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In *People Against Nuclear Energy (PANE) v. Nuclear Regulatory Commission*, the United States Court of Appeals for the District of Columbia Circuit held that the National Environmental Policy Act (NEPA or the Act) required the Nuclear Regulatory Commission (NRC or the Commission) to consider impacts upon the "psychological health" of community residents in assessing the environmental consequences of restarting the nuclear power plant facility, Three Mile Island, Unit 1 (TMI-1). Although the court limited its holding to post-traumatic psychological impacts that are accompanied by physical manifestations and caused by fears of recurring catastrophe, *PANE*
extends the scope of NEPA into an area that prior cases have avoided. A straightforward recognition of the cognizability of psychological impacts in general, however, would have been more defensible under NEPA and more easily contained within workable bounds.

While this Note was going to print, the Supreme Court unanimously reversed the circuit court's decision. The Supreme Court's opinion is discussed below in the footnote.

On March 28, 1979, a nuclear accident occurred at the nuclear generating station, Three Mile Island, Unit 2 (TMI-2). TMI-1, which was shutdown for ordinary, periodic maintenance and refueling, was forced by the Commission to remain inactive pending a Commission proceeding to determine whether TMI-1 could be operated safely. PANE submitted to the Commission two contentions asserting that

6. Case law dealing with psychological fear excludes all psychological impacts from NEPA's scope. See infra note 48 and accompanying text.

7. Sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy, 51 U.S.L.W. 4371 (U.S. April 19, 1983). The Supreme Court held that psychological reactions to risks created by a federal program are not encompassed within NEPA. Writing for the Court, Justice Rehnquist stated that because risks are not part of the physical environment, PANE's psychological harms are not "environmental" for the purposes of the Act. Id. at 4373. The Court's primary concern in so delimiting the scope of NEPA was efficiency. Id. at 4374. Although the Court did not exclude psychological impacts entirely under NEPA, its opinion places in doubt the applicability of psychological effects in all future federal actions under the Act. But see id. at 4375 (Brennan, J., concurring).

In denying PANE's psychological harm allegations, the Court construed the scope of the human environment too narrowly. NEPA mandates that federal agencies prepare an EIS whenever federal decisionmaking significantly affects the human environment. The Court's determination that PANE's psychological impact falls outside of the human environment ignores an integral component of human experience by confining NEPA to the purely physical environment. Neither Congress nor the Council on Environmental Quality (CEQ) intended such a narrow interpretation of the human environment. See infra notes 28-30, 43 and accompanying text. The TMI-1 restart directly impacts upon the psychological well-being of the Three Mile Island residents. Direct impacts on man cannot be separated from effects on the human environment simply because they derive from risks. If PANE's psychological effect is "significant" it should be considered by the NRC in its decision to restart the nuclear reactor at Three Mile Island, regardless of whether that impact was propagated through a risk. See infra notes 74-83 and accompanying text. Finally, the Court's concern with efficiency applies equally to all psychological impacts, and therefore is not a basis for distinguishing between various psychological effects. Because the regulatory and statutory scheme addresses that concern, see infra note 100, it does not justify exclusion of psychological effects from the Act's protection. See infra notes 69-73, 99-107 and accompanying text.

8. People Against Nuclear Energy, Draft Contentions, in Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Appendix G at 115a, sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy, 51 U.S.L.W. 4371 (U.S. April 19, 1983) [hereinafter cited as People Against Nuclear Energy Draft Contentions]. These Draft Contentions were submitted to the Atomic Safety Licensing Board pursuant to 10 C.F.R. § 2.714(b) on October 5, 1979. The Board, in its certification to the Commission on these issues, determined that psychological stress and community well-being
NEPA encompasses the psychological reactions of community members to a federal project and therefore requires that the Commission consider these effects in determining whether to prepare a Supplemental Environmental Impact Statement (SEIS). PANE's first contention concerned the "severe psychological distress" caused by the renewed operation of TMI-1. PANE argued that the TMI-2 accident impaired the health of the Three Mile Island community residents in the form of "increased anxiety, tension and fear, a sense of helplessness and such physical disorders as skin rashes, aggravated ulcers, and skeletal and muscular problems." PANE alleged that if TMI-1 were operating it would be a "constant reminder of the terror which they felt during the accident" and that the residents consequently would be unable to recover from their "trauma."

PANE's second contention involved the "severe harm to the stability, cohesiveness and well being of the communities in the vicinity of the reactor." PANE asserted that there would be "a loss of confidence and a breakdown of the social and political order," which eventually would "make permanent the damage, trapping the residents in disintegrating and dying communities and discouraging the influx of essential growth."

The Commission voted to exclude consideration of psychological impacts at its evidentiary hearings. PANE appealed the Commission's decision to the Court of Appeals, claiming that the Commission's failure to consider psychological effects when determining whether to prepare an SEIS violated the procedural requirements of NEPA.

The court held that psychological impacts upon health are cognizable under NEPA. The majority recognized that case law excludes psychological impacts under the Act, but distinguished those cases as dealing with psychological effects that did not affect human health. Judge Wright concluded that the psychological stress suffered by the

were cognizable under NEPA. In the matter of the Metropolitan Edison Co., 11 N.R.C. 297 (1980).

9. See supra note 2.
10. People Against Nuclear Energy Draft Contentions, supra note 8, at 1.
11. Id. at 1.
12. Id.
13. Id. at 2.
14. Id.
15. The Court of Appeals had jurisdiction to review the Commission's order pursuant to 28 U.S.C. § 2342(4) (1966) and Atomic Energy Act of 1954, 42 U.S.C. § 2239(b) (1962). The decision not to consider PANE's contentions in the restart proceeding had the procedural effect of excluding PANE altogether pursuant to 10 C.F.R. § 2.714a(b).
16. 678 F.2d at 223.
17. Id. at 229. See supra note 48 and accompanying text.
Three Mile Island residents was severe enough to become a psychological “health” effect for the purposes of NEPA. This conclusion was based upon three grounds: first, the community residents were traumatized by the TMI-2 accident; second, the residents exhibited physical manifestations resulting from this post-traumatic stress; and third, these psychological stress effects would be perpetuated and worsened by fears of recurring catastrophe.

In response to PANE’s second contention, the Court of Appeals found that the damage to surrounding communities caused by the psychological reaction to the TMI-1 restart was a cognizable secondary impact. The majority reasoned that although community stability has been held cognizable under NEPA, it consistently has been treated as a socioeconomic impact. In accordance with the well-established “socioeconomic effect” rule, the majority held that the impact upon community stability need not be considered by the Commission

18. 678 F.2d at 229-30. PANE repeatedly adverted to the “psychological vulnerability” of the TMI community residents due to the TMI-2 accident. Brief in Opposition to Writ of Certiorari to the Supreme Court of the United States at 60, *sub nom.* Metropolitan Edison Co. v. People Against Nuclear Energy, 51 U.S.L.W. 4371 (U.S. April 19, 1983); People Against Nuclear Energy Draft Contentions, *supra* note 8, at 1.

19. 678 F.2d at 229-30.

20. *Id.* The majority noted that the type of risk involved — nuclear — potentially is more severe than other types of environmental impacts and therefore should be accorded different treatment under NEPA. *Id.* at 229. This notion is supported by the district court in New York City v. United States Dep’t of Transportation, 539 F. Supp. 1237 (S.D.N.Y. 1982), *appeal docketed*, Nos. 82-6094, 82-6200 (2d Cir. Feb. 14, 1983). In that case, involving the transportation of nuclear waste, the court stated that “public apprehension of a serious accident is substantial, and it predicts that an accident . . . could produce substantial psychological impacts, greater than those resulting from a nonnuclear accident of equivalent magnitude.” *Id.* at 1273.


in its threshold analysis of whether to prepare an SEIS. If, however, the Commission determined that PANE’s psychological health effect warranted the preparation of an SEIS, then the possible deterioration of the community must be discussed and evaluated in that statement.24

Judge Wilkey, in his dissent, asserted that no psychological impacts are cognizable under NEPA regardless of their severity.25 He reasoned that because all psychological impacts affect psychological health to some degree, various psychological effects are indistinguishable, and thus psychological health would be broadened to encompass all psychological impacts. The dissent concluded that because Congress did not intend the Act to force federal agencies to evaluate such subjective reactions, Congress did not intend health to encompass psychological health.26

This Note will demonstrate the cognizability of psychological impacts in general under NEPA. First, the Act’s expansive environmental policy supports the inclusion of psychological health and psychological impacts in general. Second, the majority’s cognizability standard, which only recognizes an extremely limited range of psychological impacts upon humans, is inherently flawed and unsupported by the statute. Third, cases holding psychological fear uncognizable do not support excluding psychological impacts from NEPA in all circumstances. Finally, the 1979 NEPA regulations, promulgated by the Council on Environmental Quality, provide an effective means by which to consider psychological impacts in the NEPA process.

I. PSYCHOLOGICAL HEALTH UNDER NEPA

In holding psychological health cognizable under NEPA, the majority relied upon the cognizability of human health effects in general. The court held that Congress intended that federal agencies consider psychological health effects because of “the simple fact that effects on

24. 678 F.2d at 230-31. The court also held that the TMI-1 restart constituted a “major federal action” for the purposes of NEPA, and therefore required the NRC to comply with the procedural requirements of NEPA. Judge Wright relied upon the continuing statutory obligation of federal agencies with respect to ongoing programs to protect the health and safety of nearby residents. Id.
25. Id. at 239-42.
26. Concerned with the effect of the majority’s holding upon future licensing proceedings and the nuclear industry in general, the dissent asserted that licensing decisions would become constantly subject to claims of psychological fear because of the majority’s holding that the NRC has a “continuing obligation” to comply with NEPA. See supra note 24. The dissent argued that because only “proposed” actions are subject to NEPA’s mandate, an agency’s obligation under NEPA terminates as a project is completed and placed into operation. 678 F.2d at 242-44.
psychological health are effects on the health of human beings.” 27 Although the majority did not attempt to support this interpretation of health either statutorily or judicially, the cognizability of psychological health nevertheless has support under the Act.

Human health effects clearly are encompassed within the scope of the human environment as delimited by NEPA's broad environmental policy. 28 NEPA requires federal agencies to prepare an EIS when proposing a “major Federal action significantly affecting the quality of the human environment.” 29 Although the statute does not specify the breadth of the “human environment,” NEPA’s regulations dictate that its intended scope is that of NEPA’s environmental policy as embodied in section 101. 30 This policy mandates that the federal government “use all practical means . . . to foster and promote the general welfare, [and] to create and maintain conditions under which man and nature can exist in productive harmony.” 31 Protecting human well-being is central to NEPA’s policy of maintaining a balance between man and his surroundings. Defining the human environment in terms of NEPA’s policy is crucial because the scope of the human environment determines the applicability of NEPA’s protective mechanism — the EIS. 32 Thus, what must be considered in an EIS is determined by the policies of NEPA.

