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A Square Peg In A Vicious Circle: Stephen Breyer's Optimistic Prescription For The Regulatory Mess

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REVIEW ESSAY

A SQUARE PEG IN A VICIOUS CIRCLE: STEPHEN BREYER'S OPTIMISTIC PRESCRIPTION FOR THE REGULATORY MESS

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BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION. By *Stephen Breyer*. Cambridge, Mass.: Harvard University Press, 1993. Pp. 3, 124, notes, index. $22.95 cloth, $14.95 paper.

Long before his appointment to the United States Supreme Court, Stephen Breyer established his academic credentials as a scholar of the regulatory process.[1] His most recent book on regulatory reform, *Breaking the Vicious Circle: Toward Effective Risk Regulation*,[2] undoubtedly will attract attention from the legal and regulatory communities on the basis of his academic and legal background alone.[3] Nonetheless, his recent ascension to the high court is certain to spark public interest in his views

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[1] *See, e.g.*, STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982) [hereinafter BREYER, REGULATION]; STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT AND CASES (3d ed. 1992); Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979); Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005 (1987).

[2] STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) [hereinafter BREYER].

[3] Justice Breyer has an impressive resume. He studied at Stanford, Oxford, and Harvard Law School; clerked for Justice Goldberg of the Supreme Court; and served on the Harvard Law School faculty. He has held several positions in Washington: in 1973 he served on the Watergate prosecution team; in 1974–75 he was a special counsel to the Senate Judiciary Committee Subcommittee on Administrative Practices; and in 1979–80 he served as counsel to the Senate Judiciary Committee. Breyer was appointed to the United States Court of Appeals for the First Circuit in 1981, elevated to Chief Judge of that court in 1990, and ultimately appointed to the United States Supreme Court in 1994. For a tidy summary of his professional accomplishments, see David Margolick, *Man in the News: The Supreme Court; Scholarly Consensus Builder: Stephen Gerald Breyer*, N.Y. TIMES, May 14, 1994, at A1; and Paul M. Barrett, *High Court Choice Is Strong Thinker Who Offers Something for Everyone, No Distinct Agenda*, WALL ST. J., May 16, 1994, at A20.

on regulation. Whether expert or layman, anyone alarmed by the current state of the regulatory process and concerned with prospects for its improvement will find that Justice Breyer's ideas and observations merit serious consideration. Fortunately, Justice Breyer has written an exceptionally accessible book.

The book says much more about the regulatory process generally than its title suggests. While it certainly can stand on its own as an analysis of health and safety regulation, the book's true significance lies in the warnings it sounds concerning the regulatory process in general. Although Breyer's earlier work regarded "generic" approaches to regulatory reform with suspicion and argued instead that reform should proceed on a "step by step, program by program" basis,[4] much of the discussion in *Breaking the Vicious Circle* is generic in the sense that it can be applied to substantive areas other than health and safety regulation without losing much in translation. Thus, with his current extrapolation from the specific example of risk regulation to regulation generally, Justice Breyer sees himself following the admonition of Oliver Wendell Holmes "to look for the 'general' in the 'particular.'"[5]

With characteristically clear insight, Justice Breyer identifies several systemic problems that plague the regulatory process in the United States. He discusses how public (mis)perceptions, congressional (over)reaction, and technical (un)certainty create a "vicious circle" that increasingly undermines the legitimacy of the regulatory process. However, Breyer does more than merely criticize from the sidelines. He presents a thought-provoking proposal for the reform of the regulatory process that deserves full and fair consideration.[6]

This Review outlines the systemic problems and the "vicious circle" identified by Justice Breyer and then proceeds to review his proposed solution. The final part presents several criticisms of his proposal and concludes that, while Breyer's modest suggestions may help at the margin, they settle for tinkering with the system instead of giving it the overhaul it really needs.

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[4] BREYER, REGULATION, *supra* note 1, at 341.

[5] BREYER, *supra* note 2, at ix.

[6] *See* BREYER, *supra* note 2, at 59–61; *see also infra* notes 34–46 and accompanying text.

I. Systemic Problems and the Vicious Circle

In the first section of his book, Justice Breyer describes three pervasive problems that plague the regulatory system. Using apt, real-world illustrations, Justice Breyer identifies and discusses what he calls the "tunnel vision" or "last 10 percent" problem,[7] the "random agenda" problem,[8] and the "inconsistency" problem.[9]

The first of these problems, the "tunnel vision" or "last 10 percent" problem, arises when regulators, either through their own zeal or because they are carrying out a legislative directive, seek to eradicate a given hazard entirely, even though cleaning up the "last" ten percent is inordinately expensive compared to the increase in public safety it provides.[10] Essentially, the problem is that regulators do not know when to stop. Using fitting examples from the regulation of polychlorinatedbiphenyls, asbestos, and benzene, Justice Breyer shows how targeting the last ten percent not only costs too much, but might even create more safety hazards than it cures.[11]

Breyer next identifies what he calls the "random agenda" problem.[12] In examining some of the hazards the Environmental Protection Agency (EPA) has chosen to target, he finds that the agency's regulatory priorities are not determined by detached experts who carefully spend scarce resources to get the greatest benefit at the lowest cost. Instead, the agency's agenda is often driven by public fears, politics, history, and even chance.[13] Thus,

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[7] Breyer, *supra* note 2, at 11–19.

