s) crash test results. But Congress likes information regulation. It funds NHTSA’s crash test information program alone at 200% of the agency’s budget for rulemaking.

We have already observed the congressional actions embodied in the Intermodel Surface Transportation Efficiency Act of 1991—its instructions to NHTSA to solve the problem of airbags injuries and to mandate ever more advanced airbag technologies. For, whatever their risks, airbags have become enormously popular with the car-buying public. If the halting implementation of Standard 208 did nothing else, it changed the psychology of automobile consumers from deep skepticism about the airbag technology to the belief that airbags can and should protect them from all harm in virtually any conceivable crash. Congress has responded by demanding that the agency insist on more and better airbags, without pausing to ask whether this approach is the most cost-effective way to

130. See Levin, supra note 123.
131. For an early example, see Peter Behr, “U.S. Automakers Refusing to Use a Recent NHTSA Crash Test in Ads,” Wash. Post, Aug. 24, 1980, at G4 (“GM told NHTSA in April that ‘there is no justification for representing these tests results as realistic comparative crashworthiness measures.’”).
further reduce automobile injuries and deaths. On these rational-analytic grounds the seatbelt interlock was probably superior.

To be sure, administrative lawyers have long understood that the practice of administrative decisionmaking might be better described as “interest representation” or “micro-political accommodation” or just “muddling through,” rather than as the embodiment of “instrumental rationality.”132 And recent regulatory reform efforts have emphasized the desirability of negotiation, collaborative rulemaking, and regulatory flexibility rather than expert judgment.133 We seem capable of admitting that regulation is policy making and that policy is never apolitical.

Yet, in some fundamental ways we maintain our bedrock normative expectations of instrumentally rational administration.134 Juries and legislatures (and courts who often avoid opinion writing) can decide without reasons. Administrative rules or orders without contemporaneous supporting reasons are generally illegal for that reason alone. Moreover, we mean by reason-giving a demand for instrumental explanation, how this policy or that decision implements a legislative norm given the current state of the world and the predictable impact of compliance with the administrative command. We thus demand causal explanation, the stuff of scientific inquiry, and reject the agency’s determination as unlawful unless it can tell a factually and scientifically plausible story. Unreasoned decisions, silence, imagined states of the world are not allowed. We soften the hard edges of the demand for rationality with deference norms and occasional instances of non-reviewability. But candid political rationalization, assertions, for example, that this resolution of the matter was acceptable to most affected interests, was in line with administration policy, was dictated by resource constraints, or was demanded by powerful legislative factions, are ruled out of bounds.

In short, the normative demands of administrative law are at war with our understanding of the practical necessities of administration. We have failed to construct a normative model of administration that fits its realities, or more properly, a normative model that builds on best practices in an administrative world beset by inadequate budgets, legislative imperatives, public resistance, as well as real scientific uncertainties.

We are thus still inclined to ascribe the failure of regulatory policies to track the best scientific or technological understanding of a problem as a failure somehow to design a “good” administrative process, that is,

one that is impervious to the forces—political, social and economic—that deflect administrators from the path of scientific virtue. But the truth of the matter may be that we do not always want the law to follow science—even law as made by administrators. Our practice belies our proclaimed rationalistic commitments. The problem from this perspective is not how to reform law to better accommodate science, but how to reframe our aspirational norms about administrative law to better accommodate what we really seem to demand of administration.

The State Farm case exemplifies the tensions among politics, science and law that continue to bedevil the regulatory process. Instructed by a vague and ambivalent Congress, agencies like NHTSA are bound by their statutes and judicial review proceedings, but may not be protected by them. And as State Farm makes clear, in the absence of congressional clarity, NHTSA cannot rely with the assurance either on executive political direction or on its own internal expertise.

The fundamental separation of powers ideas that prevent the courts from insisting on congressional clarity and specificity and that restrain presidential distortions of congressional directives also leave the regulators legally and politically exposed. They have a political job without a political mandate, and they are subject to judicial review for “legality.” Regulation must proceed legally, therefore, under the cover of a fiction—that regulation is only the application of law to fact, the carrying out of statutory instructions. But the fictional quality of this posture becomes all too transparent in the glow of the political warfare that surrounds high-stakes rulemaking. Indeed, recognizing the legal limits on direct presidential direction of agency policymaking, all presidents since Jimmy Carter have sought to leverage the policy influence that they exercise through appointment, removal and budget controls, by even more elaborate structural and procedure devices designed to nudge administrators in the direction of the administration’s overall views. The most conspicuous executive monitoring device since the 1980s has been OMB review of major proposed regulations through the medium of its “comments” on required regulatory-impact analyses. And both the Executive Office of the President and the Congress have added numerous further analytic requirements over the ensuing two decades.135

Our notions of separation of powers have thus produced not only a proceduralized rationality review of rules in the courts, but also a proceduralized executive oversight. The resulting multiple tiers of process have had dramatic effects on regulatory output. Not only must

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administrators like the head of the National Highway Traffic Safety Administration satisfy executive branch overseers that they have faithfully done the required analyses, these analyses become a part of the rulemaking record, a treasure trove of facts and assertions that can be deployed to advantage by opponents in subsequent judicial review proceedings.

Some might argue that in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 136 decided only a year after *State Farm*, the Supreme Court effectively rejected *State Farm*’s vision of judicial review of administrative action. After *Chevron* courts should be more deferential to agency administrative interpretations and more willing to rely on the political accountability of administrators to an elected president. *Post-Chevron*, both supporters137 and critics138 of that decision have argued that we have entered a new age of presidential administration with a new paradigm of regulation as a political, rather than a scientific or rational-analytic activity. But that would be to overstate the impact of *Chevron* in the same way that it is easy to overstate the importance of *State Farm*. To the extent that the National Highway Traffic Safety Administration had trouble in court with respect to its rulemaking activities, and it had plenty, that trouble usually was not because of alleged misinterpretation of its statutes. Rationality review of NHTSA’s rules has focused largely on the agency’s application of law to fact and on its rationalization for its policy choices, as illuminated by the critical commentary of participants in its rulemaking processes.

It is possible, of course, that if *Chevron* had been decided before the promulgation of Standard 208, then NHTSA’s lawyers might have been able to convince the Sixth Circuit that the real issue was an interpretive question about which the agency had behaved reasonably. But who knows? That court might easily have believed that “objective” necessarily meant “fully specified” and “repeatable,” or that demanding testing without a completed procedure for carrying it out could not qualify as a reasonable construction of the agency’s statutory obligations.

NHTSA’s political troubles certainly did not come from misunderstanding its statute, but from misunderstanding the shifting politics of automobile safety regulation in a world of separated political power and

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fickle public preferences. And when the agency apparently relied too heavily on politics when rescinding the passive restraints rule, its actions were deemed illegal. State Farm's demand for reasoned decisionmaking thus remains the legal system's vision of ideal administration, a poorly marked safe harbor for regulatory agencies attempting to navigate the treacherous currents where law, science and politics converge.