Because the term “health” certainly can be understood to include both physical and psychological well-being, 33 NEPA’s statutory language is capable of encompassing both these aspects of human health.

27. Id. at 227-28.
28. NEPA’s goals include “assur[ing] for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and “attaining the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b)(2) & (3) (1976) (emphasis added). See also Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 927 (D. Or. 1977), (“No subject to be covered by an EIS can be more important than the potential effects of a federal program upon the health of human beings.”).
30. The regulations define the human environment “to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14 (1981). The CEQ has elaborated on the intended scope of the human environment: “a few commentators expressed concern that this definition could be limited to the natural and physical environment. This is not the Council’s intention . . . The full scope of the environment is set out in section 101 of NEPA. Human beings are central to that concept.” 43 Fed. Reg. 55,988 (1978).
32. Section 101 of NEPA contains the substantive portions of the Act, while § 102 provides the means for enforcing § 101’s policies.
33. [A]lthough an illness may be primarily physical or psychological, it is always a disorder of the whole person — not just of the lungs or psyche. Fatigue or a bad cold may lower our tolerance for psychological stress; an emotional upset may
Furthermore, NEPA's purposes and policies — designed to promote the "overall welfare and development of man"34 — support this broad interpretation of health under NEPA.35 Senator Jackson, who sponsored the bill in Congress, stated that "the purpose of the bill is to lay the framework for a continuing program of research and study which will insure that present and future generations of Americans will be able to live in and enjoy an environment free of hazards to mental and physical well-being."36 In addition, the agency responsible for administering NEPA, the Council on Environmental Quality (CEQ),37 has construed health effects as the "physical and emotional health . . . of Americans."38 Finally, NEPA's legislative history gives no indication that health was intended to be limited to physical health for the Act's purposes. On the contrary, the legislative history clearly demonstrates a concern for man's psychological well-being,39 and thus supports the inclusion of psychological health under NEPA.

The majority recognized a connection between physical and psychological health under NEPA, but it did not interpret health to encompass all psychological impacts upon humans. Rather, Judge Wright espoused a cognizability test which limits the consideration of

lower our resistance to physical disease. In short, the individual is a psycho-biological unit in continual interaction with the environment.


35. The statute mandates that the federal government shall use "all practical means and measures . . . in a manner to foster and promote the general welfare." Id. It further declares a national environmental policy which will "stimulate the health and welfare of man." Id. See supra note 28.


37. The CEQ was established under NEPA in order to assist federal agencies in complying with the Act, and further, to study new trends in the environment. 42 U.S.C. § 4342 (1976). The CEQ acted as an advisory board through the first decade of NEPA's existence. In 1979, the CEQ promulgated new regulations which replaced earlier nonmandatory guidelines. The Supreme Court has held that the interpretation of NEPA in these regulations must be accorded "substantial deference" by the courts. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). See generally Comment, The NEP.4 Regulations, 19 Am. Bus. L.J. 295, 296-98 (1981).


39. A report on NEPA presented to the Senate Committee on Interior and Insular Affairs discussed the dangers prevalent in the environment, including "disability and death from diseases induced by environmental factors (for example, cancer, emphysema, and mental disorders)." 115 Cong. Rec. 3,703 (1969) (emphasis added). This report also discussed "physical and psychological discomfort" caused by the present state of the environment. Id. at 3,704 (emphasis added). Senator Jackson also expressed concern with "conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being." S. Rep. No. 296, 91st Cong., 1st Sess. 4 (1969) (emphasis added).
psychological impacts to those impacts that are severe enough to rise to the level of psychological health effects. The majority defined "psychological health" narrowly as "the medically diagnosed effects of traumatic accidents on the human mind." Although the court did not attempt to define the term's limits, the court's narrow interpretation reasonably extends to other medically recognized psychological health impairments as well.

The distinction espoused by the Court of Appeals between psychological health and psychological impacts in general suffers from conceptual as well as practical problems. Although the majority acknowledged that health encompasses psychological health, it failed to recognize that all psychological impacts may affect health for the purposes of NEPA. For example, although psychological stress may not be a medically recognizable health effect in itself, stress has been demonstrated as a cause of psychosomatic disorders. More important, NEPA's language, purpose, and legislative history indicate that the "human environment" extends beyond man's survival needs to encompass the quality of his existence. Thus, to the extent that mere anxiety affects man's well-being — in this broader sense — it should be

40. 678 F.2d at 230 n.10.
41. In discussing psychological health, Judge Wright stated that "renewed operation of TMI-I may cause medically recognized impairment of the psychological health of neighboring residents." Id. at 229 (emphasis added). Further, in his dissent on the AEA issue, see supra note 4, Judge Wright distinguished psychological health from other psychological effects, stating that "not all fears and worries, of course, are psychological health effects within the definition of medical science." 678 F.2d at 254 (emphasis added).
42. The symptoms of psychophysiological [psychosomatic] disorders are highly similar to those of physical diseases. The basic distinction between the two is made on the basis of cause. Psychophysiological disorders are caused primarily by psychological factors, such as psychological stress, while physical illnesses are caused by non-psychological agents, such as viruses or faulty diet. It should be realized, however, that recent research has indicated that almost all physical illnesses are either caused, exacerbated, or prolonged to some extent by psychological factors.
43. During the Senate hearings, Senator Jackson emphasized that:

Accordingly, psychological health for the purposes of NEPA can be viewed broadly to extend to all psychological impacts that affect the "quality of life." See Town of Groton v. Laird, 353 F. Supp. 344, 347 n.6 (D. Conn. 1972) (holding "anything that influences urban dwellers' quality of life is relevant when weighing significance").
considered under NEPA despite the lack of a "medically recognizable" health impairment. Accordingly, all psychological impacts upon humans should be recognized under the Act because of their potential effect upon human well-being. Under this broad interpretation of NEPA, psychological health, as defined by the majority, is cognizable along with those psychological impacts that do not necessarily rise to the level of "medically recognized" health effects. All psychological impacts thus would become a part of the Act's threshold test of whether the federal action "significantly affect[s] the quality of the human environment." This approach would allow an agency to exclude frivolous psychological claims, while requiring an agency to assess the environmental consequences of all "significant" psychological impacts.

The dissent stressed that the majority's cognizability test creates an artificial distinction that fails to recognize the interrelation of all psychological impacts upon human well-being. The agencies' inability to distinguish between various psychological impacts will force those agencies to consider all psychological impacts under NEPA. Judge Wilkey concluded that such a result is unsupported by the Act because Congress did not intend NEPA to encompass all these subjective, unmeasurable effects.

The basic flaw in both the majority's cognizability standard and the dissent's criticism of that standard lies in their underlying premise that NEPA does not generally encompass psychological reactions to federal projects. They base this premise upon a line of cases involving psychological fear. A close analysis of psychological fear, and the reasons that have been used to exclude it, reveals that the exclusion from the Act of both fear and psychological impacts in general is unfounded.


45. A distinction should be noted between PANE's two contentions. PANE's second contention, involving community stability, is a psychological impact upon the community, rather than upon individuals. Accordingly, this psychological impact is a cognizable "secondary" impact that will not trigger an EIS. See supra notes 22-23 and accompanying text. PANE's first contention involving psychological stress on community residents, however, is clearly a primary impact under NEPA because it directly impacts upon humans and therefore should trigger an EIS when significant.

46. The dissent thus claimed that "if NEPA embraces fear and anxieties in one [proceeding], it must in all." 678 F.2d at 241 (emphasis in original).

47. Although the dissent was concerned that all psychological impacts will be considered under NEPA because of the majority's artificial distinction between various psychological impacts, federal agencies most likely will interpret the majority's holding very strictly. The NRC already has indicated that it intends to construe PANE narrowly. In a statement of policy published in the Federal Register, the NRC stated that "in ruling on NEPA contentions alleging psychological stress resulting from Commission-licensed activities, [adjudicatory boards] should assure that all the elements described [in PANE] are present." 47 Fed. Reg. 31,762-763 (July 22, 1982).
II. Psychological Fear: An Inadequate Basis for Excluding Psychological Impacts Under NEPA

Most cases dealing with psychological reactions to federal projects involve allegations of psychological fear. These courts have used two basic rationales against including psychological fear under NEPA: first, that psychological fear is not sufficiently quantifiable; and second, that psychological fear is unsubstantiated.

A. Quantification of Psychological Effects

The argument used most often and most successfully against the cognizability of psychological impacts has been that these effects are not sufficiently quantifiable for the purposes of the Act. The Hanly cases from the Second Circuit were the first to discuss psychological contentions under NEPA. The plaintiffs in Hanly I, who consisted of local city residents, contended that the General Service Administration's EIS inadequately discussed the relevant socioeconomic impacts of locating a correctional facility in New York City. After establishing that the main thrust of the plaintiff's claim involved a "psychological distaste" for having a jail in their neighborhood, the court in Hanly II remarked that it "doubted" whether such psychological impacts are cognizable under NEPA because they defy measurement.

Although the Hanly court ultimately did not rule upon the cognizability of psychological fear under NEPA, other courts have cited Hanly for the

48. See, e.g., Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 231 (7th Cir. 1975) (holding that NEPA does not require federal agencies to assess the fears of neighborhood residents with respect to the influx of low-income tenants into a federally funded housing project); First Nat'l Bank of Chicago v. Richardson, 484 F.2d 1369, 1380 n.13 (7th Cir. 1973) (stating that the "sensibilities" of neighborhood residents are uncognizable under NEPA because those effects are unquantifiable and unsubstantiated); Hanly v. Kliendienst, 471 F.2d 823, 833 (2d Cir. 1972) (stating that it "doubted" whether psychological factors are cognizable under NEPA because they are unmeasurable); Monarch Chemical Works v. Exxon, 466 F. Supp. 639, 657 (D. Neb. 1979) (stating that fears of neighborhood residents need not be addressed under NEPA in determining whether to build a prison); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044, 1078-79 (S.D.N.Y. 1974) (stating that fears are uncognizable under NEPA because they cannot be measured). But see Tierrasanta Community Council v. Richardson, 4 ENVTL. L. REP. 20,309 (S.D. Cal. Nov. 6, 1973) (holding that resident's fears of locating a correctional facility near an elementary school were "so significant" as to warrant consideration under NEPA).


