

Economic Reasoning and Judicial Review

Introduction of Associate Justice Stephen Breyer

Christopher DeMuth, at AEI-Brookings Joint Center Distinguished Lecture

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Welcome to the 2003 Distinguished Lecture and Award of the AEI-Brookings Joint Center for Regulatory Studies. Tonight we are be honoring, and learning from, Supreme Court Justice Stephen Breyer.

Economists and other students of government policy are often deeply divided on important issues, and their divisions are often highly correlated with their broader political views--whether they are liberals or conservatives, whether they vote Republican or Democratic. That is the case today in many important areas, such as tax policy and social security reform. It also seems to be the case over time with fiscal policy: when the Republicans are big spenders, the Democrats are budget balancers, and when the Democrats are big spenders, the Republicans are budget balancers.

Occasionally one observes a convergence among policy experts across the political spectrum that is a harbinger of practical policy progress. That was so with monetary policy in the 1970s and 1980s, and with welfare policy in the 1980s and 1990s. And it may seem to have been so with regulatory policy: The administrations of Gerald Ford and Ronald Reagan deserve some of the credit for airline deregulation, but the lion's share of the honors are due to President Jimmy Carter, his Civil Aeronautics Board Chairman Alfred Kahn, and, most of all, Senator Ted Kennedy and his then-chief counsel, Stephen Breyer, who were the architects of the Airline Deregulation Act of 1978.

But regulatory policy is actually unique. Essentially all careful students of economic and utility regulation and of health, safety, and environmental regulation are committed to approximately the same agenda of deregulation and regulatory reform, regardless of their politics and their views on other policy questions. In regulatory policy, it often seems that the real division is between (a) those who try to approach policy from a disinterested, academic perspective and (b) everybody else--those who work in the regulatory agencies, the regulated parties and others who attend closely to the agencies' work, and the legislators who write and oversee the regulatory statutes. Occasionally the practical world pays attention to the scholarly perspective, as in the deregulation of airline and surface transportation markets a generation ago, but for the most part the regulatory practitioners march to different drummers; they are uninterested in the disinterested.

So we regulatory reformers have to stick together, as we do at the AEI-

Brookings Joint Center. We have even come up with a school of analysis, called "public choice economics," to explain why the rest of the world ignores us-- because regulatory policy is no more than the equilibrium of favor seeking by special-interest groups. But when we speak as policy advocates, we speak as earnest reformers: we address regulatory policy issues as if everyone involved were engaged in an objective search for the best possible policy, rather than in a scramble for resources and artificial competitive advantage. We lead by example, patiently awaiting those moments when leadership is welcome.

The AEI-Brookings Joint Center is presenting its 2003 award to Justice Breyer for his immense scholarly and practical contributions to better regulatory policy, and also because he has singularly embodied the earnest, uncynical, even irenic approach to policy debate that we admire and seek to emulate.

Stephen Breyer went to college at Stanford and earned an additional degree at Magdalen College, Oxford, and his law degree at the Harvard Law School. He clerked for Justice Arthur Goldberg and was a professor at Harvard Law School from 1967–1980 and at Harvard's Kennedy School of Government from 1977–1980. He was appointed a judge of the United States Court of Appeals for the First Circuit in 1980, and an associate justice of the United States Supreme Court in 1994. Along the way he served with distinction in a succession of government posts-- special assistant in the Antitrust Division of the Justice Department, assistant special prosecutor of the Watergate Special Prosecution Force, chief counsel of the Senate Judiciary Committee under Senator Kennedy, and, during his tenure as a Circuit Court judge, a member of the United States Sentencing Commission and of the Judicial Conference of the United States.

During his Harvard years, Justice Breyer did influential work on copyright law and wrote, with Richard Stewart, a treatise on administrative law that still stands as the best in the field. Most important for this evening's award, he wrote one of the two towering landmarks of regulatory policy scholarship and advocacy: *Regulation and Its Reform* (Harvard, 1992). (The other, less normative work is Alfred Kahn's *The Economics of Regulation: Principles and Institutions* (John Wiley & Sons, 1970.) A subsequent, narrower but equally superb and influential work was *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard, 1993), which I suppose is now cited in absolutely every brief to the Supreme Court in cases involving risk regulation.

These works are distinguished for their rich exposition of the economics of regulation and their clear-eyed understanding of the institutional and political circumstances in which regulations are developed and enforced. Most of all, they are distinguished for advocating regulatory reforms in a manner that is both earnest and realistic--for pointing the way to policy improvements that would take account of the actual circumstances and constraints of government regulation. For his intellectual leadership, and for the important policy improvements he has

achieved as a public servant, we are honored that Justice Breyer has agreed to accept the Joint Center's 2003 award and to lecture to us this evening.