

BOOK NOTE

BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION

By Stephen Breyer.¹

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Judging by the hostile reaction Stephen Breyer's book, *Breaking the Vicious Circle*, received at his Supreme Court nomination hearings last July, one might think Breyer had proposed the abolition of democracy itself. Calling Breyer "presumptuous and elitist," Senate Judiciary Committee Chairman Joseph Biden told Breyer derisively that he was "delighted that as a judge you won't be able to take your policy prescriptions into the court."² Although it is inexplicable why the liberal senator was so confident that Supreme Court justices are unable to impose their policy preferences from the bench, why were Biden and the likes of Ralph Nader so upset with Justice Breyer's book?

At first glance, *Breaking the Vicious Circle* seems innocuous enough, recounting numerous tales of how quixotically and inefficiently our nation attempts to regulate small risks. Based on Breyer's 1992 Oliver Wendell Holmes Lectures at the Harvard Law School, the book underscores the difficulty of reconciling scientific analysis with political pressures in a world of rapidly changing technology and newfound risks. Breyer cites, for example, the cleanup of a toxic waste dump in New Hampshire where an extra \$9.3 million was spent to increase from 70 to 245 the number of days per year it would take for children to be harmed if they ate dirt daily from the site. This may not seem altogether unreasonable until one learns that no children ate (or were likely to ever eat) any dirt on the swampy site. Moreover, everyone involved agreed that more than half of the volatile chemicals would have evaporated by the year 2000 (p. 12).

Likewise, consider the wide variation in the amount of society's resources that different regulatory programs are willing to spend to save

1. Associate Justice, United States Supreme Court.

2. Joan Biskupic, *Senators Question Breyer's Economics; Biden Calls Cost-Effective Approach to Environmental Protection 'Elitist,'* WASH. POST, July 15, 1994, at A6.

one life. While an FAA regulation regarding aircraft cabin fire protection, for instance, costs approximately \$100,000 for each life saved, an EPA hazardous waste disposal regulation implies a \$4.2 billion expenditure to avert one death (pp. 24-27). Putting values on lives is never an easy task, but these gaping disparities force us to ask why some lives seem to be worth so much more than others and whether we could not save more lives by allocating regulatory efforts more evenly.

These are but a few of the many examples Breyer uses to show "how well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results" (p. 11). Breyer perceptively classifies these systematic problems into three categories. The first he calls "tunnel vision," by which he means the inclination of regulators to pursue their responsibilities so zealously that they lose sight of the larger cost-benefit picture. The New Hampshire waste dump described above is a perfect example. Christopher DeMuth, head of the Office of Management and Budget during the Reagan administration, has elsewhere summarized the phenomenon well: "Fearing above all a conspicuous disaster within their jurisdiction . . . [regulators] issue regulations requiring (say) the elimination of 95 percent of some risk where a 90 percent reduction would cost only half as much and would be the equilibrium point in a perfectly functioning market."³

The second systematic problem Breyer describes is the seemingly random way that risks make it onto the agendas of regulatory agencies. Politics and publicity, according to Breyer, mean that it is almost accidental which risks become the focus of regulatory action. Breyer cites as evidence a 1990 study by the EPA's Science Advisory Board which compared the general public's estimates of various risks with the views of risk experts. As it turns out, the two groups differ widely on their perceptions of a large number of risks. Visibility and publicity, for example, make industrial pollution of waterways a high safety priority in the minds of the public, while the invisible danger of radon is of little concern. The informed opinion of EPA experts, however, reverses the order, placing radon high on the list and discounting the danger of waterway pollution. Breyer rightly bemoans this lack of "any detailed federal government list that prioritizes health or safety risk problems so as to create a rational, overall agenda" (p. 20).

