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BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION. By *Stephen Breyer.* Cambridge: Harvard University Press. 1993. Pp. x, 127. $22.95.

A seasoned Breyer-watcher once said, "Steve thinks the solution to most problems is to turn them over to a room full of people as smart as he is."[1] The remark captures both the strength and weakness of Justice Breyer's 1992 Holmes Lectures, now published as *Breaking the Vicious Circle.* Breyer discusses key anomalies in our current system for regulating environmental risks, seeks out their causes, and proposes a remedy. The first phase, the discussion of the inconsistencies in our current approach to environmental regulation, is a tour de force, confidently integrating science and policy in terms easily accessible to the intelligent layman. The second, the explanation of why the incongruities prevail, is also very skilled, though impaired — I will argue — by its almost complete neglect of the role of interest group politics. The third, Breyer's suggested solution, raises more serious problems. He proposes establishing not just a room full of intelligent people, but a whole staff, located in the Office of Management and Budget, charged with nudging the relevant agencies toward policies that are consistent with each other and with economic rationality. A president who pursued the proposed remedy would doubtless seek people with the qualities so well reflected in this book — versatility, even-handedness, balance, and intelligence. Assembling such a staff would not be easy; people with these skills are in high demand and short supply. Even assuming their assembly, however, Breyer does not completely convince the reader that they could do the job. Can a SWAT team of technocrats, however brilliant, neutralize the interest groups at play in this field?

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Breyer sees current policy as bringing about a wasteful misallocation of resources — massive overinvestment in reducing some risks and comparative neglect of others. "Tunnel vision," he argues, leads agencies to pursue their missions without regard to competing

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1. Name withheld to protect the guilty.

values, a quest resulting in the attempt to eliminate "the last ten per cent" of a problem even where the benefits are minimal in relation to the costs (p. 11). In a Superfund case in Breyer's former court,[2] the Environmental Protection Agency tried to compel a private party to spend $9.3 million on additional cleanup of a waste site, so that children could eat its dirt without ill effect not merely for 70 days a year — the level the party, amazingly, agreed to achieve — but for 245 days a year (pp. 11-12). As there were no children in the vicinity, nor even residences, nor even any likelihood of residential development, and as at least half the offending chemicals would dissipate by the year 2000, the health return on this $9.3 million clean up cost would have been meager.[3]

Nor does the dirt-eating-children episode appear atypical. Breyer points to "mid-range" consensus estimates that the removal of asbestos from schools would cost approximately $250 million per statistical life saved (pp. 12-13). He cites the Fifth Circuit's observation[4] that the EPA's bans on a wide range of asbestos uses, had they been allowed to take effect, would have cost approximately $200 million by the EPA's own estimate while saving only about seven or eight lives over the next thirteen years — less than half the expected deaths from ingested toothpicks (p. 14). Further, some of the Occupational Safety and Health Administration's benzene rules will evidently cost about $180 million per statistical life saved (p. 15). Breyer includes a table listing regulations by cost per life purportedly saved, including twenty-one regulations with costs over $10 million and one with costs reaching $5.7 trillion.[5] The pursuit of completely pure air, land, and water clearly takes one to a point at which the marginal cost of extra health may daunt all but the most zealous.

Breyer argues that the related problems of random agenda selection and inconsistency compound tunnel vision (pp. 19-28). Not only do experts' assessments of the most serious risks differ radically from the popular understanding, but the government makes no effort to establish overall priorities or to coordinate agency efforts (pp. 19-20). The agencies use different methods to calculate and evaluate health effects, and they ignore the ways in which one

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

3. Speaking through then-Judge Breyer, the First Circuit upheld the District Court's conclusion that the statutory standard — "the public interest and the equities of the case" — did not require the extra $9.3 million. 900 F.2d at 441.

The EPA continues to protect children who might eat the ground daily for years at a time in places in which they rarely set foot, such as highway median strips, roadside cemeteries, golf courses, and industrial parks. *See* Leather Industries of America v. EPA, 40 F.3d 392, 404-05 (D.C. Cir. 1994).

4. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1223 & n.23 (5th Cir. 1991).

