COULD JUSTICE BREYER BE HAZARDOUS TO OUR HEALTH?

Thomas O. McGarity
William Stamps Farish Professor of Law
University of Texas School of Law

Now that prominent representatives of both ends of the political spectrum have enthusiastically endorsed President Clinton's nomination of Judge Stephen Breyer to the Supreme Court, most knowledgeable observers predict a speedy confirmation process at the end of which the Senate will consent without providing very much advice. Before jumping on the Breyer bandwagon, however, the Senate should pay some attention to what Judge Breyer has been saying about a rather arcane topic that is nevertheless of great concern to the general public -- federal regulation of activities that pose risks to human health and the environment. An examination of Judge Breyer's views on health and environmental regulation reveals that he is not likely to disappoint conservative critics of the Environmental Protection Agency, (EPA) the Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA). Before the confirmation process has run its hasty course, the Senate Judiciary Committee should pause to ask whether Justice Breyer could be hazardous to the public health.

Judge Breyer's Background.

Judge Breyer has extensive experience in public policymaking. After graduating from Harvard Law School and serving a clerkship with Justice Arthur Goldberg, he worked briefly for the Justice Department's Antitrust Division. In 1967, Breyer joined the faculty of the Harvard Law School to teach courses on

Administrative Law and Antitrust Law. He returned to Washington, D.C. several times during the next thirteen years to work for the Watergate Special Prosecutor and on two separate occasions for the Senate Judiciary Committee. During his early teaching years, Professor Breyer gained a national reputation as an expert on federal regulation of natural gas. In the midst of the energy crisis, Judge Breyer and Paul MacAvoy, a well-regarded Harvard economist, co-authored a short book questioning the existing framework for regulating natural gas and urging rapid deregulation.[1] Although the book was a little ahead of its time, Congress later passed the Natural Gas Policy Act of 1978,[2] which to a large extent adopted the policy prescriptions of Breyer, MacAvoy and other critics of natural gas regulation.

Judge Breyer next broadened his intellectual horizons to encompass *all* federal regulation of private activity. In the late 1970s, he became a consultant to the American Bar Association's newly created Commission on Law and the Economy to help in drafting a report on federal regulation and its impact on the American economy. The Commission's Report, entitled *Federal Regulation: Roads to Reform*, proved very influential in the congressional debates over "regulatory reform" in the late 1970s and early 1980s.[3] The Report adopted an impressively sophisticated taxonomy of regulation that Professor Breyer later elaborated upon in an article in the

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[1] Stephen Breyer and Paul MacAvoy, *Energy Regulation by the Federal Power Commission* (1973).

[2] 15 U.S.C. §§ 3301-3432.

[3] American Bar Association Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (1978).

Harvard Law Review[1] and in a subsequent book of about the same length entitled *Regulation and its Reform.*[2]

Soon after penning the regulatory reform article, Professor Breyer left Harvard to become Chief Counsel to the Senate Judiciary Committee, which was at that time considering legislation designed to bring about important changes in economic regulation. During his brief stint with the Committee, Breyer was instrumental in drafting legislation deregulating the airlines. Impressed with his staff work, Senator Kennedy persuaded President Carter to nominate Breyer to a vacant position on the First Circuit Court of Appeals in Boston. The nomination languished until after the 1980 election, after which the Senate (for which the Republican Party was soon to be the majority party) confirmed only one of the many Carter nominations to the bench. The single appointment was that of Judge Breyer. Senate Republicans were apparently sufficiently comfortable with Judge Breyer's views that they elected not to stall the nomination for the few weeks that would have been necessary to allow newly elected President Reagan to withdraw it.

Once on the bench, Judge Breyer did not abandon his interest in federal regulation. Although the First Circuit does not have many opportunities to review actions of federal regulatory agencies, Judge Breyer has continued to teach and write scholarly articles and books on Administrative and Environmental Law. His most recent book, entitled *Breaking the Vicious Circle: Toward Effective Risk Regulation,*[3]

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[1] Stephen Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 549 (1979) [hereinafter cited as Analyzing Regulatory Failure].

[2] Stephen Breyer, *Regulation and Its Reform* (1981).