Yet even when serious risks do make it onto agencies' agendas, the

3. Christopher Demuth, *The Regulatory Budget*, REGULATION, Mar./Apr. 1980, at 34.

programs to deal with them are so uncoordinated and inconsistent that they constitute Breyer's third systematic problem. As mentioned above, regulators in different agencies use widely divergent values for individual lives in establishing regulatory standards. Furthermore, the regulators often ignore the risks that their own regulations cause. Breyer discusses, for example, sewage disposal regulations that, though designed to save one life every five years, would actually cause two additional cancer deaths annually because of new incentives to incinerate the waste (p. 22).

These three systematic problems—tunnel vision, random agenda selection, and inconsistency—are caused, according to Breyer, by a "vicious circle" composed of three other elements: public perceptions, congressional action and reaction, and uncertainties in the technical regulatory process. Regarding the first component, public perceptions of risk, Breyer is very pessimistic about the ability of ordinary citizens to understand and respond rationally to scientific evidence about health and safety risks. Breyer makes a strong case that normal intuitions about risk are often wrong and that the overestimation of risk leads to congressional action and reaction. This link between public perception and inappropriate congressional action is all the more serious, in Breyer's view, because "[t]here is little reason to hope for better risk communication [to the public] over time" (p. 39). Efforts to educate the public about scientific risks have failed and will continue to fail, says Breyer, because it is "hard to make the normal human mind grapple with this inhuman type of problem" (p. 39).

A legislature highly responsive to public opinion will therefore itself overreact to health and safety risks. Political pressures to take strong action, combined with an institutional inability to set detailed, scientific standards, will cause inconsistent, random, and often irrational congressional lawmaking. And the failure of Congress to protect the public, according to Breyer, will in turn lead to public cynicism and occasional hysteria. Ineffective congressional action, in short, feeds the public's misperception of risk and then leads to more political pressure to take strong action. The legislative process is thus caught in Breyer's vicious circle.

Complicating this already exasperating situation are the scientific uncertainties inherent in any effort to regulate risk. Science often does not have solid answers to questions about the threat that a chemical or activity poses to public health. How can a scientist be certain, for instance, that a lifetime of exposure to a given substance is safe without

actually exposing people to the substance over a period of decades? One can always extrapolate from short-term testing and animal studies, but such extrapolations are inevitably based on unprovable assumptions. This type of uncertainty in health regulations gives to the public "the appearance of subjective decision-making" (p. 50). Public concern therefore increases, and the legislative process becomes vulnerable to special interest groups that can claim with some plausibility that the government's regulations are insufficient and based on unreliable assumptions. Congress and regulatory agencies then become even more sensitive to negative publicity, and they overreach even farther with their regulatory standards. On and on the regulatory process thus spirals, to the detriment of the public good and with no end in sight.

Breyer's solution is to draw upon the virtues of bureaucracy by entrusting these regulatory decisions to an elite and insulated cadre of civil servants (p. 61). His association of bureaucracy with virtue is unusual in an era of cynicism about the government's ability to improve public welfare. It is thoroughly consistent, however, with Breyer's repeated invocation of the Platonic goal of "uniting political power with wisdom" (p. x). Indeed, says Breyer, "[a] Socratic notion of virtue . . . must be central in any effort to create the politics of trust" (p. 81).

More specifically, however, Breyer wants to establish a new and prestigious career path by which civil servants could develop regulatory expertise across a number of different governmental agencies. These experienced bureaucrats could then form a small, centralized administrative group that could coordinate and rationalize the nation's regulatory agenda. Such an organization, according to Breyer, would combine the expertise, broad vision, political insulation, and interagency jurisdiction which are all so lacking in the current system.

Breyer has no illusions that such a system would halt the vicious circle immediately, hoping instead only for "self-reinforcing institutional change, which will gradually build confidence in the regulatory system" (p. 55). The competence and fairness of his proposed organization would, he claims, break the cycle of fear and overreaction. Breyer cites the American public's high confidence in the military, even as trust in other public institutions has plummeted, as an example of how an insulated and elite organization can nevertheless inspire confidence if successful in its mission.