5. Pp. 24-27. As $5.7 trillion is nearly a year's GNP, we may safely infer that the regulation purported to save only a small fraction of a statistical life.

set of regulations affects the fulfillment of other environmental goals. For example, Breyer notes that when the EPA proposed rules to reduce sewage sludge it claimed they would save one life every five years, but it overlooked the rules' impact on waste incineration: the resulting increases in this form of disposal would have cost two statistical lives every year — ten times the expected benefit of the sludge reduction (p. 22). Agencies similarly overlook the offsetting behavior of individuals. A farmer deprived of a relatively low-risk artificial pesticide, for example, may substitute plants with natural pesticides of equal or greater carcinogenicity.[6] At the very least, one might hope for reform that would force the government to coordinate its interventions. With some regulations costing billions but yielding almost no health gain, and with neglected opportunities at hand for saving lives at modest cost,[7] the potential gains from rationalization — shifting social investments to the most promising health and safety opportunities — seem huge.[8]

Breyer attributes the persistence of wasteful regulation to three causes: inaccurate public perceptions, congressional action and reaction, and uncertainties in the regulatory process. Though believing that people think rationally in assessing risks and possible remedies, Breyer argues that most people are unlikely to acquire a full grasp of the relevant facts. If people "think dramatically, not quantitatively," for instance, as Justice Holmes observed,[9] they are

6. P. 23. Plants resist the menace of pests with natural pesticides, many of which appear to be far more potent than artificial — and therefore regulated — chemicals. P. 98 n.117 (citing Bruce N. Ames et al., *Ranking Possible Carcinogenic Hazards,* 236 SCIENCE 271, 276-77 (1987)).

Dr. Lois Swirsky Gold and others have created a "human exposure/rodent potency index" or HERP, to relate various natural and artificial substances to each other by using conventional linear extrapolation from rodent tests. See *infra* note 10 and accompanying text for discussion of issues of linear extrapolation. The HERP for each substance is a ratio, of which the denominator is the substance's TD50 — daily lifetime dose rate estimated to halve the proportion of tumor-free rodents by the end of a standard lifetime — and the numerator is a dose that might reasonably be taken daily by humans, adjusted for their greater size. Thus, the 0.3% score for lettuce (grown free of any artificial pesticides) signifies that a normal human daily consumption (estimated at 1/8 of a head), containing 66.3 milligrams of caffeic acid, constitutes (by linear extrapolation) 0.3% of the daily lifetime dose that would halve the number of tumor-free rodents by the end of a standard lifetime. *See* Lois Swirsky Gold et al., *Rodent Carcinogens: Setting Priorities,* 258 SCIENCE 261-65 (1992). The 2.8% figure for a daily 12-ounce bottle of beer, based on its 18 milliliters of ethyl alcohol, marks it as 1400 times more potent than the 0.002% figure for a daily 6-ounce glass of apple juice, based on the EPA's contentions about Alar, and 7000 times more potent than the 0.0004% figure for ordinary pre-ban consumption of EDB. *Id.*

7. Breyer cites, for example, estimates that vaccinations against the leading cause of bacterial meningitis would cost only $68,000 per child's life saved. P. 19.

8. The theoretical rational optimum would occur when the health return per dollar for all interventions was equal at the margin, that is, where no dollar of investment in health could be shifted to a more productive use.

9. Letter from Oliver Wendell Holmes, Jr. to Canon Patrick Augustine Sheehan (July 5, 1912), *in* HOLMES-SHEEHAN LETTERS: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN 45 (David H. Burton ed., 1976), *quoted at* p. 37.

likely to reach inaccurate conclusions from a few stories associating toxic waste dumps with cancer. With 26,000 waste dumps throughout the country and a large number of locales with above-average cancer rates (by definition roughly one half), the probability that these two facts will coincide is overwhelming. A few dramatic coincidences, though in fact meaningless, may create an impression of a causal link.

Congress, meanwhile, adopts a range of mandates, from extremely detailed linguistic formulae, to absolute bans, to "hammers" — statutes that allow the EPA some time to devise regulatory control for some activity (for example, underground disposal of a chemical), but ban the activity outright if the agency misses the deadline. However these approaches might be reconciled in theory, in operation they yield widely varying degrees of stringency. The variations are hardly surprising. Congressional bills originate at different times, in different committees, with each subcommittee "competing for political time and attention" and thus likely to "consider the particular problems that it has studied as the most important, deserving a place at the head of the regulatory queue, whether or not dispassionate observers would reach the same conclusion" (p. 42). Although statutory language may offer apparent flexibility, agency fear of congressional oversight may limit its use: EPA officials may know that, "given an individual legislator's political incentive to appear in interesting, positive news stories, hearings are far more likely to mean criticism for leniency than for strictness" (pp. 40-41).