[3] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) [hereinafter cited as Vicious Circle].

contains Judge Breyer's current thinking on federal regulation of toxic chemicals in the workplace and the environment. A close look at this book and some of Judge Breyer's earlier writing on the role that courts should play in reviewing the actions of federal regulatory agencies should help answer the question whether Justice Breyer could be hazardous to the public health.

Judge Breyer's *Laissez Faire* Presumption.

One clear theme that emerges from Judge Breyer's writings is his strong preference for the free market and his corresponding skepticism about the efficacy of governmental intervention into private market arrangements. For example, the framework for analysis of federal regulation that Professor Breyer developed in the late 1970s "assume[d] that the unregulated marketplace is the norm and that those who advocate governmental intervention must justify it by showing that it is needed to achieve an important public objective that an unregulated marketplace cannot provide."[1] In this important respect, Judge Breyer's views parallel those of prominent judicial appointees of President Reagan, including Justice Antonin Scalia, Judge Alex Kozinski of the Ninth Circuit, Judges Frank Easterbrook and Richard Posner of the Seventh Circuit, Judges Stephen Williams and Douglas Ginsberg of the D.C. Circuit, and former Judge Robert Bork. Indeed, this presumption against government intervention into private economic arrangements is nothing new; it is merely a

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[1] Analyzing Regulatory Failure, supra, at 552.

somewhat subdued reinvocation of the principles of *laissez faire*, *caveat emptor*, *volenti non fit injuria*, and other related doctrines that formed the foundation for the legislative and judicial regime of the late nineteenth century that was thoroughly discredited during the Progressive and New Deal eras.

It is certainly possible that Judge Breyer is less hesitant than some of his more conservative brethren to allow the presumption to be rebutted. He does, for example, recognize certain traditional explanations for why "market failure" can justify governmental intervention. Thus, the presence of "externalities" or "spillovers" can justify environmental regulation, and occupational safety regulation may be necessary to correct for inadequate information.[1] Still, it is clear that he is no fan of health and environmental regulation. The pathbreaking aspect of his early work on regulatory reform was its recognition that just as market failures sometimes justify regulation, "regulatory failures" sometimes justify regulatory reform. According to Breyer, regulatory failures most often result from "mismatches" between the justifications for regulation and the regulatory tools that the government adopts.[2] He suggests that policymakers look for alternative regulatory tools that better match the nature of the market failure that gave rise to the need for regulation. In the case of health and environmental regulation, Breyer strongly urges agencies to pay more attention to private bargaining and incentives, such as effluent fees and marketable permits, rather than continuing to focus on traditional standard setting,[3] even though such market-

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[1] Analyzing Regulatory Failure, supra, at 555-56.

[2] Analyzing Regulatory Failure, supra, at 551.

[3] Analyzing Regulatory Failure, supra, at 586, 595-97.

oriented techniques have rarely been tested in the real world.[1]

In *Breaking the Vicious Circle*, Judge Breyer, much more clearly than in his previous work, demonstrates a willingness to allow health and safety proponents to rebut the *laissez faire* presumption. Yet although he concedes that health and environmental regulation is necessary to reduce the risks posed by toxic chemicals in the environment, he nearly always minimizes the magnitude of those risks. In his usual deliberative fashion, Judge Breyer addresses the ongoing debate in the scientific community over how to assess the magnitude of health risks posed by exposure to environmental contaminants. Some scientists believe that a relatively large percentage of human cancers are caused by exposure to man-made toxic chemicals; others believe that the percentage is so small as to warrant little societal attention. Some scientists believe that high-dose animal testing is the most practical way to screen chemicals for carcinogenicity; others believe that animal tests are not sufficiently reliable to serve as the basis for regulatory action. Unfortunately, in describing health and environmental risks, Judge Breyer relies almost exclusively upon the scientists on one side of the debate, relegating the scientists on the other side to a judicious "but see" citation at the end of a footnote. In short, Judge Breyer takes sides in the debate, and he sides with those that believe that the risks posed by environmental contaminants are not very large.