[8] *Id.* at 19–21.

[9] *Id.* at 21–28.

[10] *Id.* at 11.

[11] *Id.* at 12–15. For example, "cleaning up" asbestos in public buildings causes asbestos fibers that would have remained harmlessly in place to become airborne, increasing significantly the chance of those fibers lodging in workers' lungs and creating medical problems. *Id.* at 12.

[12] *Id.* at 19. Breyer's concern with agendas comports with the concern of other scholars who have studied the role of agendas in the legislative and regulatory process. The control of agendas can have a profound impact on the outcome of the policy process. *See generally* Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 38–42 (1991); Shaun H. Heap et al., The Theory of Choice: A Critical Guide 249–58 (1992); Kenneth A. Shepsle, *Prospects for Formal Models of Legislatures*, 10 Legis. Stud. Q. 5 (1985); Barbara Sinclair, *Agenda Control and Policy Success: Ronald Reagan and the 97th House*, 10 Legis. Stud. Q. 291 (1985).

[13] Breyer *supra* note 2, at 20. Consistent with Justice Breyer's anecdotal reports on the hazardous substance regulatory agenda, an empirical study examining the EPA's rulemaking agenda concluded that pressure from Congress "distorts priorities and prevents realistic agenda setting and deadline compliance." Steven J. Groseclose,

not only does the agenda fail to address the problems that experts consider the most serious, but the problems that it does address change with the political winds. For example, the agenda reflects the public's obsession with cancer to the exclusion of other serious maladies, such as neurological damage.[14]

The third systemic ill that Justice Breyer identifies is the "inconsistency" problem that results from the lack of coordination among the many agencies and experts whose efforts are brought to bear on a particular issue.[15] In the area of hazardous material regulation, for instance, the EPA found chlorofluorocarbons (CFCs) to be a hazardous substance. That determination, and the consequent threat of liability under the Comprehensive Environmental Response, Compensation, and Liability Act[16] (CERCLA), severely undermined the efforts of the EPA's Office of Air and Radiation to encourage the recycling of refrigerators because few recycling companies wanted to assume the potential liability of a CERCLA clean-up.[17] While the EPA classified CFCs as hazardous, the Food and Drug Administration (FDA) continued to condone the use of CFCs in asthma inhalers.[18] The widely disparate treatment of CFCs by different branches of the EPA and between the EPA and the FDA sent confusing messages to the public.

In the second section of the book, Justice Breyer explores the role played by these systemic problems in the "vicious circle" that is created by the complex interaction of public perceptions, congressional reaction, and uncertainties in the technical regulatory process.[19] The public's perception of problems starts the vicious circle in motion. Justice Breyer describes how the public frequently misperceives the gravity of risks because, as Oliver Wendell Holmes observed, "most people think dramatically, not quantitatively."[20] As a result of sloppy thinking, the public con-

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Reinventing the Regulatory Agenda: Conclusions From an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections, 53 MD. L. REV. 521, 533 (1994).

[14] BREYER, *supra* note 2, at 20.

[15] *Id.* at 21–28.

[16] Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. Law No. 96-510, 94 Stat. 2767 (1980), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. Law No. 99-499, 100 Stat 1613 (1986) (codified as 42 U.S.C. §§ 9601–9675 (1988 & Supp. 1993).

[17] BREYER, *supra* note 2, at 22.

[18] *Id.*

[19] *Id.* at 33–51.

[20] *Id.* at 37. Breyer catalogs several factors that tend to confuse the public and cause them to reach incorrect conclusions, including the use of rules of thumb, overreaction

sistently overestimates the risk of certain hazards, such as getting cancer, and underestimates the risk of other hazards, such as contracting tuberculosis.[21] In the public's mind, the absolute regulation of risks that are perceived to be great (though they are actually remote) takes precedence over the regulation of truly serious risks that are not as well-known.

The vicious circle continues when the public communicates its fears and concerns to Congress.[22] In Breyer's view, Congress contributes to the vicious circle by responding to public perceptions of risk with detailed statutes. These statutes appear to give discretion to agencies but actually tie their hands and prevent flexible responses to the public's perceived "problem."[23] While there may be political reasons for Congress to act in this manner,[24] Breyer believes that Congress is poorly suited to the task of writing specific regulatory language because, for various structural and political reasons,[25] it cannot take a coherent view of the various problems it considers.[26]

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to prominent or sensational news, protective feelings for family and friends, inability to differentiate between conflicting expert opinions, preconceived opinions, and math anxiety. *Id.* at 35–37. His list certainly is not exhaustive. He could have added to it other basic analytical infirmities of the general public such as: lack of basic reading skills, *see* IRWIN S. KIRSCH ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, ADULT LITERACY IN AMERICA (1993); inability or unwillingness to process data that has been disclosed, *see* William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1112–18 (1984); and susceptibility to "information overload," *see* Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 27–30 (1993).

[21] BREYER, *supra* note 2, at 37.

[22] *Id.* at 39–42.