Finally, the facts about environmental risks are most uncertain. Agencies typically infer risk to humans by extrapolating from the response of rats and mice exposed to very high doses. In doing so, they assume a linear dose-response curve; that is, they assume that if a dose of X causes cancer in fifty out of a hundred rodents, a dose of X/1000 — adjusting for the difference in weights or body surface area, to be sure — will cause cancer one thousandth as frequently, or in fifty humans out of every one hundred thousand exposed. In other words, the method infers human responses at low doses from rodent responses at very high doses. But rats and mice differ from humans in ways that appear relevant to the likelihood of carcinogenicity (p. 46). Moreover, even if a linear dose-response curve were accurate for the range of exposure relevant to humans (and it might be accurate, depending on the etiology of the disease, which is typically little understood), doses at the levels used in experiments, the highest that can be administered without killing the rodents from sheer toxicity, appear quite different. Such doses kill large numbers

For a recent exploration of Justice Holmes's point, see David Link, *Storyville,* REASON 35-43 (January 1995).

of cells at a time, and thus bring on quick cell regeneration and a risk of cancer-causing mutations that is not present when cells are killed more gradually.[10] There is, Breyer observes, "no consistent scientific rationale for assuming a linear relation between dose and response" (p. 44).

Breyer's solution flows naturally from his analysis. He "assume[s] a kind of 'general will' — a public that 'really' wants an overall result that differs from its substance-specific preferences revealed on particular occasions" (p. 55), and he treats the current disarray as a problem of governmental coordination. Thus he proposes a way for the executive branch to impose a coherent, rational policy on its own sprawling provinces — to the extent that statutes permit — and to present an intelligible program to Congress in the hopes of persuading it to iron out the current statutory anomalies. He would establish a small cadre of personnel within OMB, charged with the mission of building a coherent system of risk regulation and wielding authority to reallocate resources among the concerned agencies (p. 60). Its members would enjoy civil service protection (p. 61) and would proceed along a special career path that might take them to specific agencies such as the EPA and the FDA, or to a congressional committee staff (p. 71). The most successful might go on to such positions as Science Advisor to the President or Director of OMB (p. 71). Breyer's explicit model is the French *Conseil d'Etat,* a relatively small group of elite civil servants, mostly drawn from the *Ecole National d'Administration,* with competence both in law and in at least one substantive field, who bring intellect and a more-or-less unified viewpoint to bear on the activities of the executive and legislative branches.

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10. P. 46; *see also* Daniel E. Koshland Jr., *Molecule of the Year: The DNA Repair Enzyme,* 266 SCIENCE 1925 (1994). Koshland argues that extrapolating cancer risk from high dose rodent exposures is like evaluating fire risks in a large city by setting 1000 simultaneous fires in a town of 5000. That the small town's fire department is completely overwhelmed scarcely demonstrates that a large city's department will be defeated by a handful of fires. *Id.* Says Koshland:

> The estimated error rate for a DNA replication in the human with a well functioning repair system is about 10^{-10} mutations per base pair per cell generation. This system copes with a human who has 10^{14} cells with 4×10^9 bases per cell, who goes through 10^{16} division cycles in a normal life span.

Id. Thus, though the net error rate is very low — one in 10 billion — the number of events is very large, so that the aggregate number of errors absorbed in a lifetime is very high. Exposure to cell-damaging chemicals must be assessed in this context.

Affirmative evidence also demonstrates that chemicals having a statistical association with increased tumors at high doses — relative to unexposed rodents — have a statistical association with decreased tumors at moderate doses. Philip H. Abelson, *Risk Assessments of Low-Level Exposures,* 265 SCIENCE 1507 (1994); *see also* A.M. Monro, Letter to the Editor, 266 SCIENCE 1141 (1994) (discussing the anticarcinogenetic and antimutagenetic effects of chemicals); R.C. von Borstel, Letter to the Editor, *id.* at 1144 (same).

Breyer's summary of the current workings of our risk regulatory policy seems to me hard to improve upon, though experts doubtless could add detail, nuance, and qualification on many issues. While Breyer has been criticized for failure to offer a clearly preferable alternative to the risk assessment methodologies currently in place,[11] one can imagine his implicit response: "That's my point. Only if we improve the institutional structure can we expect better methodologies." The force of such an answer, of course, depends on a number of unknowns. If there is no more plausible method of using rodent tests than the one employed under present science policy[12] (linear extrapolation to humans from testing at high doses), yet there is a strong political demand that government screen out risks in advance of epidemiological evidence (in other words, before mortality and disease occur), then even the best institutions will not produce a remedy. Still, the criticism is a bit skewed; a book on political economy need not solve conundrums of science policy.[13]

As to the causes of the current predicament, Breyer is convincing that the ones he identifies play a serious role, and his proposed remedy promises a step forward. Yet a shadowy figure sits at the table, one whose workings Breyer hardly discusses but who may nonetheless be critical: the interest group. Consider the *Conseil d'Etat.* Does France adhere to — indeed insist upon — the European Community's Common Agricultural Policy,[14] with its butter mountains and its wine lakes, because the policy analysts of the *Conseil* have concluded that it represents the optimal policy for France, or does it do so because the French farmers constitute a powerful and effective lobby? If it is the latter, as I suspect, may not similar groups account for the condition of our risk regulation?[15] If so, will not the solution require something a good deal more dramatic than bolstering OMB?

