

KEEPING THE BABY AND THROWING OUT THE BATHWATER: JUSTICE BREYER'S CRITIQUE OF REGULATION

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The contemporary debate concerning government regulation is dominated by two approaches. The public interest approach presumes that regulation serves the general interests of the public. Adherents to this approach attribute "regulatory failure," or the failure of regulation to serve the public interest, to policy mistakes by regulators. Public choice scholars have challenged this model by exposing the role of politics in regulatory decisionmaking. Their research indicates that powerful political interests can secure regulatory decisions that are of more benefit to themselves than to the public. These scholars attribute regulatory failure to the inevitable capacity of powerful interests to use regulation for their own ends.

Justice Stephen Breyer's contribution to this debate is his explanation of how policy mistakes lead to regulatory failure in the public interest model. His scholarship demonstrates that regulatory failure is a function of "mismatches." A mismatch occurs when the government misdiagnoses the nature of a regulatory problem or uses an inappropriate method of regulation.

This Article evaluates Justice Breyer's effect on regulatory scholarship in two parts. Part I explains Justice Breyer's version of the public interest model and how it supports the public interest character of many regulatory programs. In light of this public character, deregulation is generally an inappropriate response to regulatory failure. The government should instead eliminate existing mismatches. Part II considers Justice Breyer's analysis of mismatches in economic and social regulation. Justice Breyer's scholarship has made an important contribution in both areas, but his work concerning economic regulation is more successful. His analysis of health and safety regulation contains important insights, but he fails to appreciate fully the role of noneconomic justifications for

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such regulation. Part III proposes that Justice Breyer's policy recommendations for risk regulation should be reformulated in light of this oversight.

I. KEEPING THE BABY

Justice Breyer's 1982 book, *Regulation and Its Reform*,¹ defends the public interest concept by demonstrating how regulatory programs address the inefficient operation of markets or serve other noneconomic goals. This insight is significant in light of the public choice explanation. If regulation is justifiable as a policy matter, it indicates that regulatory decisionmaking is not merely the product of self-interested behavior. As Steven Kelman has noted: "The best operational test of the importance of public spirit in the political process is the ability of ideas to overcome interests in determining political choices."² This section compares the public choice explanation for regulation to Justice Breyer's public interest explanation.

A. *The Public Choice Model*

Public choice scholarship describes regulatory politics as composed of market-like transactions between those who demand regulation (the buyers) and those who supply it (the sellers).³ The buyers are organized interests who support or oppose regulation according to the self-interest of their members.⁴ The sellers are public officials who make regulatory decisions according to their own self-interest. Legislators respond to buyers who offer support for reelection,⁵ while agency officials respond to buyers who can assist them to obtain additional power and prestige.⁶ When organized interests compete, the outcome depends on what group or groups offer the greatest rewards to legislators or administrators.

1. STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

2. Steven Kelman, *Why Public Ideas Matter*, in *THE POWER OF PUBLIC IDEAS* 31, 39 (Robert B. Reich ed., 1988).

3. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21-23 (1991) (describing economic theory of legislation) [hereinafter *LAW AND PUBLIC CHOICE*].

4. Samuel Peltzman, *Toward a More General Theory of Regulation*, 19 *J. LAW & ECON.* 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MANG. SCI.* 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MANG. SCI.* 3 (1971).

5. *LAW AND PUBLIC CHOICE*, *supra* note 3, at 22.

6. ANTHONY DOWNS, *INSIDE BUREAUCRACY* 44 (1967).

In public choice theory, political interactions not only are responsible for regulatory programs, they also inhibit efforts to reduce regulation that serves the interests of industry and producer groups. Deregulation is difficult because often there is no organized opposition to the political demands of such groups. When a regulatory decision benefits the members of such a group at the expense of thousands of citizens, the members of the industry or producer group have an economic incentive to engage in collective political action.⁷ In addition, organized interests and their political sponsors develop relationships that are highly resistant to change by outsiders.⁸