This leads Judge Breyer to conclude that environmental activists and the media have steered a naive Congress into creating a precautionary regulatory atmosphere in

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[1] See Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms, 37 Stan. L. Rev. 1267, 1275-84 (1985); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

which federal agencies force well-meaning companies to waste scarce resources trying to reduce or eliminate the "last ten percent" of the risks posed by environmental contaminants. Relying upon his own experience in reviewing the record in the *Ottati & Goss* case,[1] Judge Breyer questions whether it would be worth spending $9.3 million to protect children who might at some time in the future eat some of the contaminated dirt that would otherwise be left in place at a notorious New Hampshire superfund site.[2] In a similar vein, Judge Breyer critiques EPA's attempts to regulate asbestos and OSHA's and EPA's attempts to regulate benzene.[3] In each instance, Judge Breyer accepts the opinions of the experts that trivialize the risks that the government was attempting to address and rejects experts that take them seriously. Judge Breyer therefore concludes in each case that the government was attempting to force private companies to pay too much to reduce minimal health risks.

If one believes the experts that Judge Breyer cites, many of whom either work for or are supported financially by the regulated industries, it is easy to agree with his analysis. A company should not be required to spend tens of millions of dollars to save a small fraction of a single statistical life. The experts that Judge Breyer relies upon, however, are inclined to gloss over the enormous uncertainties that becloud any attempt to quantify the risks posed by chemicals in the environment. If one is less inclined than Judge Breyer to trust these experts to assess risks accurately, one might insist that companies be required to undertake their best efforts to reduce emissions or

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[1] United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990).

[2] Vicious Circle, supra, at 11-12.

[3] Vicious Circle, supra, at 12-15.

to clean up old messes, even when the resulting benefits are not precisely quantifiable.

Much depends upon how much risk lies in the last ten percent that, according to Judge Breyer, should not generally be of great concern to society. Unfortunately, attempts to answer that question are confounded by huge uncertainties. Because testing toxic chemicals in human beings in controlled experiments is ethically questionable, scientists attempt to identify subpopulations (often workers) who have received larger exposures that the general population. These after-the-fact epidemiology studies can identify substances, like asbestos and vinyl chloride, that have powerful toxic effects. Less striking, but still significant, effects get lost in the statistical noise. As the apparently never ending debate over the health effects of smoking makes clear, even the studies that show a positive correlation between exposure and disease are fiercely debated among well-credentialed scientists. Risk predictions based upon such studies are at best highly debatable, and not appropriately cited as gospel.

In the absence of good epidemiological studies, government agencies have for decades relied upon tests in rodent species to predict potential health effects in humans. For economic reasons, the tests are carried out at doses much higher than typical human exposures in the environment. Sadly, the scientists who examine under a microscope the tissues from the animals cannot always agree about what they see. Some pathologists see cancer where others see only dead tissue. Animal testing also gives rise to uncertainties over the relevance of animal studies to humans and over the proper mechanism for extrapolating the high exposure results to the low exposures that humans typically experience. Risk predictions can vary over several orders of magnitude, depending upon which mathematical model one chooses.[1]

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[1] For extended discussions of the uncertainties that regulators encounter in conducting health risk assessments, see National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983); James Leape, Quantitative Risk

Swimming in this sea of uncertainties, the regulatory decisionmaker must rely upon presumptions to fill in the factual gaps. Guided by their respective statutes, federal agencies have in the past tended to "err on the side of safety" in resolving the science/policy disputes that produce the uncertainties. It is precisely on this point that Judge Breyer parts company with this mainstream public policy toward regulating health and environmental risks. Although he clearly understands the regulator's dilemma, Judge Breyer flatly rejects a policy of erring on the side of safety in dealing with the uncertainties that arise our of these science/policy disputes, because it leads society to spend too many dollars chasing after what he believes to be trivial risks.[1]

This is the essence of a contentious policy debate over health and environmental regulation in the United States. For the most part, the American public and its elected representatives have adopted a policy of erring on the side of safety. They recognize that sometimes this policy will lead to actions being taken with respect to chemicals that do not pose very high risks, but the presumption will also help avoid disasters like thalidomide, Bhopal and Chernobyl. Persuaded by the experts on one side of the debate that tend to trivialize most health and environmental risks, Judge Breyer does not believe that the uncertainties are so large or the consequences of error so terrible that society should replace the presumption in favor of free markets with one that errs on the side of safety.