11. Lisa Heinzerling, *Political Science,* 62 U. CHI. L. REV. 449, 460 (1995) (saying Breyer offers only "wishful thinking" as an alternative to the current system of risk assessment).

12. *See* REGULATORY IMPACT ANALYSIS PROJECT, INC., CHOICES IN RISK ASSESSMENT: THE ROLE OF SCIENCE POLICY IN THE ENVIRONMENTAL RISK MANAGEMENT PROCESS (1994) (characterizing default assumptions that currently drive risk assessment as choices of "science policy").

13. A possible approach might be a *de minimis* rule framed as follows: Refrain from intervention at least where rodent tests applied under current default assumptions yield risks so low that, assuming validity of the inference, even a lifetime of experience (say 70 years) would yield no persuasive epidemiological evidence.

14. The Common Agricultural Policy is a complex system protecting higher-cost producers in the European Community from competition and yielding large surpluses of the goods whose suppliers are protected. *See, e.g., Spudsidies,* THE ECONOMIST, Apr. 10, 1993, at 17.

15. For an interesting case study, see ALAN I. MARCUS, CANCER FROM BEEF: DES, FEDERAL FOOD REGULATION, AND CONSUMER CONFIDENCE (1994).

Let us start with the most obvious culprits — the regulatees. Media accounts of major environmental statutes or rules ordinarily depict the regulated parties as ranged monolithically against the lovers of clean air, land, and water. There is of course some truth to the picture, as many regulatees would obviously prefer no regulation to any, and light regulation to harsh. But the assumption of a homogeneous "business" interest group is naive, even if we keep our eyes solely on the regulatees. For example, restricting the production of chlorofluorocarbons (CFCs) in the face of rising demand may have given the existing CFC producers oligopoly profits,[16] at least until Congress imposed taxes to catch the profits.[17] Moreover, some have suggested that the Wisconsin and Minnesota legislatures imposed temporary bans on the use or sale of bovine somatotropin and bovine growth hormone[18] to protect not consumers' health but producers' wealth. Specifically, these moratoria would tend to prevent large dairy farmers from enhancing their advantage over smaller ones, and — less clearly — prevent Western and Southwestern farmers from increasing their advantage over those in the upper Midwest and the Northeast.[19]

More generally, of course, regulatee interest appears to be a major reason why Congress has never chosen pollution taxes as a regulatory device. Economists nearly unanimously believe that such taxes would secure more environmental improvement per dollar than the present command-and-control systems because pollution cutbacks would occur primarily at firms for which cutbacks were relatively cheap.[20] Pollution taxes would, however, force firms to pay not only for the units they remove, but also for the units they continue to emit — units that are costless to them under conventional command-and-control regulation. Thus pollution taxes appear to be political nonstarters, even disregarding the opposition of environmental lobbies, which is discussed below.

The power of regulatee interests burgeons when combined with sectional interests, and together they can radically impact the shape

16. *See* Daniel F. McInnis, *Ozone Layers and Oligopoly Profits, in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 129, 145-49 (Michael S. Greve & Fred L. Smith Jr. eds., 1992) [hereinafter ENVIRONMENTAL POLITICS].

17. *Id.* at 150.

18. *See* WIS. STAT. ANN. § 97.235 (West Supp. 1994) (repealed 1992); MINN. STAT. ANN. § 151.25 (West 1989 & Supp. 1995).

19. *See* Christopher L. Culp, *Sacred Cows: The Bovine Somatotropin Controversy, in* ENVIRONMENTAL POLITICS, *supra* note 16, at 47.