50. 460 F.2d 640 (2d Cir. 1972).
51. 471 F.2d 823 (2d Cir. 1972).
52. Id. at 833.
53. In Hanly II, the court determined that the presence of another jail in the area, and zoning laws permitting the construction of a jail in the neighborhood, were dispositive of the
proposition that psychological effects need not be addressed in an EIS because they are not quantifiable. Judge Wright, however, rejected this argument in discussing the cognizability of psychological health in PANE, stating that "NEPA, moreover, does not authorize federal agencies to deal with intangible factors by ignoring them."

The PANE majority’s view that NEPA requires agencies to consider environmental impacts, even if they are unquantifiable, is strongly supported by the statute. The Act requires federal agencies to “utilize a systematic, interdisciplinary approach” and to “develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with . . . technical considerations.” Furthermore, NEPA’s “hard look” standard requires a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.” The ability to quantify an impact bears only upon the amount of detailed analysis that an agency is required to give it in an EIS. Difficulty of measurement does not per-

issue. The court thus did not need to determine whether psychological impacts are cognizable under NEPA. Id. at 835.


55. 678 F.2d at 229.
57. Id. § 4332(2)(b). See, e.g., Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n, 449 F.2d 1109, 1117-19 (D.C. Cir. 1971) (holding that the AEC (now the NRC) was required by NEPA to consider environmental amenities in the licensing of nuclear power plants). See also Baram, Cost-Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking, 8 Ecology L.Q. 473, 493 (1980) (stating that “opinions concerning EIS’s prepared pursuant to NEPA have adhered to the balancing requirement without insisting on quantification or monetization of environmental values”).

58. See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). The “hard look” standard, as espoused and interpreted by the courts, not only requires that agencies take a hard look at environmental amenities, but also requires that reviewing courts in turn take a hard look at agency decisions in order to insure that the agency has taken a hard look. See Natural Resources Defense Council v. NRC, 685 F.2d 459, 532 (D.C. Cir. 1982).


60. Quantification of environmental impacts is a necessary component of analysis where possible. However, NEPA recognizes in Section 102(2)(B), that certain environmental values and consequences are not susceptible to quantification. It should
mit an agency to place an impact entirely outside its scope of analysis.\textsuperscript{61}

In addition, case law requires agencies to consider other unquantifiable impacts under NEPA. Aesthetics plainly are cognizable under NEPA despite the difficulties in measuring these impacts.\textsuperscript{62} Psychological and aesthetic effects are generally analogous in that they both involve subjective reactions to the perceived environment. Even though an aesthetic reaction to the design of a particular federal project may be unmeasurable, these unquantified reactions nevertheless must be considered by an agency and evaluated in an EIS when significant. In City of New Haven v. Chandler,\textsuperscript{63} the district court, citing the similarity to psychological effects, discussed the quantification of aesthetic effects:

Aesthetic effects . . . are difficult to measure, in contrast to such problems as noise, or the pollution of air or water. But the elusive character of aesthetics does not mean that such concerns are less weighty. \textit{Rather, the impossibility of quantification means, at most, that a finding as to the role of aesthetics need not be supported by statistical evidence}.\textsuperscript{64}

The analogy to aesthetics has not always lead to an expansive view

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be emphasized, however, that although quantification and support of conclusions by empirical data are highly desirable, courts are aware that the depth to which an alternative need be studied must be limited by inherent limitations on the ability to quantify certain environmental information.


\textsuperscript{61} See, e.g., Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 922 (D. Or. 1977) (stating that "[i]t is necessary, however, that the EIS indicate the extent to which environmental effects are uncertain or unknown").


\textsuperscript{63} 446 F. Supp. 925 (D. Conn. 1978).

\textsuperscript{64} \textit{Id.} at 930 (citing Hanley II's reference to psychological effects) (emphasis added).

The CEQ described aesthetic effects in its \textsc{Environmental Quality Report}:

The impact of the destruction of the environment on man's perceptions and aspirations cannot be measured. Yet today citizens are seeking better environments, not only to escape pollution and deterioration but to find their place in the larger community of life . . . . Objections today to offensive sights, odors, and sounds are more widespread than ever. And these mounting objections are an important indicator of what Americans are unwilling to let happen to the world about them.

\textsc{Council on Environmental Quality, Environmental Quality Report} No. 1, at 17 (1970).

Despite the similarities between psychological and aesthetic impacts, the analogy to aesthetics is not perfect. Aesthetic effects are expressly encompassed within NEPA, but psychological effects are not explicitly included as a potential effect. A greater distinction, however, is that aesthetics can be viewed by objective means, but psychological effects are subjective in nature. In other words, the design of a federal project may be evaluated somewhat objectively by asking whether the reasonable person would be offended by that project. Yet assessing the actual level of psychological stress present in an individual requires a subjective test because the relevant issue is the project's impact on the psyche of \textit{the person in question}. 
of NEPA. In *Maryland National Capital Park & Planning Commission v. United States Postal Service*, 65 Judge Leventhal excluded those aesthetic effects that, like psychological factors, are inherently subjective. Although Judge Leventhal acknowledged that NEPA does not require all effects to be quantifiable before they must be considered in an EIS, he nevertheless regarded a particular effect's quantifiability as bearing on the intention of Congress to subject that effect to a detailed EIS. 66 Following Judge Leventhal's reasoning, the dissent in *PANE* concluded that Congress did not intend NEPA to encompass psychological impacts that not only are difficult to measure, but are "also entirely subjective." 67 The dissent thus contended that although an agency must assess the risk of a proposed action, Congress did not intend to force agencies to "assess *how people perceive and react to the risk*." 68

The rationale for excluding subjective perceptions under NEPA, expressed by Judge Leventhal in *Maryland National Capital Park and Planning Commission* and adopted by the dissent in *PANE*, does not rest upon a statutory requirement of quantifiability. Rather, the actual concern is efficiency — that agencies would dilute their limited resources by being forced to evaluate these unmeasurable impacts in a cost-benefit analysis. 69 This concern is legitimate and deserves attention under the Act, but, at the same time, it does not justify excluding psychological impacts from NEPA.

Psychological impacts upon humans can be measured by indirect, yet reliable methods, and therefore are amenable to cost-benefit analysis by an agency. 70 Although "no satisfactory, objective way to meas-

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66. *Id.* at 1038. Judge Leventhal stated: "difficulties [in measurement] have a bearing on the intention of Congress, and whether it contemplated, for example, a requirement of a detailed [EIS]." *Id.*
67. 678 F.2d at 241.
68. *Id.* at 239 (emphasis in original).
70. Furthermore, NEPA's legislative history demonstrates an intention on the part of the drafters to include subjective perceptions — including psychological factors — in an agency's cost-benefit analysis despite difficulties of measurement. A special report entitled "A National Policy for the Environment," submitted to the Senate Committee on Interior and Insular Affairs, stated that "ways must be found to add cost-benefit analysis to non-quantifiable, subjective values for environmental amenities." The report defined those amenities as "recreational, esthetic, [and] psyche." 115 CONG. REC. 29,082 (1969) (emphasis added).

The NEPA regulations further state that "the [EIS] shall, when a cost benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values and amenities." 40 C.F.R. § 1502.23 (1981).
ure psychological stress" may exist presently, scientists can measure behavioral responses, and biochemical and physiological reactions to stress. These objective measures can serve as functional indicators, and even predictors, of stress in groups of residents. Furthermore, although self-report measures may be inherently subjective "due to individual differences in how one appraises stress conditions," the development of standardized questionnaires greatly facilitates the use of psychological impacts in a cost-benefit analysis. Because psychological impacts are sufficiently quantifiable for the purposes of a cost-benefit analysis, their consideration will not overburden the agency.

B. Unsubstantiated Fears

Other courts have excluded psychological fear from analysis under NEPA because it is unsubstantiated. These cases have paralleled the dissent's reasoning that although NEPA should be concerned with mitigating risks to health and safety, considering and mitigating fears of those risks is too far removed from the purposes of the Act. Thus, in First National Bank of Chicago v. Richardson, the Seventh Circuit stated that even if psychological fears were quantifiable, the court "questioned" whether psychological fears could be cognizable without clear proof that the plaintiff's fears are substantiated.

Most psychological fear cases that have excluded fear because it is

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71. See C. Bartol, supra note 42, at 68-69. The American Psychological Association (APA), in its amicus curiae brief submitted to the court of appeals in support of PANE, attempted to demonstrate the quantifiability of psychological impacts. The brief outlined four basic means by which to measure these subjective impacts:

[F]irst, self-report measures which involve direct questioning of subjects about their feelings, beliefs, opinions, and symptoms; second, behavioral measures which either record coping mechanisms or measure some ability or skill during or after exposure to the stressful event; third psycho-physiological assessments of the responses by one or more organ systems (e.g., cardiovascular, respiratory); and finally, biochemical measures of endocrine response to stressful conditions.


In addition, PANE submitted preliminary plans for the measurement of the residents' psychological stress to the Atomic Safety Licensing Board, see supra note 8, from which the Board concluded: "The intervenors have, in our view, established a sufficient prehearing basis for the premise that the effects are measurable." 11 N.R.C. 297, 302 n.8 (1980).

72. See C. Bartol, supra note 42, at 69.

73. Id. In addition, the use of standardized questionnaires in the place of individual interviews would minimize the cost of assessing psychological effects.

74. See supra note 48.

75. 484 F.2d 1369 (7th Cir. 1973).

76. Id. at 1380 n.13.
unsubstantiated arose in the context of evaluating criminal activity, or the propensity of particular individuals to commit crime, where a federal project had brought a certain class of persons into a neighborhood. In all the psychological fear cases, the plaintiffs alleged that groups of persons brought in by the federal project would alter the "social fabric" of the neighborhood, reduce property values, and increase criminal activity. In stating that these fears were unsubstantiated, the courts discussed psychological fear only in connection with the impact upon the neighborhood's safety.

These cases excluded the use of fear as an evidentiary tool. In other words, fear was being used to predict the significance of criminal activity in an area. In *Trinity Episcopal School Corp. v. Romney,* for example, the court considered whether residents' fears could be used to demonstrate an impact upon community stability caused by the propensity of certain individuals to commit anti-social acts. The court stated, "fears . . . are [not] objective criteria of community stability and as such do not fall within the ambit of a NEPA study."