What would Breyer's organization actually look like? Breyer himself envisions an organization much like the Office of Information and

Regulatory Affairs ("OIRA") which currently operates within the Office of Management and Budget ("OMB"). OIRA already reviews regulatory actions but lacks the authority, staffing, and scientific expertise that Breyer compellingly argues is needed. Indeed, congressional suspicion of OMB as a political tool of the president may actually be exacerbating Breyer's vicious circle. With his proposed civil service career path, however, Breyer aims to staff OMB with depoliticized experts who can raise the organization above politics and instill confidence among the public in government's ability to get things right.

This proposal to insulate regulators from the usual political pressures is what so angered Biden and consumer advocacy groups such as Ralph Nader's Public Citizen. The idea that decisions affecting health and safety should be made out of the public spotlight is anathema to those like Nader who see corporate and conservative cabals at work behind every closed door. Frustrated with the lack of public opposition to Breyer's nomination, Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, could only say he hopes Breyer "will change some of the Neanderthal views he holds."⁴

Does Breyer deserve this kind of criticism for his views in *Breaking the Vicious Circle*? Much of the criticism seems directed simply at Breyer's application of economics to an emotional issue that literally involves life and death. Cost-benefit analysis is an easy target for politicians trying to portray themselves as defenders of the common person. How heartless it can appear, especially in an age of media sensationalism and soundbites, to suggest that some lives are not worth the price we are paying to save them. And how much easier it is to strike the pose of a caring, sensitive leader, willing to spend whatever sum and to do whatever is necessary to save that one extra infinitely valuable life.

Of course, whether the politicians want to recognize it or not, values are being placed on lives all the time. Whenever any law is passed or any regulation is promulgated that affects health and safety, a valuation of life is being used—maybe only implicitly, but a valuation nonetheless. Economic analyses like Breyer's reveal only what already exists, but they allow us to judge whether this is how we want our nation's resources allocated. Indeed, economics tells us very little about what we *should*

4. Eva M. Rodriguez, *Scenes From the Breyer Hearings: Liberals Throw Up Hands, Conservatives Roll Eyes, and Ethicists Are at Each Other's Throats*, LEGAL TIMES, July 18, 1994, at 10.

desire. Once we have decided on our preferences, however, economics tells us a lot about how we can achieve those desires most effectively.

The lessons of economics can easily be distorted by carelessness and misunderstanding. The goal of economics in health and safety regulation, for example, is *not*, strictly speaking, to put a single dollar value on all lives.⁵ Rather, the goal is to replicate the solution that a market would create if all parties had perfect information and were able to contract costlessly among themselves over the allocation of risk. When toxic substances have minute and untraceable effects on the population, such contracting between the public and the polluter is obviously not possible. Moreover, the tort system can not adequately handle such unattributable injuries. The government therefore has to regulate, but the regulation should come as close as possible to a market result.

Would people in a free market ever agree to trade their lives for even the millions of dollars that regulations implicitly use as the value of life? If death were nearly certain, then of course not: you would never trade your life for money you would not be around to spend. If death were only a small probability, however, you might agree to incur that risk of death for some amount of money; the greater the risk, the more money you would demand. We make these tradeoffs everyday, such as when we drive a little faster or a little more recklessly to get somewhere on time. Properly conceived, therefore, an economic approach to regulation does not dictate how much a life is worth, but tries instead to extrapolate from everyday experience how much money people would demand to incur a given risk. Different quantities and types of risk will therefore require different valuations of life. The argument that economics ruthlessly places a single dollar value on all lives is therefore simply wrong.

Justice Breyer, of course, is no economic novice, and he is undoubtedly aware of these economic subtleties.⁶ Properly understood, his argument thus is not that all regulations should use the same valuation of life, but rather that the disparity in the figures now being used is too large to be accounted for by any economic rationale. Regulation is failing to

5. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 196-201 (4th ed. 1992).