The influence of organized interests on regulatory politics is indisputable, but the public choice approach does not explain key elements of the regulatory state. Industry and producer groups were unable to stop the passage of the many environmental, health and safety, and consumer protection laws.⁹ Also, they have been unable to secure the repeal of these laws.¹⁰ They have been unable to stop deregulation efforts in the airline, trucking, banking, and telecommunications industries that disfavored them.¹¹ Yet, public choice scholarship predicts that business and producer groups should prevail because they have more political influence than their opponents.¹²

The public choice explanation falls short in explaining the origins of regulation because it does not account for the influence of "ideas" or policy considerations in regulatory decisionmaking.¹³ Regulatory decisions result from a mix of persuasive argument and political influ-

7. When a government action affects a large number of persons, the effect on any individual is so small that it may be less than the costs of joining in a collective action. Moreover, each individual will be better off if the person is a "free-rider" on the political efforts of others. Smaller groups are generally more successful in overcoming this constraint. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 43-52 (1971).

8. THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY & THE CRISIS OF PUBLIC AUTHORITY* 90 (1969).

9. Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 *YALE J. ON REG.* 369 (1993).

10. Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 *CORNELL L. REV.* 280 (1990).

11. RICHARD H. K. VIETOR, *CONTRIVED COMPETITION: REGULATION & DEREGULATION IN AMERICA* 11 (1994).

12. *Supra* note 7 and accompanying text.

13. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 10 (1981) (suggesting that political explanations of government fail to account for significant impact of ideas).

ence.¹⁴ The mix of each may vary, but both policy and power matter.¹⁵ Interest groups with a good policy idea can prevail even if they have less political power than their opponents.¹⁶

B. The Public Interest Model

Regulation and Its Reform presents a framework for analyzing regulation that has had a lasting effect.¹⁷ The book draws mainly on economic theory concerning the objectives of regulation.¹⁸ The forces of supply

14. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, & PUBLIC POLICIES* 21 (1984).

15. SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW & POLICY* 17-18 (1993); Sidney A. Shapiro, *Occupational Safety & Health: Policy Options and Political Reality*, 31 HOUS. L. REV. 13, 23 (1994); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward A Synthesis*, 6 J. L. ECON. & ORG. 167, 193-94 (Special Issue 1990); see FARBER & FRICKEY, *LAW AND PUBLIC CHOICE*, *supra* note 3, at 24-33 (explaining that economic model overlooks important aspects of political process including ideology); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 23-25 (1991) (suggesting that public choice model is based on faulty assumptions concerning legislative behavior); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2127 (1990) (stating that social choice theory does not fully describe "general legitimacy and meaningfulness of democratic decision making"); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76-94 (1990) (stating that public choice explanations must be supplemented to account for other legislative motivations including lawmaker's ideological satisfaction).

16. Professor Wilson explains the linkage between politics and policy as "entrepreneurial politics." Wilson says that "entrepreneurial politics" can occur when an organized interest proposes a policy that confers general but small benefits on a large number of persons with costs borne by a small segment of society such as a specific industry. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 370 (James Q. Wilson ed., 1980). He argues that the proponent may be successful if someone serves as a "policy entrepreneur." The policy entrepreneur mobilizes latent public support for the proposed policy by linking it with values widely shared by the public. *Id.*

17. See generally SHAPIRO & TOMAIN, *REGULATORY LAW & POLICY*, *supra* note 15 (adapting analytical framework used by Justice Breyer to context of law school casebook on regulatory policy). Law students also have been introduced to Justice Breyer's regulatory concepts in the administrative law casebook that he co-authored with Richard Stewart. STEPHEN BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, & CASES* (3d ed. 1992).

18. For technical economic analysis of regulation, see JEAN-JACQUES LAFFANT & JEAN TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* (1993); DANIEL F. SPULBER, *REGULATION AND MARKETS* (1989); ALFRED E. KAHN, *THE*

and demand will maximize consumer welfare as long as the market has certain characteristics, such as numerous buyers and sellers, adequate information, and the absence of any spillover benefits or costs. When one or more of these attributes are missing, there is a market "failure" or "defect." According to economic theory, the purpose of regulation is to address market failures and thereby increase the efficiency of markets.¹⁹

The market failure paradigm has become the dominant language of policy analysts today.²⁰ As Jerry Mashaw has noted, economic theory now "provides substantive criteria for the application of law, describes its underlying rationale, or defines parameters for the evaluation of the law's success or failure."²¹ Economics, however, is not the only source of values that society uses to determine whether to regulate. Such noneconomic values as equity or fairness also are the basis of regulation.²² In *Regulation and Its Reform*, Justice Breyer acknowledges the noneconomic basis of regulation,²³ but he leaves it to others to develop this line of argument.