The courts are correct in excluding fear from the NEPA process when that fear is used to demonstrate the significance of another effect. Fear does not necessarily correlate with the significance of an alleged risk and therefore is not relevant in assessing the risk. This does not mean, however, that psychological fear should be excluded from NEPA as an effect in itself. The Act was designed to protect against significant adverse impacts upon the human environment, and federal agencies therefore should consider psychological impacts regardless of whether that reaction is substantiated by a significant risk.

First, fears may prove justified and rational, despite an agency's determination that an alleged risk is insignificant for the purpose of the Act. When a particular risk is deemed improbable, an agency's obligation under NEPA to consider that risk is reduced accordingly. Thus, the "insignificance" of a risk may only be a consequence of a finding by that agency that the risk is highly remote. Before the TMI accident, the NRC did not assess the consequences of major nuclear accidents because the Commission determined that the probability of such acci-

78. *Id.* at 1079 (emphasis added).
79. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Fed. R. Evid.* 401.
80. *See, e.g., Concerned About Trident v. Rumsfeld,* 555 F.2d 817, 830 (D.C. Cir. 1976) (stating that an agency need not "'foresee the unforeseeable' ")
dents was too remote to require detailed analysis. Yet, in the aftermath of the TMI accident, risk assessment for nuclear power plants has been widely criticized as inadequate. Under these circumstances, unsubstantiated fears may nevertheless be rational under NEPA.

More important, when a psychological reaction to a federal project is unjustified in terms of the actual risk that is created, these irrationally based fears nevertheless should be considered under NEPA because the psychological impact may be significant regardless of the actual risk involved. Because one of NEPA’s primary purposes is to restore public confidence in federal actions, the sometimes irrational reactions of individuals must be considered. The majority implicitly adhered to this notion by holding that psychological impacts that affect psychological health must be considered, without discussing whether those psychological effects are rational. Thus, if a psychological reaction to a risk created by a federal project causes significant psychological harm, then NEPA should encompass that impact, irrespective of whether the risk has been found insignificant, or whether the fear is deemed irrational.

Despite these concerns over subjectivity, unquantifiability, and unsubstantiability, some courts have required an EIS to evaluate the psychological impacts of a federal project. Most notably, in Tierrasanta


The Kemeny Commission, which was established to study the effects of the TMI accident, reported: “The NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants.” REPORT OF THE PRESIDENT’S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR A CHANGE: THE LEGACY OF TMI 56 (1979).

83. Senator Jackson stated, in discussing NEPA in Congress, that “[a] primary purpose of the bill is to restore public confidence in the Federal Government’s capacity to achieve important public purposes and objectives.” 115 CONG. REC. 19,010 (1969). Although fulfilling this purpose may entail taking into consideration the subjective perceptions of residents, which may be irrational, this purpose has been regarded as necessary:

Some have asserted that the events at TMI did not at all call into question the inherent safety of the technology, arguing that this worst case resulted only in low, safe levels of public radiation exposure. No matter how true this may be, to make such an assertion simply ignores the practical fact that people were worried. Moreover, it exemplifies the need for a better understanding of what the public thinks and for a better effort to increase its level of comprehension.

Community Council v. Richardson, the court held that the resident's fears of a correctional facility that was to be built near an elementary school were "so significant" as to warrant the preparation of an EIS under NEPA. Other courts have considered psychological impacts in a number of cases dealing with man's psychological reactions to his surroundings. In Chelsea Neighborhood Association v. United States Postal Service, for example, the Second Circuit held that the psychological reactions of tenants to living in a high-rise apartment atop a postal facility were properly considered under NEPA. In addition, NEPA has been applied to such diverse psychological effects as the "psychic irritation" of commuting, the "dissatisfactions" arising from nonresident ownership, and the psychological harm attending relocation. Furthermore, a federal agency recently has announced its plans to prepare an EIS in order to consider the "physical and psychological separation of a minority neighborhood."

C. A Qualification

In espousing an approach that includes all psychological impacts under NEPA, one caveat should be emphasized: Federal agencies must be cautious in applying NEPA in situations where the fundamental rights of another group of persons are involved. NEPA requires that implementation of its goals and policies should be "consistent with other essential considerations of national policy." NEPA's legislative history, in discussing the values that underly a national environmental policy, emphasized that "if it is ethical . . . to want to obtain the best that life has to offer without prejudicing equal opportunities for others, then the cornerstone of environmental policy is ethical." NEPA plainly was not intended to be used as an exclusionary zoning tool. Thus, when a significant psychological harm is manifested in a group of residents because of their reaction to other persons, federal agencies must carefully weigh that harm against the risk of affecting the fundamental rights of the other group of persons.

84. 4 ENVTL. L. REP. 20,309 (S.D. Cal. Nov. 6, 1973).
85. Id. at 20,311.
86. 516 F.2d 378, 388 (2d Cir. 1975).
94. For a discussion of the use of NEPA in relation to the civil rights of prospective
The psychological effects alleged in all of the psychological fear cases were caused by the establishment of jails within a city, the influx of low-income workers to staff federal projects, and the influx of low-income tenants into federally funded housing projects. In all these cases, the risks were allegedly caused by the influx of persons into a community. In *Maryland National Capital Park Planning Commission v. Postal Service*, the court explicitly stated that effects caused by the presence of an undesirable group of persons do not fall within the scope of NEPA:

A secondary, and related factor was the prospect of an influx of low income workers into the County. Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on “environment,” if the term be stretched to its maximum. We think this type of effect can not fairly be projected as having been within the contemplation of Congress.

The influence of this factor in determining the outcome in these fear cases is unquestionably strong. Moreover, commentators support the exclusion of psychological impacts based upon this policy consideration. Yet this policy consideration does not support the exclusion of fear or psychological impacts in other circumstances. Thus, to the extent that the fear cases were decided on the basis of an influx of persons, they do not conflict with holding psychological impacts cognizable under NEPA.

### III. Psychological Impacts in the NEPA Process

NEPA serves often conflicting goals. Although the Act is concerned with protecting human well-being, Congress did not intend to do so at any cost. The subjective nature of psychological impacts,
which causes inherent difficulties in measurement, can potentially worsen the long delays and burdensome costs already present in preparing an EIS.99 Furthermore, the inclusion of psychological effects can affect not only the entire nuclear industry, but potentially all areas where NEPA is applicable. Although efficiency is a factor in applying NEPA, this consideration should not exclude psychological effects from the NEPA process.

The NEPA regulations100 offer a number of rules and procedures designed to lessen the burdens placed upon agencies in preparing an EIS. These regulations can be used to limit the amount of detailed analysis that is required of an agency, as well as to preclude the consideration of unwarranted psychological claims under NEPA in the future. For example, the 1979 regulations introduced a new procedure called “scoping”101 which should enhance an agency’s ability to deal with psychological impacts. The scoping process allows federal agencies to prepare for an EIS102 by identifying, limiting in scope, and even excluding potential impacts of a federal project. The agency thus will not be forced to devote an overabundance of resources to evaluating psychological claims.

In addition, NEPA mandates that only “significant” effects trigger an EIS.103 Accordingly, “mere dissatisfactions arising from social opinions, economic concerns, or political disagreements with agency policies”104 will not trigger an EIS when they are found insignificant. Finally, when evaluating “significant” psychological impacts, NEPA’s “hard look” standard limits an agency’s analysis to a “reasonably thorough” discussion of the environmental consequences.105 Thus, the unavailability of data will reduce the agency’s obligation to evaluate the impact.

Subjective perceptions play an integral role in NEPA’s environmental policy,106 and psychological impacts have been recognized as a part of that policy. Accordingly, the most efficient method for dealing

100. The 1979 NEPA regulations were promulgated by the CEQ with three goals in mind: reducing paperwork, lessening costs and delays, and facilitating environmentally sound decisions. 40 C.F.R. §§ 1500.1-1500.5(1982).
101. Id. § 1501.7.
102. The scoping process, however, cannot be used in determining whether to prepare an SEIS. The regulations provide that agencies shall prepare an SEIS in the same manner as an EIS “exclusive of scoping.” Id. § 1502.9(c)(4).
104. 678 F.2d at 230.
105. See supra note 59 and accompanying text.
106. In discussing NEPA in the Congress, Senator Jackson emphasized the subjective nature of NEPA’s policy:
with frivolous claims and wasted resources, that will also insure that NEPA's goals are not frustrated, is through the Act's process. Although additional costs are associated with broadening NEPA's scope to include psychological reactions, NEPA's procedural requirements can be used to minimize these costs, while insuring that significant psychological harms are considered and evaluated by the agency in accordance with NEPA's purpose to "encourage productive and enjoyable harmony between man and his environment." 107

IV. Conclusion

By limiting its holding to psychological health under NEPA, the majority attempted to accommodate the "unique" circumstances surrounding the Three Mile Island nuclear accident without creating havoc in the form of unwarranted psychological claims in the future. The majority's holding, however, does not facilitate a clear understanding of the proper role of psychological impacts in general under NEPA. 108 Instead, the court's expressed "severity" standard is very likely to prove unworkable in the Act's process. 109

Psychological impacts should be encompassed within the scope of NEPA. Significant psychological effects would be protected under the Act, while insignificant anxieties and fears would be excluded from detailed analysis by federal agencies. This approach will help "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." 110

Recent years have witnessed a growing public concern for the quality of the environment and the manner in which it is managed. Most often it is seen in the form of citizen indignation and protest over the [government's] actions. Examples of the rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation may be seen in the federally sponsored or aided construction activities such as highways, airports, and other public works projects which proceed without reference to the desires and aspirations of local people.

115 Cong. Rec. 19,010 (1969). See also Note, The Psychology of the Designed Environment: NEPA and Public Housing, 60 Iowa L. Rev. 674, 683 (1975) (stating that the "environment should be seen as including the totality of inputs — both natural and man made — perceived by the individual") (emphasis added).


108. See Township of Lower Alloways Creek v. Public Service Electric and Gas Co., 687 F.2d 732, 741 n.20 (3rd Cir. 1982) (citing PANE for the proposition that psychological impacts must be considered in an EIS "under some circumstances").