[23] *Id.* at 39–40. Helen Garten described a similar problem in federal banking regulation where congressional action has frequently impeded the efforts of regulators to fashion a coherent regulatory policy. *See* HELEN A. GARTEN, WHY BANK REGULATION FAILED: DESIGNING A BANK REGULATORY STRATEGY FOR THE 1990S (1991).

[24] Such political considerations might include congressional distrust of the executive branch to carry out a broadly worded statute or congressional desire to take political credit for a "tough" law. BREYER, *supra* note 2, at 41–42.

[25] For example, because Congress typically enacts one statute at a time, it rarely considers an entire regulatory program at once. In addition, bills originate in different committees, many of which have overlapping jurisdiction. Committees may also have radically different ideas about what should be addressed and how. Finally, Congress's need to reflect and respond to public opinion makes it a poor candidate for establishing a rational regulatory agenda, given the public's difficulty with understanding risks. *Id.* at 42.

[26] *Id.* Regarding the structural deficiencies of Congress in addressing regulatory matters, see also Eric J. Gouvin, *Truth in Savings and The Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281 (1994); Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233 (1991).

Congress probably plays an even greater role in Breyer's vicious circle than he acknowledges. While Breyer sees the institution as merely reflecting misguided public notions, Congress itself is at least as great a source of misinformation and misperceptions as the public at large. It seems only fair to assume that members of Congress are subject to the same analytical weaknesses as the public when it comes to risk perception. Because so much legislation begins in congressional offices and does not in fact spring from a great public outcry, the misperceptions of members of Congress, not their constituents, may become enshrined in the law.[27] If that is the case, then the vicious circle may begin and end in Congress, and public perception is either a mere adjunct to the process or a handy and easily manipulable rationalization of congressional action. Breyer fails to consider this possibility.

After Congress has acted, the vicious circle rolls into the realm of the regulatory agencies. In Breyer's view, the inherent uncertainty in the technical aspects of substantive regulation provides the last element of the vicious circle.[28] Different agencies (and even different departments within the same agency) approach similar problems from different directions leading to the formulation of inconsistent policies.

In part, uncertainty and inconsistency are a function of the many different disciplines that can be brought to bear on a particular problem. As an example, Breyer cites the enormously complex task of assessing a hazardous waste site: "A waste site evaluation . . . may require knowledge of toxicology, epidemiology, meteorology, hydrology, engineering, public health, transportation and civil defense, disciplines with different histories, different methods of proceeding, and different basic assumptions."[29] Different agencies, with different missions and different personnel who have jurisdiction over the same matter are bound to have different perspectives on the problem and prescribe different courses of action.

Unfortunately, Congress and the public are looking for *the* solution—not a range of possible approaches to the problem.

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[27] For example, when Congress passed Truth-in-Savings legislation, the bill's chief sponsor, Rep. Lehman, admitted that the impetus for the bill was a personal reaction to what he perceived to be a misleading advertisement. Gouvin, *supra* note 26, at 1321 n.160.

[28] BREYER, *supra* note 2, at 42–50.

[29] *Id.* at 43.

Asking regulators to establish *the* solution to a problem, however, is somewhat unrealistic. Because the "solution" depends to a great extent on the theoretical lens one chooses to look through, different regulators looking at the same phenomenon through different lenses will make inconsistent policy. Those inconsistent policies, while based on theoretically sound premises, will tend to suggest to the public and Congress that the regulators are hopelessly muddled and do not know how to respond to the problem.

While different theoretical approaches to similar problems cause some inconsistency in the regulatory process, other technical matters also play a role in making the regulatory scheme appear irrational. For example, all regulators must take action without complete information. In the face of incomplete information, regulators must rely on assumptions. Assumptions do not always derive from scientific principles, but might result from political considerations.[30] Reliance on conflicting assumptions causes different agencies to reach different conclusions and produce a regulatory scheme that appears irrational. As an obvious example, an agency guided by the principle that all policy should "err on the safe side" will almost always reach a different conclusion from an agency that scrutinizes the bottom line for demonstrable "cost effectiveness."

These three elements—public perception, congressional action, and technical uncertainty—make up Breyer's vicious circle. The vicious circle creates the systemic problems that plague it: tunnel vision, irrational agendas, and inconsistency. The elements of the vicious circle reinforce each other and lead to public distrust of the regulatory process, which results in greater political oversight, which aggravates the random agenda problem and in turn creates more inconsistent outcomes. Taken as a whole, the regulatory process undermines its own legitimacy.[31] While Breyer's treatment of the interrelation of the systemic problems and the elements of the vicious circle is somewhat sketchy,[32] the overall scheme nevertheless appears intuitively attractive and commonsensical.[33]

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[30] *Id.* at 49.

[31] *Id.* at 50–51.

[32] *Id.* In Justice Breyer's defense, the book was derived from a series of lectures, so one might expect a certain degree of brevity.