Regulation and Its Reform brings substantial clarity to the debate concerning whether regulation serves public purposes. Although there are hundreds of regulatory programs at all levels of government, Breyer suggests two common policy issues underlie each regulatory scheme. First, what is the justification for regulation, and does it make sense based on economic (or noneconomic) reasoning? Second, what is the most appropriate tool to remedy a market defect or to accomplish some

ECONOMICS OF REGULATION: PRINCIPLES & INSTITUTIONS (1988).

19. BREYER, REGULATION AND ITS REFORM, *supra* note 1, at ch. 1.

20. THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 13 (1991); BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 60 (1984).

21. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT. L. REV. 123, 123 (1989).

22. For discussions of other values in risk regulation, see CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 57-69 (1990); MARK SAGOFF, THE ECONOMY OF THE EARTH PHILOSOPHY, LAW AND THE ENVIRONMENT (1988); Elizabeth Anderson, *Values, Risks, and Market Norms*, 17 PHIL. & PUB. AFF. 54, 63 (1988); Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 620-21; Richard B. Stewart, *Regulation in the Liberal State: The Role of Non-commodity Values*, 92 YALE L.J. 1537 (1983).

23. See BREYER, REGULATION AND ITS REFORM, *supra* note 1, at 22-23 (explaining that "economic rents" or high profits reflect normal operation of market when good or service is in short supply). Nevertheless, a "plausible" justification for regulation exists when regulation is "undertaken for reasons of 'economic fairness' . . . or to avoid certain adverse social effects—dislocation and hardship—of a significant increase in the price of an essential household item." *Id.* at 23-24.

other social purpose?

When a regulatory program makes policy sense, there is a strong inference that it is the product of a deliberative process rather than public choice politics. Alternatively, when the policy rationale is weak, the lack of a policy rationale supports the conclusion that a program is the result of self-interested behavior. For example, there is a policy consensus that unregulated markets will produce inappropriate levels of environmental pollution.²⁴ No similar consensus exists which would suggest that agricultural subsidies serve a useful policy function as these programs are now configured.²⁵ The lack of a convincing policy rationale suggests that the subsidies are the product of public choice politics, which is confirmed by political analysts.²⁶

II. THROWING OUT THE BATHWATER

A regulatory program which has the potential to serve a legitimate policy goal may still be in need of reform. The government may have chosen the wrong policy goal or, if the goal is appropriate, it may not have used the most effective method of regulation to achieve the goal. Since publication of *Regulation and Its Reform*, the regulation literature has focused primarily on these issues. This focus reflects the waning interest in deregulation. Under Justice Breyer's framework, deregulation is appropriate only in cases where a regulatory program cannot serve a useful policy function. Not all regulatory programs are justifiable,²⁷ but many address significant market failures or other important social problems.²⁸

This section considers Justice Breyer's criticisms of regulatory implementation. It first describes his concept of regulatory mismatch. It then analyzes his application of this concept concerning economic and social regulation.

24. *Id.* at 261.

25. Elmer W. Learn et al., *American Farm Subsidies: A Bumper Crop*, 84 PUB. INTEREST 66 (1986).

26. For example, see E.C. PASOUR, JR., AGRICULTURE & THE STATE: MARKET PROCESSES AND BUREAUCRACY 18-19 (1990); PETER NAVARRO, THE POLICY GAME: HOW SPECIAL INTERESTS AND IDEOLOGIES ARE STEALING AMERICA 107-38 (1984).

27. *See supra* notes 25-26 & accompanying text (stating that agricultural subsidies are questionable public policy).

28. *See* SHAPIRO & TOMAIN, REGULATORY LAW & POLICY, *supra* note 15, at 38-48 (discussing regulatory goals of addressing market failures and promoting noneconomic values, and providing examples of regulatory programs designed to achieve such goals).