Judge Breyer also believes that Congress, the regulatory agencies and the

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Assessment in Regulation of Environmental Carcinogens, 4 Harvard Envt'l L. Rev. 86, 100-103 (1980); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729 (1979).

[1] Vicious Circle, supra, at 42-50.

public cannot be trusted to address risk regulation in a sensible way. Relying on highly suspect comparisons of environmental risks with other safety risks that human beings routinely encounter, Breyer concludes that the risk perceptions of ordinary folks depart dramatically from the real risks as determined by the experts.[1] If the experts are right (and Judge Breyer rather uncritically assumes that they are), the public must be wrong in clamoring for more protection from environmental contamination. Nor does Judge Breyer trust Congress to regulate risks intelligently. He is especially critical of absolutist statutory provisions like the Delaney Clause, which prohibits the deliberate addition of animal carcinogens to food. He believes that "Congress is not institutionally well suited to write detailed regulatory instructions that will work effectively."[2] In fact, Judge Breyer does not really trust the regulatory agencies to get it right, because they cannot be trusted to "resist Congressional or public efforts to set agendas and to manage particular results."[3]

Like many industry and academic critics of health and environmental regulation, Judge Breyer argues that the money expended complying with "unreasonable" health and environmental regulations could more effectively be spent addressing different health and environmental risks. For example, he suggests that much of the money expended on cleaning up abandoned hazardous waste dumps in the United States would be better spent saving the trees in Madagascar. In addition to relying upon dubious quantitative risk comparisons, such "wishful thinking" arguments

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[1] Vicious Circle, supra, at 35-39.

[2] Vicious Circle, supra, at 42.

[3] Vicious Circle, supra, at 50.

presume the existence of institutional vehicles for directing private resources from one private use to entirely unrelated public uses. Judge Breyer's example presumes a vehicle for collecting monies from hazardous waste generators, a vehicle for directing those resources to Madagascar, and a vehicle for ensuring that they are spent on saving trees, presumably by compensating the owners of those trees. Imagine the reception in Congress of a Bill the intent of which was to shift wealth from manufactures and municipalities in United States to large land holders in Madagascar. Since the government is powerless to save the trees in Madagascar, the argument that the money spent cleaning up hazardous waste dumps could be better spent in Madagascar is in reality an argument for doing nothing at all.

Judge Breyer even accepts the highly dubious "richer is safer" argument against stringent regulation of activities that pose health and safety risks. This theory, which has few adherents in the academic community, posits that health and environmental regulation can harm human health through the adverse impact that it has on the economy. Breyer approvingly cites one estimate that "every $7.25 million spent on a cleanup regulation will, under certain assumptions, induce one additional fatality"[1] for the proposition that regulations that cost more than that amount per statistical life saved are counterproductive. The "certain assumptions" alluded to are for the most part entirely lacking in empirical support. They include the assumption that the money that employers save from not having to comply with strict OSHA standards will be passed on to workers, rather than shareholders, and the assumption that workers will spend that extra money on better diets, rather than cigarettes, and on less stressful leisure, rather than on jet-skiing or bungie-jumping. It is hard not to

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[1] Vicious Circle, supra, at 23.

conclude that this argument is merely a conscience-salving makeweight to justify an antiregulatory posture arrived at on other grounds.

In sum, Judge Breyer has after much study formed fairly strong opinions about the need for and efficacy of federal health and environmental regulation. In his mind, the burden of justifying such regulation is on the would-be beneficiaries of such regulation, and they should be prepared to demonstrate not only that regulation will reduce health and environmental risks, but also that the money expended in doing so could not better be spent reducing some other risks. It seems reasonably clear that if Judge Breyer had been a member of Congress, he would not have supported many of the current health and environmental statutes. But Judge Breyer is not running for Congress; he has been nominated to fill a vacancy on the Supreme Court. The Supreme Court cannot enact or repeal legislation, but it can profoundly affect how regulatory agencies implement congressional enactments. Therefore, to answer the question whether Justice Breyer would be hazardous to the public health, we must examine his views on the proper role of the reviewing courts in implementing health and environmental legislation.

The Role of Federal Courts in Health and Environmental Regulation.