[33] While Justice Breyer's observations are anecdotal, many of the problems he identifies have also been identified by the National Performance Review after intensive

II. JUSTICE BREYER'S SOLUTION

Justice Breyer's proposal for breaking the vicious circle focuses on the behavior of regulatory agencies. He targets the agencies because, in his words, "any practical, institutionally oriented solution must also take account of the extreme difficulty of changing human psychology, press reactions, or Congressional politics."[34] Apparently, he sees the regulatory agencies as being somewhat amenable to change, and suggests structural modifications in the way regulations are developed that will help bring about "self-reinforcing institutional change, which will gradually build confidence in the regulatory system."[35]

To break the vicious circle, Justice Breyer proposes the creation of an elite, politically insulated group of "super-regulators" within the executive branch. These super-regulators would be given interagency jurisdiction and the authority to implement substantive changes with the aim of achieving the "mission of building an improved, coherent [regulatory scheme] . . . ; of helping to create priorities within as well as among programs; and . . . [of] comparing programs to determine how better to allocate resources . . . ."[36] The super-regulators chosen to carry out this function would be drawn from a new, special, prestigious civil service career path. They would be groomed for this service by rotation through assignments on Capitol Hill, the administrative agencies, and the Office of Management and Budget (OMB).[37]

Although Breyer does not see these structural changes as a cure-all for the regulatory woes he describes in his book, he does believe the proposal represents a "constructive approach."[38] If the goal is to make regulation better, as opposed to making it "right," Breyer's approach has great appeal.

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field work, research, and interviews. *See generally* Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 1994 DUKE L.J. 1165 (1994).

[34] BREYER, *supra* note 2, at 55 (citation omitted).

[35] *Id.*

[36] *Id.* at 60–61. *See also* Robert A. Katzmann, *Wayne Morse Forum, November 10, 1992: Have We Lost the Ability to Govern? The Challenge of Making Public Policy*, 72 OR. L. REV. 231, 240 (1993) (making a similar suggestion for the creation of a function within the Office of Management and Budget to resolve conflicts and establish priorities among various policies).

[37] *Id.* at 59–60.

[38] *Id.* at 59.

While the creation of an elite institutional body within the federal government with the authority to set regulatory policy priorities and allocate resources accordingly would be a new approach (especially during peacetime),[39] the idea has a distinguished pedigree. Breyer's idea may first remind one of Plato's *Republic*, in which an elite group of philosophers are specially groomed to govern.[40] In Breyer's scheme, however, the guardians must share political power with Congress, so it is not quite as undemocratic as the republic envisioned by Plato.

More recently, John Stuart Mill suggested that technical rules, be they laws or regulations, ought to be made by persons with special understanding and expertise.[41] Mill proposed a "Commission on Legislation" that would assist Parliament in making public policy.[42] In the early twentieth century, Woodrow Wilson proposed the creation of institutional structures to move public policy out of Congress and into a body that could act more rationally.[43] Even more recently, Professor Cass Sunstein has recommended the creation of such a body in either the legislative or executive branches to coordinate and rationalize regulation.[44]

Not only has this idea been proposed before, it has been implemented to some degree. In France, for example, the Conseil d'Etat performs a function in the coordination of agency work which is similar to the role Breyer foresees for the super-regulators.[45] In fact, even in this country Breyer's proposal is no longer strictly theoretical since the National Performance Review has endorsed, and President Clinton has implemented, a Regulatory Working Group to be chaired by an OMB administrator.[46]

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[39] During World War I and World War II, the federal government exercised general control over economic resource allocation and production priorities. *See generally* DAVID BRINKLEY, WASHINGTON GOES TO WAR 50–82 (1988).

[40] PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., 1968).

[41] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 237–39 (H.B. Acton ed., 1972) (1861).

[42] *Id.*

[43] *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 45 (1994) (providing an historical inquiry into the respective roles of Congress, the executive branch and the administrative agencies).

[44] CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 108 (1990).

[45] BREYER, *supra* note 2, at 70–71.

[46] Lubbers, *supra* note 33, at 1170.

III. CRITICISMS OF THE PROPOSAL

Justice Breyer does not pretend that his proposal is a panacea that will correct all of the ills facing the regulatory process.[47] Even with that disclaimer, his proposal raises at least four serious concerns that call its value into question: it ignores the body of work developed by public choice scholars; it transplants existing problems; it accepts pervasive regulation without seriously considering deregulation as an alternative; and it attempts to correct the regulatory problem too late in the process.

A. *Public Choice*

The coherence and intuitive appeal of Justice Breyer's proposal rest on the unstated assumption that regulators serve the public interest.[48] Justice Breyer seems to adopt a neo-republican outlook in which civic-minded public servants act in the public interest. However, not everyone shares his optimism that government actors, no matter how "elite," will be immune to the forces described in the public choice literature.[49]

Implicit in the book's approach to the subject is the idea that the regulatory scheme is broken but fixable or, in other words, the incoherent results produced by the system are avoidable. Public choice scholars, on the other hand, contend that the whole exercise is doomed to produce incoherent results regardless of the structure of the process.[50] While arguing that the system has

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[47] BREYER, *supra* note 2, at 59.

[48] Breyer indirectly suggests this idea when he assumes that his scheme will be adopted by a government composed of "honest, talented, and qualified" regulators. *Id.* at 59.

[49] Jonathan Macey, for example, would likely find that Breyer's formula misses "an appreciation of the frightening power of man to subvert the offices of government for what can only be described as evil ends." Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988).