A. Regulatory Mismatch

In *Regulation and Its Reform*, Justice Breyer proposed that regulatory reform should be understood as an issue of "match and mismatch."²⁹ Regulatory failure in a justifiable regulatory program occurs when the government fails "to correctly match the [regulatory method or] tool [used] to the problem at hand."³⁰

A mismatch can occur for two reasons. First, the government can misdiagnose the problem it is attempting to solve and apply the wrong regulatory approach as a result. For example, transportation regulation was based on the erroneous perception that unrestrained competition would result in the monopolization of transportation markets.³¹ Along with other critics of such regulation,³² Justice Breyer concludes that price and entry controls are unnecessary because the rationale of unrestrained competition cannot be justified in terms of economic theory.³³ Second, even if the problem is identified correctly, regulatory tools will vary in their effectiveness and cost. A partial mismatch occurs when the government relies on a regulatory tool that is less effective and more expensive than other options. Justice Breyer, for example, was among the earliest proponents of market incentives, such as pollution taxes and marketable pollution rights, as a more appropriate response to environmental pollution than command and control regulation.³⁴

B. Economic Regulation

Reform of economic regulation has proceeded along the lines proposed by Justice Breyer in *Regulation and Its Reform*. Antitrust regulation has been substituted for price and entry control regulation of transportation³⁵ and for price controls over natural gas production.³⁶ Moreover, regulators are experimenting with rate caps and other alternative methods of regulating electrical utilities and natural gas pipelines.³⁷ On-

29. BREYER, REGULATION AND ITS REFORM, *supra* note 1, at 191.

30. *Id.*

31. *Id.* at chs. 11-12.

32. For example, see Alfred E. Kahn, *Airline Deregulation—A Mixed Bag, But A Clear Success Nevertheless*, 16 TRANSP. L.J. 229 (1988).

33. BREYER, REGULATION AND ITS REFORM, *supra* note 1, at ch. 14.

34. *Id.* at ch. 13.

35. Kahn, *supra* note 32, at 229.

36. Richard J. Pierce, Jr., *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983).

37. VIETOR, *supra* note 11, at 91; PAUL L. JOSKOW & RICHARD SCHMALENSEE,

ly agricultural price supports remain untouched in tribute to the powerful political forces that support this form of redistribution.³⁸

Justice Breyer also has had an impact outside of the areas discussed specifically in his book. The Federal Communications Commission, for example, has acted on this admonition that market forces can and should be harnessed to serve the goals of a regulatory program.³⁹ Likewise, the health care reforms proposed by the Clinton administration would structure health care markets to promote greater competition and hold down health care prices.⁴⁰

C. Social Regulation

Justice Breyer is not the only analyst to propose these reforms of economic regulation, but *Regulation and Its Reform* makes the case for such reforms in a particularly cogent and compelling manner. A decade later Justice Breyer turned his attention to mismatches in social regulation. *Breaking The Vicious Circle*,⁴¹ published in 1993, cogently summarizes a critique of risk regulation that has many supporters. Moreover, Justice Breyer extends that critique by offering a unique theory for the failure of risk regulation. Much of Justice Breyer's analysis deserves serious consideration. But his failure to consider how social regulation serves noneconomic goals ultimately limits the usefulness of his analysis.

1. Economic rationality

Critics of regulation have long complained about the large aggregate cost of regulation, but they normally make no attempt to compare these costs to aggregate benefits.⁴² When Robert Hahn and John Hird made

MARKETS FOR POWER: AN ANALYSIS OF ELECTRICAL UTILITY DEREGULATION 93 (1983).

38. See *supra* notes 25-26 and accompanying text (stating that agricultural subsidies are questionable public policy).

39. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

40. Walter A. Zelman, *The Rationale Behind the Clinton Health Care Reform Plan*, 13 HEALTH AFF. 9, 12 (Spring I 1994). But see Alain C. Enthoven & Sara J. Singer, *Economic Analysis: A Single-Payer System in Jackson Hole Clothing*, 13 HEALTH AFF. 81 (Spring I 1994) (stating that President Clinton's Health Security Act relies on government regulations rather than market forces to control costs).