To understand how a Supreme Court Justice could possibly have an adverse effect on human health or the environment, one must begin with an understanding of the role that federal courts play in federal regulation. Under prevailing doctrines of Administrative Law, arising out of the federal Administrative Procedure Act (APA) and various substantive statutes, the federal courts play a profound role in health and safety regulation. Congress has in many cases assigned the federal courts the role of

stimulating action by lazy or recalcitrant federal agencies. The APA provides that a reviewing court may compel agency action that is "unlawfully withheld or unreasonably delayed," and specific deadlines in many environmental laws provide Congress' guidance on how long particular tasks should take.[1] The net result has been a long line of "bureaucracy forcing" cases in which the beneficiaries of delayed regulatory programs secure court orders forcing health and environmental agencies to issue orders or promulgate rules by dates certain.[2] For example, during the 1980s, nearly every health standard issued by the Occupational Safety and Health Administration (OSHA) came only after a court had ordered OSHA to take up the topic and decide whether or not to promulgate a regulation prior to a judicially determined deadline.[3]

The federal courts are also empowered to review agency orders and rules after they have been promulgated and issued. Courts engaged in judicial review of agency action can perform three basic functions. First, a court can review the agency's interpretation of a statute or the constitution. In some cases petitioners allege that the agency's action is unconstitutional or outside of the agency's delegated powers and ask the court to restrain such unlawful exercises of bureaucratic power. More frequently, petitioners accept the agency's power to address a particular topic, but

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[1] 5 U.S.C. § 706(1).

[2] See generally Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Administrative Law Review 171 (1987); Neil R. Eisner, Agency Delay in Informal Rulemaking, 3 Ad. L. J. 7 (1989); John D. Graham, The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act, 1985 Duke Law Journal 100.

[3] See Thomas O. McGarity and Sidney A. Shapiro, Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration (1993).

challenge the agency's interpretation of the statutory language that empowers the agency.

Second, a court can set aside agency action that is "without observance of procedure required by law."[1] Petitioners often challenge agency action on the ground that the agency did not afford them an appropriate opportunity to present their side of the issues. Or the petitioners may claim that the agency failed make a required threshold finding or to prepare a necessary analytical document such as an environmental impact statement or a regulatory flexibility analysis. These challenges do not go to the existence of agency power or to the correctness of the agency's conclusions. Rather, the challengers are insisting that the agencies "go by the book" in taking actions that affect their interests.

Third, petitioners may challenge the substance of the agency's resolution of an issue or issues at the end of the relevant procedures. The Administrative Procedure Act and many agency statutes require an agency's explanation for its action to come up certain minimum measures of rational decisionmaking. For the most part, agency action taken after formal proceedings, such as licensing hearings, must be supported by "substantial evidence" in the record made before the agency.[2] Informal agency action, such as standard setting, must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[3]

Given the extraordinary potential for a court playing one or more of these three

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[1] 5 U.S.C. § 706(2)(D).

[2] 5 U.S.C. § 706(2)(E).

[3] 5 U.S.C. § 706(2)(A).

roles to disrupt an agency's policymaking initiatives, it should come as no surprise that agencies are very aware of the possibility judicial review and adjust their conduct accordingly. Applied with the deft touch envisioned in the Administrative Procedure Act, judicial review can be a bulwark against the arbitrary exercise of bureaucratic power. But judicial power can also be abused. Overly aggressive judicial intrusion into the administrative process can greatly hinder the implementation of laws designed to protect human health and the environment from dangerous private conduct. If regulatory agencies like EPA and OSHA are not allowed to perform their assigned tasks in an expeditious fashion, unprotected workers will be killed and maimed, and irreparable environmental damage will needlessly result. It therefore behooves us to examine where Judge Breyer, an acknowledged expert in administrative law, stands on these somewhat arcane questions concerning the scope of judicial review of administrative action.

Judge Breyer on Statutory Interpretation.