6. University of Chicago economist and law professor William Landes has said, "Breyer is better educated in economics than any justice in the Court's history." Peter Passell, *Economists See an Intellectual Atty in Supreme Court Nominee*, N.Y. TIMES, May 26, 1994, at D2. For further evidence of his economic expertise, see, e.g., STEPHEN G. BREYER, *REGULATION AND ITS REFORM* (1982); Stephen Breyer, *Economics for Lawyers and Judges*, 33 J. LEGAL EDUC. 294 (1983).

reproduce a market result, and social welfare is therefore being harmed.

Although Breyer's economic analysis of the *problem* is unassailable, his solution is problematic. The danger is not, as some have charged, that Breyer's elite regulatory agency is inherently anti-democratic. As a nation we currently assign countless vital tasks of government to unelected bureaucrats. Specialization and some degree of technocracy are inevitable in any society as complex as ours today. As Breyer himself notes, our republican form of government is, by definition, based on the delegation of the people's power to specialist legislators. To quote Breyer:

[T]he existence of a single, rationalizing group of administrators can thus facilitate democratic control, for it would reduce a mass of individual decisions to a smaller number of policy choices, publicize the criteria used to make those choices, and thereby make it easier for Congress, or the public, to understand what the Executive Branch is doing and why. . . . To systematize, to create clear lines of authority, to facilitate the assignment of responsibility is to empower the public. Representative democracy is not undemocratic (pp. 73-74).

If all Breyer is proposing is to make our already unaccountable bureaucracy work better, then no one should object.

What is troubling about his proposal, however, are occasional comments by Breyer that suggest an unawareness about where his elite bureaucracy's authority should end. No one disputes that some government regulation is necessary, and Breyer's proposal would allow the government to do a better job with that regulation. But, as discussed above, that regulation is only needed when market and common law mechanisms fail. To push bureaucratic regulation beyond those situations threatens individual liberty and freedom.

Consider, for example, Breyer's dismissive approach to less intrusive types of regulation, such as requiring that consumers be given information about potentially harmful products. He says the reader of a drug label "does not want a warning [concerning the probability of harm from the drug]; he wants to know what to do" (p. 56). Perhaps, but is there only one right answer for everyone regarding "what to do"? People using medication and other possibly dangerous products use them with various goals in mind and with different attitudes towards risk. Imposing one

solution from Washington allows none of the flexibility made possible by giving people the relevant information and empowering them to make the final decisions.

Of course, the government will have to regulate directly the fields where the relevant information may be too scientifically complex for the untrained citizen to understand. Regulators should use this power reluctantly, however, and they should approach these issues with a presumption that people can understand information and take responsibility for their own lives. This presumption is necessary to counter the tendency of regulators to underestimate people's abilities to acquire and comprehend risk information. Indeed, evidence from the workplace—an area dominated by government safety regulation—indicates that worker perceptions of risk are relatively accurate in relation to the actual risks they face.⁷ And where workers cannot get reliable information about risks, regulators should first try requiring employers to give workers safety information before trying to foist one solution upon all employees.⁸

It is this failure to discriminate between different risk situations that ultimately mars Breyer's otherwise excellent book. Situations like the workplace, where the parties know each other and might be able to contract around the risk, are lumped together with issues like toxic waste, where individual citizens have no information and are too dispersed for a contractual solution. Indeed, Breyer even tosses in issues such as prenatal care and deforestation in Madagascar as areas to be addressed by his regulatory agency, despite the obvious social, political, and scientific differences between those situations and the normal place for regulation as outlined above (p. 77).

Breyer, in short, is certainly correct when he argues for the necessity of virtue and wisdom in the making of public policy. In its proper place, the elite coordination and expertise in regulation that Breyer proposes would improve American well-being. The flaws of Breyer's book, however, suggest that overreaching bureaucrats may ultimately be neither as virtuous nor as wise as they are apt to think they are.

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7. See MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS 74-75 (1990).

8. See generally W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE (1983).