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

42. See Heritage Foundation Report, *A Citizen's Guide to Regulation* (Susan M.

such a comparison for social regulation, they found that total costs and benefits were roughly equal.⁴³ Aggregate figures do not reveal whether the benefits of a particular regulatory program exceed its costs. Moreover, Hahn and Hird caution that their calculations are subject to considerable uncertainty.⁴⁴ Nevertheless, this comparison indicates that considering only the costs of regulation reveals little about its value.

In *Breaking The Vicious Circle*, Justice Breyer offers a more telling criticism. He argues that if risk regulation were better implemented, there would be greater protection for the same or less cost. This conclusion is based on three insights. First, it is counterproductive to remove the "last 10 percent" of a risk.⁴⁵ It is so expensive "to buy a little extra safety" that the costs of doing so inevitably exceed the benefits to be gained. Because of the high cost of excess risk reduction, less money is available to address more significant risks.⁴⁶ Second, agencies do a poor job of setting regulatory priorities. The result is that some significant risks are ignored, or not regulated sufficiently, while agencies address other less significant risks.⁴⁷ Finally, agencies use inconsistent methodologies to assess the value of regulation. For example, the Environmental Protection Agency and the Food and Drug Administration use different methods of calculating how many lives a reduction in risk likely will produce. Such inconsistencies make it difficult to set government-wide enforcement priorities. If a common method of evaluation were used, the government could determine whether more funding for the EPA or FDA would yield a greater reduction in risk.⁴⁸

Other analysts also have argued that government risk regulation produces counterproductive results.⁴⁹ Like Justice Breyer, they favor greater use of risk analysis, cost-benefit analysis, and similar analytical tech-

Eckerly ed., 1994), at 1 (stating that conservative estimates place cost of regulation at \$500 billion annually).

43. Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 253 (1991) (estimating costs of \$78 billion to \$107.1 billion and benefits of \$41.9 billion to \$181.5 billion for regulation that does not involve entitlements such as welfare or subsidies).

44. *Id.*

45. BREYER, *BREAKING THE VICIOUS CIRCLE*, *supra* note 41, at 11.

46. *Id.* at 18.

47. *Id.* at 19-20.

48. *Id.* at 21-29.

49. Sunstein, *Administrative Substance*, *supra* note 22, at 607; *see generally* W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC & PRIVATE RESPONSIBILITIES FOR RISK* 149 (1992) (suggesting that society's system for managing risks to life and limb is "deeply flawed").

niques, to bring more economic rationality to risk regulation.⁵⁰ Justice Breyer warns, however, that a “vicious circle” exists that prevents the adoption of more rational risk reduction policies.

This vicious circle comprises public perceptions, congressional reaction, and the uncertainties of the regulatory process.⁵¹ First, the public’s evaluation of risk “differs radically from any consensus of experts in the field.”⁵² Moreover, public attitudes are based on psychological factors that are unlikely to change.⁵³ For example, although flying is considerably safer than automobile travel, the public regards airlines as more dangerous because crashes are more widely publicized than automobile accidents. Second, Congress reacts to these attitudes by legislating extreme risk reduction goals.⁵⁴ Finally, agencies implement these goals by resolving all ambiguities concerning individual risks in favor of seeking the maximum level of protection.⁵⁵ The cumulative effect of these factors is that Congress will resist efforts to rationalize regulatory policies which are now counterproductive.

Justice Breyer believes that the best way to break out of the vicious circle is to “harness the inherent virtues of the civil service to bring about improved performance.”⁵⁶ He proposes that a cadre of senior civil service employees be assigned the role of rationalizing risk reduction policies throughout the government.⁵⁷ The Office of Management and Budget (OMB) would be given a more powerful role in shaping risk reduction policies throughout the government. OMB employees would have policy training and expertise concerning risk reduction and would spend part of their careers rotating through staff positions in Congress and regulatory agencies. This would help rationalize policy debates in these venues.⁵⁸

Justice Breyer’s solution is hardly surprising in light of his diagnosis. If the political system produces “irrational” policies concerning risk, the only solution is to circumvent the political system. Although this step appears undemocratic, Justice Breyer offers two defenses of it. First, he assumes that there is a “kind of ‘general will’—a public that ‘really’

50. MCGARITY, *supra* note 20, at 10.

51. BREYER, BREAKING THE VICIOUS CIRCLE, *supra* note 41, at 50.

52. *Id.* at 33.