Since 1984, courts reviewing agency interpretations of their own statutes have been guided by the so-called *Chevron* doctrine. The Supreme Court announced that doctrine in a case involving an environmental group's challenge to EPA's policy of allowing major sources of pollution in areas that did not meet air quality standards to add new equipment or modify existing equipment without EPA review so long as they came up with offsetting reductions in emissions within the same plant. As a prelude to examining the statutory basis for this "bubble" policy, the Supreme Court spoke to the role of courts in interpreting agency statutes:

> When a court reviews an agency's construction of the statute which it

> administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

This prescription for a very limited judicial role in statutory interpretation of agency statutes has received a great deal of academic criticism, and it is not always clear that the lower courts follow it religiously. Reviewing courts, including the Supreme Court itself, are sometimes inclined to find the statute clear on its face when they disagree with the agency's interpretation and to stretch to find ambiguity when they agree with the agency.

The existing sample of Judge Breyer's opinions involving judicial review of statutory interpretation is too small to support any firm conclusions about his

inclination to defer to agencies' interpretations of their own statutes. But his writing on the subject indicates that he believes that the *Chevron* test is too simplistic to provide guidance to the lower courts, given the wide variety of situations in which agencies are called upon to interpret their own statutes.[1] Judge Breyer doubts that judges, who develop their own expertise in interpreting statutes, can adopt the deferential frame of mind that the *Chevron* test demands:

> [S]uch a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, and that its interpretation is reasonable. More often one concludes that there is a "better" view of the statute . . . and that the "better" view is "correct," and the alternative view is "erroneous."[2]

Given Judge Breyer's skeptical view of the deferential *Chevron* test, we should expect *Justice* Breyer to reach his own conclusions about the "better" view of the environmental statutes. Since Judge Breyer is not sympathetic to the existing statutory regime for health and environmental regulation, Justice Breyer may be inclined to interpret health and environmental statutes narrowly to preclude health and environmental agencies from taking aggressive action at the outer edges of their

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[1] Judge Breyer has also written on the related question of the role that legislative history should play in judicial interpretation of statutes. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1991). In this article, Judge Breyer convincingly rejects Justice Scalia's radical suggestion that legislative history should play no role in statutory interpretation.

[2] Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363 (1986) [hereinafter cited as Judicial Review].

statutory authority. Justice Breyer's presumption in favor of allowing markets to function without government intrusion may not easily be overcome by an agency's interpretation of its statute to allow governmental intervention.

Judge Breyer on Agency Procedures.

Although Judge Breyer has had very little to say in the academic literature about judicial review of an agency's procedural choices, he has authored four opinions in cases involving challenges to agency failures to prepare environmental impact statements (EISs). The court in two of the cases ruled in favor of the agencies;[1] in one case the court required the agency to prepare an EIS;[2] and in another case the court required the agency to prepare a supplemental EIS.[3] In none of the cases was the agency clearly out of bounds in failing to prepare an EIS. Yet in all four cases, Judge Breyer examined very carefully the agency's reasons for foregoing the EIS and measured the agency's explanation against the materials assembled in the substantial administrative records. Given that the Supreme Court has not once in NEPA's twenty-

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[1] City of Waltham v. U.S. Postal Service, 11 F.3d 235 (1st Cir. 1993) (EIS not required for construction of a Postal Service regional distribution facility); Citizens for Responsible Area Growth v. Adams, 680 F.2d 835 (1st Cir. 1982) (EIS not required for private construction of hanger for corporate jets).

[2] Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (EIS required for proposed cargo port and causeway on Sears Island).

[3] Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983) (supplemental EIS required for federal auction of drilling rights off Georges Banks, given government's drastically reduced estimate of amounts of oil yields likely to result).

five year history ruled against an agency, Judge Breyer's apparent willingness to do so half the time may indicate an activism with respect to this particular procedural issue that is currently lacking on the Court.[1]

Judge Breyer on Substantive Judicial Review of Agency Action.

Judge Breyer has had a great deal to say in the academic literature about the role that reviewing courts should play when they engage in substantive judicial review of agency action under the "substantial evidence" and "arbitrary and capricious" tests. Under existing judicial precedent "substantial evidence" means "more than a mere scintilla." It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] An informal agency action is "arbitrary and capricious" if:

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

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[1] Judge Breyer's opinion in *Watt* demonstrates an inclination to require agencies to engage in meticulous cost-benefit analysis. Although there is strong judicial precedent for requiring agencies to engage in a "finely tuned" cost-benefit balancing in NEPA cases, Calvert Cliffs' Coordinating Comm. v. v. AEC, 449 F.2d 1109 (D.C.Cir. 1971), cost-benefit analysis is not as clearly required in statutes empowering EPA and OSHA to take actions to protect health and the environment, and it is in fact forbidden by statute in some contexts. See American Textile Mfrgs. Inst. v. Donovan, 452 U.S. 490 (1981) (occupational health standards); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (1980) (national primary ambient air quality standards).