[50] Summarizing the public choice literature in a footnote is a task doomed to failure. The scholars who make up the public choice school are a somewhat loosely knit group. Their perspectives on the law draw heavily on economics, game theory, organizational behavior and political science. *See* FARBER & FRICKEY, *supra* note 12, at 21–33; Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 143 (1989); *see generally,* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878–79, 883, 901–06 (1987) (stating a general theory of "public choice" is impossible, since there are many variations on the set of core principles that have inspired many of the scholars). As a general proposition, however, a public choice scholar is likely to see statutes and regulations as products that are bought and sold in economic markets. For an overview, see Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV.

reached its current state because of the bureaucratic failure to make rational policy analysis, Justice Breyer makes no attempt to address any anticipated criticisms from the public choice school.[51] He completely ignores the possibility that the system has evolved into its current state as a result of an intricate web of deals, concessions and paybacks bought and sold in the legislative marketplace by interested actors. Others have eloquently attacked the public choice position.[52] Justice Breyer weakens his proposal by not adding his voice to the chorus.

B. *Transplantation of Problems*

Justice Breyer believes his proposal has appeal because it draws upon the "virtues of bureaucracy" and builds on what he sees as the traditional strengths of administrative agencies—essentially, their ability to rationalize policy, expertise and political insulation, combined with their authority to carry out the

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339 (1988). A significant school of thought within the movement owes much to the work of Kenneth Arrow, who developed the famous theorem that bears his name. Arrow's Theorem holds that under certain conditions it is impossible to aggregate the preferences of a given group because the way in which voting is conducted could result in an infinite cycling of choices. For a useful summary of Arrow's Theorem and its larger implications, see HEAP, *supra* note 12, at 209–15. Given the theoretical problems of aggregating preferences, the output of collective bodies tends to be incoherent.

[51] Breyer's earlier important book on regulatory reform was also criticized for ignoring the perspectives of the public choice literature. Ernest Gellhorn, *Rationalizing Regulatory Reform*, 81 MICH. L. REV. 1033, 1036–37 (1983) (reviewing BREYER, REGULATION, *supra* note 1.

[52] Scholars have attacked the public choice position on the grounds that it lacks empirical support. *See, e.g.*, Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency is Complex*, 33 AM. J. POL. SCI. 1 (1989) *reprinted in* THE CONGRESS OF THE UNITED STATES, 1789–1989, vol. 8, 689 (Joel Silbey ed., 1991); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 236–68 (1988). Other scholars have criticized the methodology of the public choice approach for failing to give weight to legitimate concerns about the public interest that legislators may have and instead constructing an *ex post* explanation for legislative behavior based on who benefitted from the legislation. *See, e.g.*, Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 692 (1987); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 5–30 (1992). In addition, many scholars have questioned whether a world view dominated by interest groups and excluding higher values runs the risk of becoming morally impoverished and ultimately politically illegitimate. *See, e.g.*, Farber & Frickey, *supra* note 50, at 906–07; Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989); Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 180 (1988) (describing this criticism).

policy.[53] Ironically, Breyer's reliance on the system's perceived strengths prevents his proposal from escaping the system's fundamental problems. These systemic flaws will merely manifest themselves in a different forum.

1. Rationalization

Hopes for a coherently rationalized regulatory scheme may prove difficult to realize. As Breyer himself points out, the EPA, which has a single head, sometimes ends up working at cross-purposes with itself.[54] Although agency heads are unable to rationalize their own agency's agenda, Breyer believes the new cadre of super-regulators will be able to draft a specific regulatory agenda for *all* agencies with little difficulty. Breyer contends the super-regulators will rationalize the agenda partly by "mak[ing] explicit, and more uniform, controversial assumptions that agencies now, implicitly and often inconsistently, use in reaching their decisions."[55]

While such a rationalization scheme might be possible, it will only be accomplished if agencies defer to the particular theoretical position held by the super-regulator. This rationalization will not harmonize the different perspectives; rather, it will choose one perspective over another. By necessity, the super-regulators will have to adopt some theoretical point of view when analyzing regulatory issues. For instance, by taking the point of view of an economist over the point of view of an environmentalist, the super-regulators will produce different substantive regulations and agendas for regulatory action. However, the underlying normative foundations of the economist and the environmentalist are fundamentally different and incommensurable. Asking the super-regulator to reconcile them and come up with "the" solution to a particular regulatory problem is impossible because the different values of these disparate disciplines cannot be judged by a common measure.[56] Any solution the regulator reaches will

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[53] BREYER, *supra* note 2, at 61–63.

[54] *See supra* notes 15–18 and accompanying text; BREYER, *supra* note 2, at 22.

[55] BREYER, *supra* note 2, at 64–65.

[56] For a discussion of the myriad problems involved in attempting to deal with conflicting values in the law, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

necessarily be informed by a world view that embraces some values and rejects others.