53. *Id.* at 39.

54. *Id.* at 39-42.

55. *Id.* at 48.

56. BREYER, BREAKING THE VICIOUS CIRCLE, *supra* note 41, at 67.

57. *Id.* at 59-60.

58. *Id.* at 55, 65-67, 71-72.

wants an overall result that differs from its substance-specific preferences revealed on particular occasions.”⁵⁹ Second, he notes that his plan reflects the long tradition in this country of delegating regulatory decision making to administrative agencies because of their expertise, experience, and political insularity.⁶⁰

2. *Noneconomic rationality*

Economic analysts such as Justice Breyer are critical of policy choices that cannot be reconciled with risk assessment and cost-benefit analysis. They object to spending more money to reduce a risk than the economic benefits of reducing that risk. Citizens, however, may be using a different yardstick. Citizens may choose certain risk policies, for example, because they promote such values as individual autonomy and fairness. This section explains the role of such noneconomic factors in policy choices concerning risk. It then recommends that Justice Breyer’s policy recommendations be recast to take account of these objectives for social regulation.

Risk choices are related to the uncertainty inherent in risk analysis.⁶¹ These uncertainties often make it difficult to characterize a risk as either small or large. Critics of risk regulation are quick to choose an interpretation that minimizes a risk, but the opposite conclusion is often equally plausible.⁶² In other words, the critics are assuming that once additional scientific information is available, a “small” risk will in fact turn out to be trivial. Although this has sometimes proven to be the case, as for example with Alar,⁶³ other chemicals, such as Dioxin,⁶⁴ have turned out to be more dangerous than originally understood.

Given this uncertainty, choosing to err on the side of safety can be defended on two grounds. This presumption will lead to regulation of chemicals that do not pose very high risks, but it will also help avoid

59. *Id.* at 55.

60. *Id.* at 61-62.

61. BREYER, *BREAKING THE VICIOUS CIRCLE*, *supra* note 41, at 42-47.

62. See Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 732-33 (discussing whether OSHA’s vinyl chlorinate standard may be extraordinarily expensive or quite reasonable).

63. Frank B. Cross, *The Public Role in Risk Control*, 24 ENVTL. L. 887, 942-43 (1994).

64. Keith Schneider, *Fetal Harm is Cited as Primary Hazard in Dioxin Exposure*, N.Y. TIMES, May 11, 1994, at A1; Keith Schneider, *EPA Moves to Reduce Health Risks from Dioxin*, N.Y. TIMES, Sept. 14, 1994, at A8.

disasters like Bhopal or Chernobyl.⁶⁵ Moreover, this choice has an important distributional consequence. When a regulator makes a decision under conditions of uncertainty, there are two possible types of error. The regulator can overregulate a risk that turns out to be insignificant or the regulator can underregulate a risk that turns out to be significant. If the regulator erroneously underregulates, the burden of this mistake falls on those individuals who are injured or killed, and their families. If a regulator erroneously overregulates, the burden of this mistake falls on the regulated industry which will pay for regulation that is not needed. This result, however, is fairer than setting the burden of uncertainty about a risk on potential victims.

The choice to err on the side of safety is fairer because of who ends up paying for the mistake.⁶⁶ The costs of overregulation are paid for by the persons who buy the products of the regulated industry and the stockholders who own the companies in the industry. The financial effect on each of these individuals is likely to be small because there are so many of them. By comparison, if a risk is underregulated, the financial impact on the far fewer individual victims can be devastating. Moreover, the effect of erroneous regulation on consumers and stockholders is only financial. The effect of a lack of regulation on victims and their families is emotionally and psychologically devastating.