109. See supra notes 42-48 and accompanying text.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. DEPARTMENT OF TRANSPORTATION
— JUDICIAL REVIEW OF RESCISSION OF AGENCY ACTION UNDER THE ARBITRARY AND CAPRICIOUS STANDARD

In State Farm Mutual Automobile Insurance Company v. Department of Transportation, the United States Court of Appeals for the District of Columbia Circuit held the National Highway Traffic Safety Administration's (NHTSA) rescission of the passive restraint requirement of Federal motor vehicle safety standard 208 (Standard 208) to be arbitrary and capricious. The court concluded that a broad scope of review was necessary because the rescission reversed a long-standing agency policy promoting passive restraints, and therefore rescission would be unjustified unless supported by a rational explanation and a reasoned, good faith effort to consider alternative ways of advancing the agency's purpose. Although the State Farm court followed a questionable route in reaching this decision, which included heavy reliance on postenactment legislative history, the case suggests a workable test which may be helpful in future cases where the rescission of an agency rule is at issue.

This case presents the latest development in a long-standing controversy over the means by which highway safety shall be promoted.


4. 680 F.2d at 230.

5. Id. at 229-30. The court remanded the case to NHTSA for further assessment, directing the agency to prepare a schedule for implementing Modified Standard 208 unless it could find nonarbitrary reasons to justify suspension or delay. Id. at 240-41. For subsequent action in the case, see infra notes 33-40 and accompanying text.

6. See infra notes 66-71 and accompanying text.

7. See infra notes 81-88 and accompanying text.
Because the central issue in this case — whether the rescission was arbitrary and capricious — involves past agency responses to that controversy, a review of the background to Standard 208 is necessary before analyzing the State Farm decision.

I. BACKGROUND

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act8 (the Safety Act) for the purpose of “reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents.”9 In passing this act, Congress intended safety to be the overriding consideration.10 The Safety Act directs that the Secretary of Transportation or his delegate “shall establish by order appropriate Federal motor vehicle safety standards [that] shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.”11

Although safety is the most important consideration, in requiring that the standards be practicable, the agency “must of necessity consider many variables, and make ‘trade-offs’ between various desiderata in deciding upon a particular standard for auto safety.”12 These factors include collateral risks posed by the standard, public reception, cost,
and prevailing economic situations, any of which could affect the success of the proposed standard. The Safety Act further requires the Secretary, in developing these standards, to consider relevant available motor vehicle safety data, whether the proposed standard is "reasonable, practicable and appropriate" for the particular type of motor vehicle for which it is prescribed, and the extent to which the standard contributes to carrying out the purpose of the Safety Act.

A. The Administrative History of Standard 208

Pursuant to the above guidelines, in 1967 the Department of Transportation (DOT) issued the original Standard 208 requiring seatbelts in all cars. This regulation was in response to congressional concern with injuries resulting from the "second collision," or the collision of the passenger with the interior of the automobile. By 1969, DOT concluded that the level of seatbelt usage was too low, and issued an advance notice of proposed rulemaking to consider the development and installation of the so-called "passive restraint" systems. Passive restraints, also called automatic restraints, are defined as crash protection devices in an automobile "by means that require no action by vehicle occupants" to be effective. These include air bags, which inflate upon impact to cushion the occupant, and passive seatbelts, which automatically enclose vehicle occupants when they enter the vehicle and close the door. The passive restraint can either supplement (in the case of air bags) or replace (in the case of passive seatbelts) the manual seatbelts presently installed in cars. The latter are called "active restraints" because they require the user to buckle them in order to be effective. In 1970 DOT formally revised Standard 208 to require pas-

13. See, e.g., Pacific Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1345-47 (D.C. Cir. 1979)(finding that under the Safety Act public reaction and collateral dangers must be evaluated in order to determine practicability).
15. 49 C.F.R. § 571.21 (1967).
16. S. REP. No. 1301, 89th Cong., 2d Sess. 3 (1966): "The 'second collision' — the impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc. — has been largely neglected. The committee was greatly impressed by the critical distinction between the causes of the accident itself and causes of the resulting death or injury."
17. Advance Notice of Proposed Rulemaking, Federal Highway Administration, 34 Fed. Reg. 11148 (1969)(to be codified at 49 C.F.R. ch. III)(proposed July 2, 1969). Entitled "Inflatable Occupant Restraint Systems," this Notice suggested requiring the installation of passive restraints and discussed the advantages of air bags. Id. It also suggested that other forms of passive restraints, which had not yet been developed to the stage where they would provide compliance with the standard, may eventually satisfy the requirement. Id.
NHTSA was established by Congress in the Highway Safety Act of 1970, and was delegated authority under the Safety Act, including the authority to administer the passive restraint program. From NHTSA’s inception until 1976, the decisions concerning passive restraints rested with the Administrator of NHTSA. In March 1976, however, Secretary of Transportation William Coleman assumed ultimate control over the standard because of the controversial nature of the rule. Coleman then suspended the requirement in 1977, substituting instead a large-scale test to determine the effectiveness of passive restraints and an educational program to increase public awareness and to promote eventual acceptance of passive restraints. But his successor, Brock Adams, reopened the rulemaking four months later because he was concerned that the suspension was not consistent with the mandate of the Safety Act. Determining that a test and an educational program need not precede implementation, he issued a new passive restraint rule, Modified Standard 208. Modified Standard 208 provided the same requirements as the earlier standard, but set out a new phase-in schedule (based on vehicle size) for its implementation. The new schedule was in effect over three years when current DOT decision-makers assumed their duties in January, 1981.

22. 41 Fed. Reg. 24,070 (1976) (“It is in the context of this controversy that I must make a decision as to the future of passive restraints.”).
I am concerned that this recent decision by the Department [to suspend the passive restraint requirement] may not be entirely consistent with the statutory mandate of the National Traffic and Motor Vehicle Safety Act . . . to issue standards to reduce highway deaths and injuries . . . . I cannot agree that consumers would respond to passive restraints in the same fashion as the ignition-interlock. The ignition-interlock was a “forced-action” system that required the vehicle occupant to operate the seat belts each time the car was started . . . . In direct contrast, the passive restraint system requires no action to be effective. In the case of inflatable-cushion-type restraints, it is not even visible to the occupant.
Id. at 15,935-36.
B. Rescission of Modified Standard 208

In April 1981, NHTSA issued a notice of proposed rulemaking suggesting the rule's rescission, citing as major reasons the substantial economic impact of passive restraints on manufacturer and consumer costs, as well as the economic difficulties faced by the automobile industry.\(^\text{28}\) NHTSA rescinded the passive restraint rule in October 1981, stating as its reason the "uncertainty about the public acceptability and probable usage rate of the type of automatic restraint which the car manufacturers planned to make available to most new car buyers."\(^\text{29}\) NHTSA found that most car manufacturers would use "detachable" passive belts which were functionally equivalent to the currently used "active" belts and hence would perpetuate the low usage rates associated with active restraints.\(^\text{30}\) Therefore, NHTSA believed that enforcing Modified Standard 208 would be an exercise in futility because no appreciable positive result could be predicted reliably.\(^\text{31}\) Also, NHTSA decided that it should not amend the standard to preclude detachable passive belts for reasons of cost, equity, public receptivity, and safety.\(^\text{32}\)

After notice of the rescission, State Farm Mutual Automobile Insurance Company brought an action for judicial review, arguing that statistical evidence had demonstrated the safety\(^\text{33}\) and cost effectiveness\(^\text{34}\) of both air bags and passive seatbelts. State Farm argued that if NHTSA found detachable passive belts unable to produce the protection desired by passive restraints, then NHTSA erred in rescinding the rule rather than amending it to require nondetachable passive belts.\(^\text{35}\) In reaching its decision, the court described the agency's rescission as "a paradigm of arbitrary and capricious agency action because the NHTSA drew conclusions that are unsupported by evidence in the rec-

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\(^{28}\) 46 Fed. Reg. 21,205 (1981) (to be codified at 49 C.F.R. § 571.208)(proposed April 9, 1981). Rescission of the passive restraint requirement was one of three alternatives considered by the Department of Transportation. Another was to reverse the sequence of compliance so that small cars would be required to comply first, then mid-sized cars, then large cars. The third alternative would have required all cars to comply on March 1, 1983. The latter two alternatives would also have included an amendment that passive restraints not be required in the front center seat. \textit{Id.} at 21,207. NHTSA also simultaneously published an order postponing the implementation date for large cars until the 1983 model year. 49 C.F.R. § 571.208, \textit{amended by} 46 Fed. Reg. 21,172 (1981).


\(^{31}\) \textit{Id.}

\(^{32}\) \textit{Id.} at 53,423-24.

\(^{33}\) Brief for Petitioner State Farm at 17-24.

\(^{34}\) \textit{Id.} at 39-42.

\(^{35}\) \textit{Id.} at 48-49.
ord, [and] . . . thus failed to demonstrate the reasoned decision-making that is the essence of lawful administrative action."  

NHTSA's response on remand suggested several long-term studies designed to gather additional evidence supporting its rescission. Upon receiving this answer, the court, sua sponte, ordered Modified Standard 208 to take effect on September 1, 1983, giving NHTSA one month in which to reply should it find a sufficient basis for not complying with the court's order. The Supreme Court granted a petition for writ of certiorari for argument during the 1982 term, and the Court of Appeals suspended its order to reinstate the standard pending review by the Supreme Court.

II. ANALYSIS

The court found the "most troublesome" issue to be determining the intensity with which it should examine the record. Although the parties agreed that the appropriate standard of review was the "arbitrary and capricious" standard under section 706(2)(A) of the Administrative Procedure Act (APA), the court observed that this standard was a coat of many colors, encompassing "intensive as well as deferen-

36. 680 F.2d at 208-09.
37. Notice of Filing submitted to the Court of Appeals on July 1, 1982 to comply with the court's deadline on remand. Attached to this notice was a notice of proposed rulemaking and appendix that NHTSA intended to publish in the Federal Register, but which was no longer appropriate after the court reinstated Modified Standard 208 in response to this notice. In addition to requesting comments from interested parties, this notice and appendix proposed several long-term studies, to take from one and a half to two years to complete. These studies suggested controlled experiments under neutral, unbiased circumstances. The studies were designed to provide data gathered through direct observation of users who would be representative of the national population of motorists, passive belts representative of the various belt designs that would be likely to be offered to the public, and cars representative of the various sizes available to the public. App. at 2-4. The proposed formats included a private study with a large number of sales to a limited geographical area, a corporate fleet study, and a rental car study. Id. at 5-11.
38. Order and Memorandum of the Court of Appeals, August 4, 1982, State Farm.
40. Order and Memorandum of the Court of Appeals, November 19, 1982, State Farm.
41. 680 F.2d at 218.
42. Id. at 220. The "arbitrary and capricious" standard is found at 5 U.S.C. § 706(2)(A)(1976), and states:

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

(2) hold unlawful and set aside conclusions found to be —

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

In making the foregoing determinations, the court shall review the whole record or
tial judicial scrutiny depending in part on 'the nature of the particular problem faced by the agency.' Generally deferential to an agency's decision, the arbitrary and capricious standard has been vaguely de-

those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 337-38 (D.C. Cir. 1968), held that the arbitrary and capricious standard was the correct test to apply when reviewing challenges to a rule under the Safety Act. Other decisions have found the arbitrary and capricious standard applicable to informal agency rulemaking unless another standard is specified by the agency's mandate, such as the substantial evidence standard, used to review formal agency action or other action that is "on the record of an agency hearing provided by statute," 5 U.S.C. 706(2)(E) (1976). See, e.g., Camp v. Pitts, 411 U.S. 138, 141-42 (1973) (finding the arbitrary and capricious standard appropriate for reviewing informal agency action); Pacific Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1343 (D.C. Cir. 1979) (reviewing Modified Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1343 (D.C. Cir. 1979) to determine whether it was "consistent with its statutory mandate, rational, and not arbitrary"); Ethyl Corp. v. EPA, 541 F.2d 1, 33-34 (1976) (applying arbitrary and capricious standard to review of informal rulemaking), cert. denied, 426 U.S. 941 (1976). See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.00-1 (1982 Supp.) (discussing the applicability of the arbitrary and capricious standard to informal agency action); Verkuil, Judicial Review of Informal Rulemaking, 60 VA. L. REV. 185, 206 (1974) ("It has been widely assumed that section 706(2)(A), which provides that the reviewing court should set aside action which is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' is applicable to informal rulemaking."). But see Assure Competitive Transp., Inc. v. United States, 635 F.2d 1301, 1307 (7th Cir. 1980) (finding the arbitrary and capricious standard the correct test for reviewing a policy statement, but the substantial evidence test the proper one for review of a rule); Chrysler Corp. v. Dep't of Transp., 472 F.2d 659, 669 (6th Cir. 1972) (claiming that the substantial evidence test applies to review of the original Standard 208, an informal agency rule); Note, Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard, 84 YALE L. J. 1750, 1756-58 (1975) (stating that the Supreme Court has suggested in several opinions, in dicta, that the substantial evidence standard is applicable to review of informal rulemaking).

Most courts, however, will require that the substantial evidence standard be used for cases involving review of formal rulemaking, or where the agency's statute requires a hearing. See, e.g., Boating Industry Ass'n v. Boyd, 409 F.2d 408, 411 (7th Cir. 1969); California Citizens Band Ass'n v. United States, 375 F.2d 43, 53 (9th Cir. 1967) cert. denied, 389 U.S. 844 (1967).

43. 680 F.2d at 219 (quoting Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979)). This standard has been described as a "multifaceted" scope of review. E.g., National Resources Defense Council v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979) ("In applying the 'arbitrary and capricious' standard, it is well to keep in mind the considerations that led Congress to commit to the courts a 'multifaceted review function.'") (quoting Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)); Weyerhaeuser Co., v. Costle, 590 F.2d 1011, 1024 (D.C. Cir. 1978) ("In its totality, at all events, [the arbitrary and capricious standard] is indicative of a multifaceted review function committed to the courts."); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974) ("Judicial review of inherently legislative decisions of this sort is obviously an undertaking of different dimensions.").

Petitioner in State Farm requested that a broad scope of review be applied, that is, an "intensive and exacting scrutiny," while respondent contended that the court should exercise "a high degree of deference to the agency's determination," or, a much narrower scope. 680 F.2d at 220 (quoting Brief of Petitioner State Farm at 21, and Brief of Respondent NHTSA at 19).
scribed by reviewing courts as requiring a finding of "reasonableness" or a "rational basis" for the agency action. 44

As the court in State Farm noted, a reviewing court is not permitted to substitute its judgment for that of the agency. 45 The court is not allowed to examine the record to determine how it would have acted had it been in the agency's place; rather, the court is restricted to deciding whether the agency could reasonably have taken the action in question. 46 The State Farm court recognized that the line between substituting judgment and simply judging whether agency action is ra-

44. Bowman Transp., Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 290 (1974) ("[W]e can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more."); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) ("The Board's determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law."); Mississippi Valley Barge Co. v. United States, 292 U.S. 282, 286-87 (1934) ("The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (stating that the arbitrary and capricious standard of review "requires affirmation if a rational basis exists for the agency's decision."); cert. denied, 426 U.S. 941 (1976). But see Mobil Oil v. Dept of Energy, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979), interpreting this standard as: The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather . . . the inquiry is "whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body." Id. (quoting Texaco, Inc. v. FEA, 531 F.2d 1071, 1076-77 (Emer. Ct. App. 1976), cert. denied, 426 U.S. 941 (1976). Although purportedly rejecting the "rational basis" test, the distinction in Mobil Oil is actually only semantic, because previous courts, including the Supreme Court, have interpreted the rational basis test as including an examination of whether the relevant factors were considered and whether the agency committed a clear error of judgment. E.g., Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 401, 407 (1971); Texaco, Inc. v. FEA, 531 F.2d 1071, 1076-77 (Temp. Emer. Ct. App. 1976), cert. denied, 426 U.S. 941 (1976). See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 182 (1965) ("Once a court decides, however, that the action has been and can be reasonably attributed to an application of valid factors of choice, it will normally not interfere with an administrative choice.").

45. See, e.g., E.L. duPont de Nemours & Co. v. Collins, 432 U.S. 46, 57 (1977) ("In rejecting the conclusion of the [SEC, with regard to their approval of the merger of a closed-end investment company into an affiliate company] the Court of Appeals substituted its own judgment for that of the agency charged by Congress with that responsibility.") (reversing Collins v. SEC, 532 F.2d 584 (8th Cir. 1976)). See also FCC v. Schreiber, 381 U.S. 279, 290-91 (1965) ("Thus, in providing for judicial review of administrative procedural rulemaking, Congress has not empowered district courts to substitute their judgment for that of the agency.").

46. See, e.g., National Broadcasting Co. v. FCC, 516 F.2d 1101, 1122 (D.C. Cir. 1974) ("If an agency has 'genuinely engaged in reasoned decision-making . . . the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards.") (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)).
tional or arbitrary is sometimes a fine one;\textsuperscript{47} nevertheless, the court proceeded with a holding that undoubtedly will be criticized as a substitution of its judgment for that of NHTSA. As the following analysis will show, however, such criticism is more likely to arise because of the manner in which the court formulated its conclusion and not because of the result itself.

The court approached its formulation of an appropriate standard of review in two stages. The first focused on the kind of agency action involved,\textsuperscript{48} and the second on that action’s relationship to the agency’s statutory mandate.\textsuperscript{49}

A. Rescission: Action or Inaction?

As a first step in its analysis, the court distinguished review of agency inaction (which is subject to very deferential review) from review of agency action (which is more intrusive) and concluded that this case — rescission of agency action — did not fit neatly into either category and presented a matter of first impression.\textsuperscript{50} Although the court observed that at first glance the rescission more closely resembled agency inaction,\textsuperscript{51} it concluded that its review should be “thorough, probing, and in-depth,” approximating the more intrusive review normally applied to agency action.\textsuperscript{52}

Application of this distinction to \textit{State Farm} can be justified for two reasons. First, deferential review of agency inaction avoids judicially imposed rulemaking.\textsuperscript{53} Because a decision to promulgate a rule is a legislative function, which Congress has delegated to the agency and not to the court, a decision by the court to force an agency to promulgate specific rules might frustrate the regulatory scheme established by Congress.\textsuperscript{54} Without clear error on the part of the agency, courts

\begin{itemize}
    \item \textsuperscript{47} 680 F.2d at 229.
    \item \textsuperscript{48} \textit{See infra} notes 50-58 and accompanying text.
    \item \textsuperscript{49} \textit{See infra} notes 59-64 and accompanying text.
    \item \textsuperscript{50} 680 F.2d at 218-19.
    \item \textsuperscript{51} \textit{Id.} at 218.
    \item \textsuperscript{52} \textit{Id.} at 228.
    \item \textsuperscript{53} \textit{See, e.g.,} WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981) ("It is only in the rarest and most compelling circumstances that this court has acted to overturn an agency judgment not to institute rulemaking."); Rhode Island Television Corp. v. FCC, 320 F.2d 762, 766 (D.C. Cir. 1963) ("Administrative rulemaking does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules.").
    \item \textsuperscript{54} \textit{See SEC v. Chenery Corp.,} 332 U.S. 194, 196 (1947)("[If the administrative agency’s] grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.").
\end{itemize}
naturally will be reluctant to follow this course. Instead, when a court finds an agency's inaction to be arbitrary and capricious, the proper remedy is to remand the case to the agency to conduct further rulemaking analysis.\textsuperscript{55}

Although the remedy in \textit{State Farm} was an order directing NHTSA to follow a specific course of action, the court did not substitute its own judgment by formulating an appropriate remedy as it might have in a case of agency inaction. In \textit{State Farm}, the remedy was provided for the court in the form of a rule that NHTSA itself had spent years formulating. The court did not substitute its judgment for that of the agency; rather, it simply refused to allow the agency to rescind one of its own remedies, absent valid reasons.

A second reason for limiting the scope of review when agency inaction is involved is the extent of the record available to the reviewing court. In cases where a rule has been promulgated, a detailed record usually has been developed; if no agency action is involved, little or no record may exist.\textsuperscript{56} In this situation, for a court to provide the relief most desired by the petitioner, i.e., the implementation of a rule, the court essentially would have to develop evidence on its own. This plainly is not an objective of judicial review, as judges have neither the time nor the expertise required to make such determinations.\textsuperscript{57}

By contrast, a very extensive record was available for the \textit{State Farm} court to consider because NHTSA had collected, by its own admission, "an enormous record compiled over the past decade on automatic restraints."\textsuperscript{58} This allowed the court to conduct an in-depth analysis of the problem without either undertaking studies of its own or speculating about the advantages of passive restraints.

\textsuperscript{55} Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency action, is ordinarily the proper course. NLRB v. Food Store Employees Union, Local 377, 417 U.S. 1, 10 (1974).

\textsuperscript{56} See WWHT, Inc. v. FCC, 656 F.2d 807, 818 n. 19 (D.C. Cir. 1981) ("[I]n cases where the agency has decided against promulgation of a rule, the scope of review is very limited because the 'record' will likely be a simple statement of reasons for nonadoption.") (emphasis in original).