The result will be a consistent agenda, but it may be an agenda that fails to support the particular missions of particular agencies. When agencies charged with protecting the environment, for instance, are seen as failing to advocate the position of their "clients," political consequences will follow. In addition, the consistency provided by the super-regulator will last only as long as the super-regulator holds her post. When the regulators change, the agency's values will change along with its underlying substantive policies. The impermanent nature of super-regulators' tenure may not be entirely unappealing since policy changes at least will be made by someone intimately familiar with the entire regulatory scheme. Even so, the scheme is a far cry from the happy situation Justice Breyer envisions.

2. Expertise

The expertise argument in favor of administrative agency authority has paled in light of attacks that agencies are not especially expert. The idea of an all-knowing expert who can objectively perform a rational assessment and produce an objectively "right" answer seems somewhat naive.[57] On the other hand, if Breyer's super-regulator idea could be implemented, it certainly would create a group of experts who know not only the substantive regulations, but also the workings of the various branches of government. Such a group of knowledgeable career civil servants could be a valuable resource for writing more intelligent regulations.

By utilizing experts in the creation of the regulatory product, Justice Breyer's proposal has been heralded as a possible way to incorporate "total quality management" ideas from industry into the design of government regulation.[58] The creation of a highly trained and respected group of professional super-regulators could go a long way toward injecting quality into the regulatory

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[57] *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY at xvi (1991) (observing that "data analysis is expensive, cost and benefit assessment models are inaccurate, biases can subtly creep into 'objective' analyses, and the uncertainties are sometimes so huge and pervasive as to render the idea of objectivity virtually meaningless").

[58] Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 16 (1993).

design process, representing a vast improvement over the current practice of checking for quality after the fact.[59] Just as industry has found that after-the-fact quality checks are a poor way to insure a quality product, government attempts at after-the-fact quality control—such as sunset provisions, law revision commissions, judicial review and congressional oversight—have met with poor results.[60]

Yet experts are not immune to sloppy thinking, zealotry, or incompetence. Even a super-regulator could fall victim to the "last 10% problem," especially if, as contemplated by Justice Breyer, the super-regulator's entire professional experience is in government and has not been tempered by the realities of industry. Perhaps the super-regulator career path should require a stint in the private sector instead of allowing a regulator to rule supreme with only inside-the-beltway experience to inform her world view. Without a reality check, a super-regulator produced in accordance with Breyer's new career path might nevertheless be the kind of regulatory zealot who spends $1,000 to get a $1 benefit.

In addition, expert regulators might nevertheless be susceptible to the same analytical infirmities as mere mortals. While Breyer correctly points out that "framing effects" often cause the general public to make poor decisions,[61] he fails to note that research has found that framing effects warp the judgments of highly educated professional decisionmakers as well.[62] Framing effects have been called the linguistic or logical equivalent of optical illusions because they make the perceiver see something

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[59] *See* E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do about It*, 57 LAW & CONTEMP. PROBS. 167 (1994) (advocating changes in the regulatory review process that would incorporate "total quality management" concepts from industry and focus regulatory review efforts on the beginning, not the end, of the agency rule-making process). Ultimately, the process would create knowledgeable agency bureaucrats who would be able substantially to internalize the regulatory review regime.

[60] Breyer's earlier work reveals his lack of faith in post-enactment review to bring about meaningful reform of regulation. BREYER, REGULATION, *supra* note 1, at 365–66. For a general discussion of several methods of post-enactment review and their shortcomings, see Gouvin, *supra* note 26, at 1364–70.

[61] The way in which a question is asked often influences the answer that will be given. This is called the framing effect. Breyer analyzes framing effects as a subset of mathematics anxiety, but it reaches beyond math problems. BREYER, *supra* note 2, at 36–37.

[62] *See* HEAP, *supra* note 12, at 39–40 (describing a famous framing effects experiment on the choice of treatment regimes for cancer patients and finding that both patients *and their doctors* made the same analytical mistakes based on framing effects).

that is not there.[63] Putting an expert in the role of decisionmaker does not make these effects go away.

Similarly, while Breyer points out that the general public can become befuddled by expert opinions,[64] he offers no evidence that expert decision-makers are not likewise subject to the same confusion. As anyone who has ever had to arrange for expert witnesses in a trial knows, there are experts on both sides of every issue. The experts can apply acceptable research techniques to a given problem and come up with very different conclusions and recommendations. In the end, someone has to choose between two supportable positions. There is no way for an expert decisionmaker to know if one consulting expert is "right" and the other "wrong" in any meaningful sense.[65]

3. Political Insulation

In his previous work, one of Breyer's great strengths was his realistic understanding of political forces and the role they play in any congressional action.[66] In *Breaking the Vicious Circle*, however, Breyer's political antennae seem less finely tuned. His proposal for a super-regulator clearly invites criticism that it is undemocratic, elitist and otherwise politically unacceptable. Although Breyer briefly responds to each of these anticipated criticisms, he does so somewhat cryptically.[67] The book needs a stronger defense of its position against those who maintain that Congress has already delegated too much authority to agencies without sufficient accountability.[68] Breyer could have written such a defense since the way the proposal provides for political insulation is its greatest strength. Insulation could allow the super-regulators to make decisions that politically accountable authorities never would be able to pull off. In fact, Congress has resorted

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[63] Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 399 (1990).

[64] BREYER, *supra* note 2, at 36.