[2] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

expertise.[1]

Both of these tests appear at first glance to be quite deferential, but they both leave substantial room for courts to substitute their policy judgments for those of the agencies. We have seen that Judge Breyer has strong opinions about the policies that should govern health and environmental regulation. The paramount question in the area of substantive judicial review is whether he will substitute his policy preferences for those of the health and environmental agencies.

Judge Breyer's writings suggest that he believes that the courts should take a deferential approach toward substantive judicial review. He is particularly sensitive to the question of the institutional competence of federal courts to second-guess agency attempts to resolve highly complex and uncertain science/policy disputes:

> . . . The court may not appreciate the agency's need to make decisions under conditions of uncertainty. Compromises made to secure agreement among the parties may strike a court as "irrational" because the agency cannot "logically" explain them.
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> [C]ourts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand. . . .

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[1] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983).

> . . . The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo.[1]

Yet most of the examples that he cites of judicial overreaching involve cases in which the agency action was deregulatory in nature and therefore consistent with his laissez faire policy presumption.[2]

The critical question, on which Judge Breyer's existing judicial opinions shed very little light, is whether *Justice* Breyer will retain this sympathetic posture when the agency action runs counter to his strongly held preference for free markets. The reviewing courts have tremendous discretion under the "substantial evidence" and "arbitrary and capricious" tests to find gaps in the agency's analysis, to question the agency's assumptions, and to second guess how the agency resolves science/policy questions. The temptation for the judge to substitute his or her weltanschauung

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[1] Judicial Review, supra, at 388-91.

[2] For example, Judge Breyer is critical of the Supreme Court's opinion in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983), a case in which the Court remanded a deregulatory initiative by the National Highway Traffic Safety Administration withdrawing a previous rule requiring auto makers to incorporate passive restraints in automobiles manufactured after 1984. See Judicial Review, supra, at 395. At the same time, Judge Breyer cites the Fifth Circuit opinion in Aqua Slide'N'Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831 (5th Cir. 1978) as an example of a court's ability under even a relaxed judicial supervisory attitude "to catch the occasional agency policy decision that is in fact highly irrational." Judicial Review, supra, at 395. The Fifth Circuit in *Aqua Slide'N'Dive* overturned a regulation of the Consumer Product Safety Commission aimed at making swimming pool slides safer for the public. From a perspective other than Judge Breyer's presumption in favor of free markets, the agency action was not at all irrational. The Fifth Circuit opinion is in many respects a paradigm of overly strict judicial review.

for that of the appointed regulatory officials can be overwhelming. But it must be resisted if agencies are to be allowed to implement congressionally enacted regulatory programs to protect public health and the environment. For, as Judge Breyer clearly recognizes, a judicial remand of an important regulation can have a tremendous impact on the ongoing viability of a regulatory program.[1]

Conclusion.

Will Justice Breyer possess the fair-mindedness to consider the opinions of experts on both sides of science/policy debates? Will Justice Breyer have the humility to shelve his personal policy preferences and allow regulatory agencies to pursue the "last ten percent" of the health and environmental risks that Congress has empowered them to regulate? Will Justice Breyer exercise the good judgment to defer to congressional policy determinations when they differ dramatically from his own considered conclusions, even when he knows that he has thought longer and harder about the underlying issues than any individual congressperson?

The members of the Senate Judiciary Committee should press Judge Breyer hard for honest answers to all of these questions. Judge Breyer's policy prescriptions are a matter of

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[1] Judicial Review, supra, at 383.

public record. However, the record is still incomplete on how Justice Breyer will resolve the tension between his views on the proper role for regulation in society and his views on the proper role for the courts in reviewing regulatory agency actions. Only after Judge Breyer has publicly addressed this tension can we know whether Justice Breyer will be hazardous to our health.