\textsuperscript{57} See, e.g., Bazelon, \textit{Coping with Technology through the Legal Process}, 62 \textit{Cornell L. Rev.} 817, 822 (1977)("[W]here administrative decisions on scientific issues are concerned, it makes no sense to rely upon the court to evaluate the agency's scientific and technological determinations.").

B. Arbitrary and Capricious Action or Action Exceeding Delegated Authority?

After determining that rescission of Modified Standard 208 resembled agency action more closely than agency inaction, and thus required correspondingly less deferential review, the court redefined the issue as involving not just arbitrary and capricious but also ultra vires agency action: "Even where there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, sudden and profound alterations in an agency's policy constitute 'danger signals' that the will of Congress is being ignored." Thus, in determining "the scrutiny with which the arbitrary and capricious standard should be applied" to the rescission, the court looked to "the extent to which NHTSA's action may be inconsistent with the congressional purpose behind the Safety Act." Although *State Farm* illustrates the intersection of these limits on agency action, the court turned to an improper source to define the scope of authorized agency action and ultimately articulated a test which is ill founded and which appears unnecessarily intrusive.

Although embodied in different provisions of the APA, the categories of "arbitrary and capricious" agency action and action exceeding an agency's authority are not mutually exclusive. First, the agency conceivably could take action that is at once unreasonable and outside its bailiwick: for example, an attempt by NHTSA to encourage birth control to stem population growth and thus to reduce traffic congestion would be both unreasonable and ultra vires. Indeed, from an ex post perspective, any unauthorized agency action could be considered unreasonable: what legitimate purpose could be served by producing a rule that will be nullified on review?

Second, and more important in *State Farm*, the agency's mandate as expressed in its enabling legislation by hypothesis carries affirmative as well as limiting directives. Hence agency action, such as rescinding a regulation, could so inhibit the agency's effectiveness that it no longer is carrying out its appointed mission. Because the reasonableness of

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59. 680 F.2d at 221.
60. Id. at 222.
61. Although § 706(2)(A) provides that agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," § 706(2)(C) provides that agency action may be set aside if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."
62. Section 706(1) provides that "[t]he reviewing court shall — (1) compel agency action unlawfully withheld or unreasonably delayed." See, e.g., Nader v. FCC, 520 F.2d 182, 187 (D.C. Cir. 1975) (finding that the FCC had unreasonably delayed action on its investigation of IT&T's telephone rate increases).
agency action is determined in part by reference to the agency's statutory mandate, such a consequence also would be arbitrary.

In short, a reasonable, nonarbitrary agency is one that does what it is told by Congress, whether creatively and aggressively or unimaginatively and perfunctorily. These matters yield linedrawing questions: First, an agency may advance and it may retreat, but it may not wage someone else's war nor may it surrender. The boundary in each case must be the statute, the interpretation of which our governmental system in the first instance assigns to the courts.63 Second, an agency may take steps that are ill advised, mean spirited, or even stupid, yet these actions will be legal if they meet some threshold of reasonableness.64 Within the loose confines provided by the APA, that threshold also is to be determined by the court.

C. Problems in the Court's Scope-of-Authority Analysis

Although a central issue in State Farm is whether the rescission was within the scope of NHTSA's delegated authority, the court's analysis is problematic. First, the court's description of the purpose of its inquiry — as aiding its determination of the level of "scrutiny with which to apply the arbitrary and capricious standard"65 — misconceives the effect of its result. Once the court determines that the agency has exceeded the range of its delegated authority, it must hold that action invalid per se. Hence, what the court characterizes as a preliminary inquiry is actually the dispositive issue. The court's inquiry thus does not clarify the scope of review, but rather determines the scope of agency authority.

It is in identifying the limits of agency authority, or more precisely, whether the rescission falls within those limits, that the court's analysis

63. If an agency has interpreted its statute in a particular way, however, the court will normally accord a great deal of deference to that interpretation. See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944)(upholding the NLRB's determination that newsboys are "employees" within the meaning of that term as used in the National Labor Relations Act); Gray v. Powell, 314 U.S. 402, 411-12 (1941)(holding that courts should not exercise an independent judgment when reviewing an agency's application of a statutory term to undisputed facts, but rather should affirm the administrative decision if there is a rational basis for it). See also L. JAFFE, supra note 44, at 573:

When we say 'discussed in terms of' statutory purpose, we have in mind a concept of statutory purpose which takes account of the fact that the legislature in realizing its purposes has chosen to work through an administrative agency, and so (presumptively, as we have said) to confer on it some policy-making function. This discretion should normally be permitted to function short of the point where the court is convinced that the purpose of the statute is contradicted.

64. See supra note 44.

65. 680 F.2d at 222.
is most troublesome. To determine "the extent to which NHTSA's action may be inconsistent with the congressional purpose," the court embarked on a lengthy review of "the legislative history of the 1974 Amendments to the Safety Act and subsequent congressional reaction to Modified Standard 208..." The court concluded that "the standard had come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so.";

The court's implication that the legality of agency action may be judged by reference to evidence of subsequent opinion in Congress of that action ignores the constitutional status of the duly enacted enabling legislation and its amendments. Apart from difficulties inherent in determining legislative intent, the scope of an agency's delegated authority undoubtedly is defined by the intent of the Congress that passed the act — not comments made in later committees and debates. To hold otherwise would nullify the act, and thus usurp the constitutional authority of the legislative and executive branches that enacted it.

Moreover, by this practice a court in effect abdicates its judicial

66. Id.
67. Id.
68. See W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 260 (1980) ("To allow the introduction of such evidence might be tempting in a state where legislative history is generally unavailable, but it is a course that should be avoided.").

Nevertheless, courts sometimes take postenactment legislation into account. In North Haven Bd. of Educ. v. Bell, 102 S. Ct. 1912, 1923-25 (1982), the Court relied on postenactment history of Title IX to uphold the validity of regulations prohibiting discrimination based on gender in employment by educational institutions. Although the Court claimed it was using postenactment history only to "lend credence" to their decision, it stated that this history "provides additional evidence of the intended scope of the Title and confirms Congress' desire to ban employment discrimination in federally financed education programs." Id. But see id. at 1931 (Powell, J., dissenting) ("[T]here is no evidence in 1972, when it passed Title IX, that Congress through Title VI applied to employment discrimination."). The dissent continues that in holding as it did, the majority "relies heavily on ambiguous and muddled oral statements made on the floor of the Senate." Id. at 1935.

For other examples of cases where postenactment legislative history was used, see United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979)("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-89 (1940)); Cannon v. University of Chicago, 441 U.S. 677, 687 n.7 (1979)("Although we cannot accord [postenactment] remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX... ").

responsibility of statutory interpretation to a committee chairperson in the political branch.\textsuperscript{70} Whereas legislative history prior to enactment can elucidate the reasons supporting that legislature's passage of the statute, once the statute is enacted it is the province of the judiciary to interpret the statute and "to say what the law is."\textsuperscript{71}

Arguably, the availability of a legislative veto adds sufficient formality, and hence credibility, to such evidence. This proposition may have some merit where the regulation survives a formal vote in both houses, but it is less convincing where disapproval resolutions are decided in committee. Although the full Senate voted to table a resolution disapproving the passive restraint requirement of Standard 208 in the present case,\textsuperscript{72} the House resolution never got out of committee.\textsuperscript{73} Even where disapproval resolutions are submitted to Congress in conformance with a legislative veto provision, legislative inaction on that resolution does not necessarily indicate that the legislature agrees with the agency's interpretation of its mandate. ImPLYING acquiescence of the legislature by their failure to act is inconclusive, because the decision not to act can be based on many factors besides the merits.\textsuperscript{74}

In sum, to determine whether NHTSA's rescission of Modified Standard 208 exceeded the agency's mandate, the court must look to the Safety Act itself and perhaps pre-enactment legislative history, but not subsequent unenacted congressional responses to the regulation or its rescission.

D. A Second Problem: The Court's Test

The court justified its recourse to postenactment legislative history as aiding its determination of how hard it should examine the record. Together with the abruptness of the agency's course change, the court concluded that postenactment legislative reaction to the passive restraint standard required that its rescission "be subject to 'thorough, probing, in-depth review' lest the congressional will be ignored."\textsuperscript{75} In

\textsuperscript{70} The judiciary has the responsibility of statutory interpretation, and the views of the current Congress are irrelevant unless those views have been manifested in some formal legislative action.

\textsuperscript{71} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

\textsuperscript{72} 123 CONG. REC. H33,332 (daily ed. Oct. 11, 1977).

\textsuperscript{73} 680 F.2d at 224. The subcommittee and committee actions were not reported. The legislative history is recounted in S. REP. No. 481, 95th Cong., 1st Sess. 2 (1977). \textit{See} 680 F.2d at 224 n.22.

\textsuperscript{74} W. REYNOLDS, supra note 68, at 263-65. \textit{See also} H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1395-96 (tent. ed. 1958)(listing a "variety of reasons which legislators may have either for opposing a bill or simply withholding the votes necessary for its forward progress").

\textsuperscript{75} 680 F.2d at 228. \textit{See} Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402,
effect, the court appears to establish the following proposition: When an agency attempts to rescind a relatively stable, legislatively promulgated rule, which has not been disapproved by Congress — at least where a two-house legislative veto provision has brought the issue before Congress in some formal sense — the agency must present evidence sufficient to meet a stringent standard showing that: (1) the agency's prior course was unjustified, and (2) it had considered and reasonably rejected obvious alternatives to rescission, including amendment or suspension, that would have justified the original course. The court's juxtaposition of these concepts fails as a rule of law in several respects.

The first difficulty with this formulation is its reliance on postenactment legislative history to determine the proper scope of authority, which has been discussed previously. Another difficulty is that the court applies its test in a way that seems overly stringent.

By casting the issue in terms of the depth of review, the court appears to apply a very intrusive test. The court found that NHTSA must refute its prior course by showing evidence that the prior course was unjustified, not by presenting evidence that its present course is justified. This approach suggests that the court has substituted its judgment for that of the agency, its disclaimers to the contrary notwithstanding, because the court in effect rejected the evidence for recission presented by the agency. The court thus appeared to regard itself as capable of exercising expertise in the auto safety field. Furthermore, by limiting the procedures that the agency must follow in taking action, the court's statement is arguably violative of Vermont Yankee Nuclear Power Plant v. Natural Resources Defense Council, Inc.

In the area of judicial review, much seems to depend on the choice of words. A more careful formulation might have led the court to the same result, while resting on a more defensible basis.

415 (1972) (interpreting the arbitrary and capricious standard as requiring a "thorough, probing, in-depth review") quoted in State Farm, 680 F.2d at 219.