[65] The public debate over disposable diapers provides an excellent example of the battle of experts in the public policy arena. *See* Cynthia Crossen, *How 'Tactical Research' Muddied Diaper Debate*, WALL ST. J., May 17, 1994, at B1.

[66] Louis B. Schwartz, Book Review, 35 HASTINGS L.J. 233, 237 (1983) (reviewing BREYER, REGULATION, *supra* note 1).

[67] BREYER, *supra* note 2, at 72–79.

[68] *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993); *but cf.* Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

to such undemocratic methods in the past precisely to break the stranglehold of political forces.[69]

Unfortunately, the benefits of depoliticization come with a serious cost. If the regulatory process is not completely depoliticized, then some actors will continue to have access to the process and shape it to their needs while others will be locked out. The prospect that super-regulators will be truly insulated from politics is remote. Breyer himself does not believe appointments that touch the political process can ever escape the taint of politics. For example, in *Regulation and Its Reform* he recognized the inherently political nature of the appointments process and the generally negative effects it has on the quality of regulation.[70] Although Breyer's super-regulators will be career civil servants and therefore less susceptible to political forces than appointees, they nevertheless will be buffeted by political forces. In the end, some argue, if the process cannot be completely and evenly depoliticized, it perhaps should not be depoliticized at all.[71]

4. Authority

Even with a super-regulator, the laws passed by Congress will remain the law of the land. If a super-regulator identifies an inconsistency between the law as written and the perceived risk it addresses (in the terms of Breyer's earlier writings, a regulatory "mismatch"), the regulator nevertheless will be bound by the law. Only Congress can weed out the inconsistent statutes and implement sufficiently flexible laws that would allow a super-regulator to reach his full potential. Relying on Congress to pass such laws, however, dooms the project to failure. Congress struggles to deal with even relatively simple problems in a rational, coherent manner.[72] If the regulatory scheme is so dis-

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[69] Warren Weaver, Jr., *New Panel Asked on Social Security*, N.Y. TIMES, Sept. 7, 1981, at A8; *see*, Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 952–53 (1990) (suggesting that the success of the Defense Base Closure and Realignment Commission and other *ad hoc* national commissions has been due, at least in part, to the fact that the commission structure allows the creation of an informal bargaining mechanism outside of the public eye). As another example, Congress effectively foreclosed unmitigated political bickering over Social Security reform in the early 1980s by forming the National Commission on Social Security Reform.

[70] BREYER, REGULATION, *supra* note 1, at 343–45.

[71] David A. Dana, *Setting Environmental Priorities: The Promise of a Bureaucratic Solution*, 74 B.U. L. REV. 365, 373–85 (1994) (reviewing BREYER, *supra* note 2).

[72] *See* Gouvin, *supra* note 26 (analyzing Congress' failure to address the problems raised by the proponents of Truth-in-Savings legislation).

jointed and confused as to require an apolitical super-regulator to straighten it out, the legislative enactments necessary to implement that scheme will also be fraught with political deals and brinksmanship.

C. *Failure to Consider Alternatives*

Despite his earlier passion for designing a regulatory system that consciously analyzes available alternatives,[73] Justice Breyer seems to discard them completely in his current proposal. He seems to assume the underlying necessity for regulation and pays short shrift to the idea of deregulation. This position comes as somewhat of a surprise given Breyer's eloquent discussion of deregulation of the airline industry in *Regulation and Its Reform.* There, he was skeptical of the idea that regulation was the best response for every problem.[74] At that time Breyer believed that "classical regulation ought to be looked upon as a weapon of last resort,"[75] and should be used only where less restrictive methods will not work.[76]

Breaking the Vicious Circle, on the other hand, seems to accept the inevitability of a pervasive regulatory scheme—at least for hazardous substances regulation. Breyer simply dismisses deregulation in one paragraph, labelling it a "non-solution."[77] In doing so, Breyer chooses to ignore innovative programs for the regulation of hazardous wastes adopted in Texas and other states that scale back the government's role and incorporate a significant measure of industry self-regulation.[78] More generally, some scholars have convincingly argued that private actors can be regulated in the most responsive and flexible manner by creating incentives for these actors to comply with federal regulations voluntarily, and that this method should be employed in

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[73] *See* BREYER, REGULATION, *supra* note 1, at 156–83.

[74] "Too often arguments made in favor of governmental regulation assume that regulation, at least in principle, is a perfect solution to any perceived problem with the unregulated marketplace." *Id.* at 5 (footnote omitted).

[75] *Id.* at 185.

[76] *Id.*

[77] BREYER, *supra* note 2, at 56.