Whether a risk is voluntary also affects how citizens perceive risks. As Carl Cranor has noted, avoiding involuntary risks preserves individual autonomy. He explains, "It is one thing to incur risk to one's life where the risks are palpable, where one fully understands what one is getting into, and where one voluntarily takes or embraces them. It is quite another to be put at risk by the knowing or unknowing or unwitting activities of others when those activities could have been done more safely."⁶⁷

Justice Breyer and other critics of current risk policies are free to reject the previous (or other) noneconomic goals as a sufficient basis for risk regulation. This position, however, ignores that "[s]ome things are more important than producing net community benefits."⁶⁸ Moreover, the fact that consideration of such values produces risk policies that are inconsistent with economic analysis does not automatically make them

65. K.S. SHRADER-FRECHETTE, *RISK & RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS* 90 (1991).

66. Shapiro & McGarity, *supra* note 62, at 741.

67. CARL F. CRANOR, *REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW* 128 (1993).

68. *Id.* at 172.

irrational. "If it is true that a risk's importance is measured not only by its probability, but also by other factors," Professor Shrader-Frechette writes, "then it makes sense for people to value the same level of safety differently in different settings. Although this valuing may be economically inefficient, it is neither inconsistent nor irrational."⁶⁹

Justice Breyer noted the possibility that regulation may serve desirable noneconomic goals in *Regulation and Its Reform*.⁷⁰ Thus, his purpose in the *Vicious Circle* may simply be to caution the public that pursuit of noneconomic goals must be evaluated in light of the costs and tradeoffs that such choices entail. This message is timely and appropriate. Citizens should understand how much money it costs to have regulated programs that are based on noneconomic goals. Moreover, the pursuit of a regulatory goal for noneconomic purposes may not be good policy if the result involves other significant risks going unregulated.

If this is Justice Breyer's purpose, his civil service employees should be trained in more than the art of risk analysis. If risk policies are to serve economic and noneconomic goals, as the public appears to demand, regulators will face difficult questions concerning the tradeoffs between such goals. As Mark Sagoff has observed, "The role of the policymaker and of the legislature may be to balance what we believe in and stand for as a community with what we want and need as a functioning economy The future of environmental policy rests on . . . [facilitating] the balance of interests with morality and one morality with another morality."⁷¹ A corps of civil servants that helps to develop methods for discussing and evaluating tradeoffs between economic and noneconomic goals would be an important addition to the current policy process. Professor Shrader-Frechette has proposed that an ethically weighted system of risk analysis could serve this role:

Because [risk-cost benefit analysis (RCBA)] is often misinterpreted in purely utilitarian ways, it typically fails to take account of egalitarian values, social obligations, and rights. One way to remedy these deficiencies would be to employ a weighing system for RCBA. Many of the dilemmas of risk evaluation . . . could be ameliorated by a weighing scheme. For example, in cases where free, informed consent to risk imposition was in question . . . , policymakers could assign a negative weight to those risks. [Similarly,] if a potentially catastrophic

69. SHRADER-FRECHETTE, *supra* note 65, at 90-91.

70. See *supra* note 23 and accompanying text (suggesting Justice Breyer's acknowledgment of noneconomic goals of regulation in *Regulation and Its Reform*).

71. Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1419 (1981).

technology imposed a greater risk on consumers, rather than on producers, then its costs could be weighted more negatively.⁷²

In this manner “ethically weighted [risk analysis] would enable persons to see that good policy is not only a matter of economic calculations, but also a question of ethical analysis.”⁷³ If Justice Breyer’s civil servants served this goal, they would make an important contribution to risk regulation.

III. CONCLUSIONS

Justice Breyer’s concept of “mismatch” has had two effects in the regulation literature. First, this concept counters the conclusion of public choice scholars that regulatory failure is caused only by regulatory politics. Justice Breyer has explained how a regulatory program can serve a public purpose and still be in need of reform. Government regulation has the potential to make society better, but only if regulators correctly define the problem they are addressing and then use the most appropriate regulatory tool. Second, Justice Breyer has applied the concept of mismatch to identify candidates for reform in economic and social regulation. This work is generally powerful, but Justice Breyer neglects to consider noneconomic justifications for risk regulation.

The concept of “mismatch” is now a dominant paradigm in the evaluation of regulation. It reminds us that although regulation can serve useful social purposes, we still have the difficult job of ensuring that it achieves those ends.

72. SHRADER-FRECHETTE, *supra* note 65, at 183.

73. *Id.* at 183-84.