76. Id. at 233.
77. Id. at 232.
78. See supra notes 66-74 and accompanying text.
79. 680 F.2d at 231 ("[T]he question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so.").
80. 435 U.S. 519 (1978). Vermont Yankee held that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." Id. at 524.
E. A Proposed Test Suggested by the State Farm Opinion

The court’s opinion in State Farm suggests an approach for analyzing the legality of an agency about-face. The proposed formulation is simply stated: When an agency abruptly abandons a previous course of regulation, the earlier findings and conclusions form a part of the record (as though submitted by a "mega-expert" — the agency itself), and if the evidence on the record to support the agency’s about-face is so pale by comparison that no reasonable person seeking to advance the agency’s mission would have made such a decision, then the rescission must fail as arbitrary and capricious.

This test differs from the court’s approach in two significant respects. First, it eschews as irrelevant any evidence of postenactment congressional reaction to the agency’s prior regulatory course. Second, it remains faithful to the arbitrary and capricious standard because it does not raise the evidential standard that the record must meet.

This second assertion requires elaboration. The proposed test bears a suspicious resemblance to review under a different section of the APA — section 706(2)(E)

81. 5 U.S.C. § 706(2)(E)(1976). Although both the substantial evidence test and the arbitrary and capricious test are considered ultimately deferential to the agency, the latter is generally considered the less stringent of the two. See Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 705 (1980) (Marshall J., dissenting) (substantial evidence standard “represents a legislative judgment that regulatory action should be subject to review more stringent than the traditional ‘arbitrary and capricious’ standard for informal rulemaking”); Abbott Laboratories v. Gardner, 387 U.S. 136, 143 (1967) (substantial evidence test affords “a considerably more generous judicial review than the ‘arbitrary and capricious’ test”); Verkuil, supra note 42, at 212 (arbitrary and capricious test is normally less stringent than the substantial evidence test).

Nevertheless, some confusion with respect to the difference between the two standards is evident. See, e.g., Illinois v. United States, 666 F.2d 1066, 1072 n.6 (7th Cir. 1981)(“It may be that the difference in review standards is primarily semantic.”); Bunny Bear, Inc. v. Pederson, 473 F.2d 1002 (1st Cir. 1973) (applying the arbitrary and capricious standard, but describing it as “a standard of review that may differ little, if at all, from the standard normally used in substantial evidence review”); Associated Industries of New York State, Inc. v. Dep’t of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973) (the distinction may be largely semantic and the two standards “tend to converge”). See also K. Davis, supra note 42, § 2900-1, at 520 (“Surprisingly, the answer to the question whether the two tests differ has been in doubt for several decades and still is.”).

The State Farm court appears to follow what commentators have described as a recent trend of the judiciary to assume a more active role in reviewing the substance of agency decisions under the arbitrary and capricious standard. See, e.g., Berendt & Kendall, Administrative Law: Judicial Review — Reflections on the Proper Relationship Between Courts and Agencies, 58 CHI.-KENT L. REV. 215, 216 (1982) (“[R]ecently the courts have exhibited an inclination to assume a more active role in reviewing the substance of agency decisions.”); Pederson, Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 48-49 (1975) (“[T]he invitation to make a searching and careful inquiry into the facts also has been enthusiastically accepted” by the circuit courts. The result of the decision in Overton Park “has
formal rulemaking conducted under Sections 556 and 557, not informal rulemaking under section 553 as in State Farm. Section 706(2)(E), as interpreted by the Supreme Court in Universal Camera Corp. v. National Labor Relations Board, requires formal agency decisions to be supported by substantial evidence on the record as a whole, i.e., the reviewing court looks at both the evidence supporting the agency action and any contrary evidence presented on the record. By reviewing informal rulemaking on the record as a whole, this proposal at first glance seems to be at odds with the statute. Closer inspection, however, reveals that the proposed test elaborates, rather than abrogates, section 706(2)(A).

Congress has not set limits on how a court is to conduct its "arbitrary and capricious" inquiry under section 706(2)(A), except that it instructs courts reviewing under any of the standards set forth in Section 706(2) "[to] review the whole record or those parts of it cited by a party . . .." Although informal agency rulemaking is not conducted "on the record" as is formal rulemaking, cases involving review of informal rulemaking have held that the court should make an examination of whatever record is available. As the District of Columbia Circuit observed in Ethyl Corp. v. Environmental Protection Agency, although this approach extends judicial review to the entire administrative record, it does not raise the standard that the evidence must meet to the level of "substantial evidence." In other words, the court looks at more evidence, but does not look harder at that evidence.

Thus, the proposed test does not impose section 706(2)(E) review on informal rulemaking, but merely provides meaning to the vague terms "arbitrary and capricious" in light of the unique characteristics

been to transform the arbitrary and capricious standard into something very close to substantial evidence review.

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83. Id. at 485.
85. See, e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying that standard [arbitrary and capricious], the focal point for judicial review should be the administrative record already in existence . . . ."); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)(the "whole record" compiled by the agency" is the "basis for review required by § 706 of the Administrative Procedure Act"). See also Wright, Commentary: Rulemaking and Judicial Review, 30 Ad. L. Rev. 461, 464 (1978) ("[I]f courts are going to make a searching and careful review of the facts in an informal rulemaking proceeding, they will need a proper record.").
87. Id. at 37-38 (finding that although the court was not required to decide whether the agency's decision was supported by substantial evidence, it still must determine whether the cumulative effect of all the evidence presented a rational basis for the promulgated regulation).

of a challenge to an agency about-face. Review should extend to all the evidence on the record, including the agency’s prior findings and conclusions. According great weight to the agency’s previous findings merely recognizes agency expertise in its own field.

F. *Application of Proposed Test to Rescission of Modified Standard 208*

The value of this test, like any other, is seen in its application. In *State Farm*, the court applying this test would have determined whether NHTSA’s rescission of Modified Standard 208 was at all reasonable in light of the facts on the entire record. This in essence is what the court did, but the court’s approach obscures the validity of its result.

After comparing the agency’s findings and conclusions supporting Modified Standard 208 with those supporting its rescission, the court in *State Farm* concluded that the agency’s action was unreasonable.\(^8^8\) The proposed test would not compel a different result. Rather, it would force the court to face its responsibility for making this crucial determination, rather than implying that subsequent congressional posturing somehow justifies and in a sense requires the result (either because that heightens the level of scrutiny on review or because it is itself evidence that the agency’s action is ultra vires).

Additionally, the proposed test assists the court’s decision-making by clarifying the issue. In a case like *State Farm*, the question is not whether some plausible reason can be found for the agency’s action. The agency offered several explanations for its decision, none of which seem wholly irrational in the abstract. The proposed test, however, recognizes that the rationality of actions, like that of words, must be evaluated in context. Because the action in question is the agency’s abandonment of a prior course, the agency’s findings and conclusions supporting that course, and the extent to which it furthered the agency’s purpose, provide the context for judging the rationality of the change.

Determining which factors should inform the court’s analysis is not the end of the inquiry. The next question is how these factors should be weighed. Rather than asking if the abandonment of the standard advances the cause of highway safety in any conceivable way, the court should ask whether the discrepancy between the case in the record for retaining Modified Standard 208 and that for abandoning it is so wide that no reasonable person, seeking to advance motor vehicle

\(^{88}\) 680 F.2d at 230.
safety, would choose to abandon it under the circumstances existing at the time the agency made its decision.

Under its articulation of the proper standard, the court found "not one iota of evidence" to support NHTSA's conclusion that Modified Standard 208 was inadequate. Based on its examination of the record, the court determined that NHTSA had not presented any statistical data or logical argument suggesting why even detachable passive seatbelts would not lead to safety benefits exceeding their relatively small costs. Also, the court found NHTSA's discussion of possible amendments to Modified Standard 208 "wholly inadequate" because the agency had summarily ruled out several alternatives to rescission that the court termed reasonable and obvious.

The difficulty with the court's analysis is that the court's conclusion that NHTSA presented no evidence to support its position is not at all clear from the record. NHTSA did present reasons to support its rescission, even if they were shallow and speculative when compared with the evidence in the record supporting passive restraints. The correct application of the arbitrary and capricious standard for cases of agency rescission would have recognized that NHTSA did present a minimum amount of reasons for its decision, because review under this test would have compared those reasons with the data in the record for retaining the standard. Under this test NHTSA's rescission could properly have been found to be irrational, because a reasonable person, viewing NHTSA's reasons in the context of its previous findings supporting passive restraints, would not have rescinded the rule were his true intention to advance motor vehicle safety.

A more immediate problem with the opinion is that the Supreme Court may reverse *State Farm* on certiorari. If the Supreme Court interprets the Court of Appeal's test as a question of whether any plausible reason can be found to support rescission, it may conclude that the Court of Appeals' decision that NHTSA had presented "no evidence" was incorrect — and label the decision as a substitution of judgment. But under the proposed test, the Supreme Court could balance the rea-

89. *Id.* at 231.
90. *Id.*
91. *Id.* at 230. The court found his case analogous to cases in which promulgated regulations were set aside because an agency failed to consider obvious alternatives. See, e.g., Sabin v. Butz, 515 F.2d 1061, 1069 (10th Cir. 1975) (reversing summary judgment for the government on whether a regulation was arbitrary where the agency had failed to consider anticompetitive factors); Pillai v. Civil Aeronautics Bd., 485 F.2d 1018, 1027-30 (D.C. Cir. 1973) (reversing an order extending multilateral air carrier rates because the agency had considered the only alternative to be open rates, and thus ignored bilateral negotiations and the agency's suspension powers).
sons supporting rescission with the data in the record supporting retention. In this way, the Supreme Court could correctly uphold the validity of the Court of Appeals' decision, while accommodating the requirements of the APA.

III. IMPLICATIONS

The *State Farm* decision’s impact on future review under the “arbitrary and capricious” standard is difficult to predict. If courts can effectively isolate and apply the basic test suggested by *State Farm*, the decision may help to add clarity to judicial review, particularly where the rescission of agency action is questioned. If, on the other hand, courts attempt to follow *State Farm*’s problematic articulation of its approach, this case may simply add to the confusion in the field. More immediately, the court’s approach may result in the reversal of its decision if the Supreme Court takes the view that some evidence can be found in the record to support the rescission.

In any event, the judiciary must determine the validity of agency action on its own, rather than turning to postenactment expressions of opinion in Congress. Meanwhile, the future of passive restraints, and in a sense that of highway safety, remains unclear.