[78] *See* Mary Lenz, *Environmentalists, Industry Both Praise Water Panel Chief*, HOUSTON POST, May 18, 1992, at A9; *Governor Announces Cleanup Plan, Program Aims to Cut State Pollution In Half*, HOUSTON POST, Apr. 8, 1992, at A22 (describing the Clean Texas 2000 program).

more situations.[79] Congress certainly appears to be listening to the voices calling for more flexible regulation.[80]

D. *Too Little, Too Late*

Although Justice Breyer's prescription correctly identifies the structure of the regulatory process as the problem, the primary defect in his approach is that it does not go to the root of the problem. Unfortunately, he ultimately concludes that the systemic problems may be meaningfully addressed by tinkering with the existing OMB review process.[81] While the structure of this process clearly contributes to the problems of effective regulation, by the time the regulatory mess reaches OMB, it has already proceeded too far down the wrong track. Any hope for effective regulatory reform depends on pushing the review process back to the inception of the legislative idea that gives rise to the regulatory scheme.[82] A system that encourages Congress to get legislation "right" in the first place makes more sense than a system where regulatory mandarins are charged with rationalizing inconsistent congressional directives.

In this regard, the "high noon" structural reform proposed by Justice Breyer in *Regulation and Its Reform* makes more sense and would get the regulatory process off to a better start.[83] Under that approach, executive branch commissions would be charged with the task of studying specific regulatory programs and reporting findings within a specified time-table. The commissions would have to undertake a broad review of the programs in light of other less restrictive alternatives. The recommendations of the executive commissions would then go to Congress, where the appropriate committees would consider them. If the congressional committees did not act on the recommendations within one year, the recommendation would automatically come up for

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[79] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101–32 (1992); CHARLES L. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 13 (1977).

[80] *See* Craig Gannett, *Congress and the Reform of Risk Regulation*, 107 HARV. L. REV. 2095, 2100–01 (1994) (reviewing BREYER, *supra* note 2) (citing Congress's passage of the Clean Air Act amendments in 1990 as evidence of a willingness to use new "regulatory tools informed by economics and sensitive to costs and benefits").

[81] BREYER, *supra* note 2, at 71–72.

[82] For a general discussion of ways in which the legislative process might be modified to provide a feedback loop that would improve the quality of legislation, see Gouvin, *supra* note 26, at 1353–75.

[83] BREYER, REGULATION, *supra* note 1, at 366.

a vote on the floor of each house of Congress. By starting the review process with a deliberate and thoughtful study, the high noon idea would encourage informed decisionmaking based on a coherent agenda—assuming the executive branch could put together such a thing. The adherence to strict timetables would tend to overcome legislative inertia.[84]

If Breyer's high noon idea falls short, others have recommended ways to make the legislative process more amenable to the promulgation of effective, rational and coherent laws. For instance, Professor Edward Rubin has suggested that Congress prevent members and staff from drafting statutory language until the issues and goals supposed to be addressed by the legislation have been identified with some specificity.[85]

On a different tack, Professor Robert Seidman has suggested putting additional responsibilities on legislative drafters to justify their proposed bills with a comprehensive legislative memorandum. The memorandum would have to analyze the problem at which the legislation is aimed and show why the proposed solution is the best solution.[86]

Finally, I have suggested the creation of an Office of Public Policy that would bring together existing policy analysis resources in the Congress, such as the Congressional Research Service, General Accounting Office, Office of Technology Assessment and the Congressional Budget Office, and extend those analytical services to all important legislation. The Office of Public Policy would do nothing more than consciously identify the issues and the alternative approaches available for action. Adoption of a given course of action would remain a political decision for Congress.[87]

Any one of these pre-enactment reforms likely will do more to improve the regulatory product than the post-enactment dam-

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[84] The high noon idea received mixed reviews from legal commentators. *See* Lloyd N. Cutler, *Regulatory Mismatch and Its Cure,* 96 HARV. L. REV. 545, 553 (1982) (reviewing BREYER, REGULATION, *supra* note 1); Ernest Gellhorn, *Rationalizing Regulatory Reform,* 81 MICH. L. REV. 1033, 1038 (1983) (reviewing BREYER, REGULATION, *supra* note 1) (criticizing the idea); *see also* Louis B. Schwartz, Book Review, 35 HASTINGS L.J. 233, 235 (1983) (reviewing BREYER, REGULATION, *supra* note 1) (discussing the idea in generally positive terms).

[85] Rubin, *supra* note 26.

[86] Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory, and Practical Reason,* 29 HARV. J. ON LEGIS. 1 (1992).

[87] Gouvin, *supra* note 26, at 1371–75.

age control proposed by Justice Breyer. While he senses that changing the congressional legislative process is difficult, he must recognize that it is not impossible. His proposal instead calls for Congress to relinquish some amount of power to an unaccountable super-regulator—a situation to which Congress certainly will not accede without a struggle. On the other hand, proposals like the three just discussed that change the legislative process within Congress but keep political power in that institution seem easier to implement.

IV. Conclusion

Justice Breyer's proposal is undeniably thought-provoking. His book's most significant contribution may be to draw attention to the current regulatory regime's systemic problems, thereby encouraging serious discussion about how to "reinvent" the regulatory process. Breyer courageously points out that the political legitimacy of the process rests to some degree on the effectiveness of its product. Nonetheless, his proposal for correcting the problems he perceives will not likely win universal acceptance. At its core, however, Breyer's proposal contains a crucial insight that must be fully recognized: the current regulatory structure contains built-in flaws that contribute to a poor result, and the structure must be changed to correct, or at least ameliorate, those flaws. Although many will disagree with Justice Breyer's prescription, many more will concur in his message that the system needs fixing.