20. Expressed more technically, all firms would reduce pollution to the point at which the marginal cost of reduction equalled the unit tax. As the marginal cost would be equal across firms, there would be no reallocations of cutback that could achieve the same aggregate reduction at lower cost.

of regulation. For example, the 1977 Clean Air Act Amendments,[21] in effect requiring "partial scrubbing" to reduce sulfur dioxide emissions, both protected the market for high-sulfur Midwestern coal and imposed lower unit costs on electricity produced in the region than those imposed on the less-politically-represented Sunbelt.[22] The prevention-of-significant-deterioration (PSD) rules that Congress adopted the same year also tended to protect the Rustbelt against Sunbelt competition. As Robert Crandall — among others — argues, it seems a mistake to attribute the PSD rules to a simple devotion to clean air: the congressional support came largely from the North and Northeast, and the rules took the form of a quite unnecessarily byzantine permit process in the PSD regions.[23] Regional favoritism also appears pervasively in the tendency to impose more stringent standards on new sources.[24] Other political and economic factors are at work, of course — such as the natural political advantage of existing firms and employers over ones as yet unborn, and, to a degree, the interest in efficiency, as pollution control is almost always more costly as a retrofit than in initial construction — but the sectional influence can hardly be disregarded.[25]

Regulatees are not the only commercial interests trying to influence regulatory policy. Every cost incurred in cutting pollution, even if it goes only to reduce Breyer's "last ten per cent," is revenue for someone else, namely, the suppliers of the land, labor, and equipment needed to effect the reduction. Unsurprisingly — and, of course, legitimately — the firms involved lobby aggressively for pollution controls that will send lucrative business their way.[26] For example, agricultural and petroleum interests have been quite vocal in the highly charged debate over the use of cleaner-burning "oxygenates" in reformulated gasoline, a multi-million-dollar market, with farmers pushing corn-derived ethanol and petroleum interests

21. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

22. *See* ROBERT W. CRANDALL, CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR 123-25 (1983). Because the scrubbing requirement applied to new sources, its impact was most severe in rapidly growing areas and mildest in the slow-growth areas — which happened also to produce high-sulphur coal. *See generally* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

23. CRANDALL, *supra* note 22, at 127-29.

24. *Id.* at 39-44.

25. The bias against new sources may also fit the agenda of persons in the environmental movement who are concerned more with reducing industrial development than pollution itself. *Cf.* BRUCE YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION 159-60 (1989) (taking note of the distinction between pure environmentalists and the antigrowth or antibusiness lobby that "parades under the banner of environmentalism").

26. *See, e.g.*, Marc K. Landy & Mary Hague, *The Coalition for Waste: Private Interests and Superfund, in* ENVIRONMENTAL POLITICS, *supra* note 16, at 67.

boosting natural-gas-derived MTBE.[27] The presence of revenues for firms that supply pollution control and remediation does not mean that their political clout exactly balances that of the regulatees; the former companies may be starting up, as yet unable to match large existing pollution sources. They nevertheless stand as a counterweight and a force affecting both the stringency and the design of regulation.

Even among the environmentalists themselves, the very problems that make it desirable to have environmental groups — problems of transaction costs and rational consumer ignorance — suggest a question about their representative capacity. People as consumers and enjoyers of the environment have relatively insubstantial interests in the characteristics of innumerable consumer goods and potential threats to the environment; each person is likely to be unwilling to invest time and effort in becoming informed, lobbying, or negotiating with offending firms. Thus standard public choice lore suggests that parties with more concentrated interests, such as industry or labor groups, will be more effective than scattered environmentalists in applying pressure to legislatures or agencies.[28] National and regional environmental groups appear to represent a partial solution: they can somewhat offset this apparent lopsidedness, aggregating the small contributions of many members to advance their views.

The assumption as to the members' rational ignorance of the details of each dispute nonetheless cuts deeper. This ignorance implies that the members have a limited ability to monitor the organization's leadership and staff. Consequently, the leadership may "shirk" a bit, that is, pursue to a degree their own rather than the members' interests.[29] The fact that the members continue to con-

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27. The EPA adopted a requirement that reformulated gasoline be made in such a way as to give "renewable oxygenates" (in practice, ethanol) a "30% market share," on the theory that ethanol would have attained such a share but for certain adverse effects from its use in summer months. *See* Regulation of Fuels and Fuel Additives: Renewable Oxygenate Requirement for Reformulated Gasoline, 59 Fed. Reg. 39,258, 39,262 (1994). The rule was vacated in *American Petroleum Institute v. EPA,* No. 94-1502, slip op. (D.C. Cir. Apr. 28, 1995).

28. For a discussion of the advantages that small groups in general have in organizing and thus obtaining public goods, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 48, 53-57 (1971). For a discussion of the same advantages enjoyed by certain special interests such as industry and labor groups, see *id.* at 143-48.

29. The problem is obviously not unique to environmental organizations but would apply to any similarly structured association with a very large number of members who individually have relatively small interests. *See generally* Robert Michels, *Oligarchy, in* The Sociology of Organizations 25-43 (Oscar Grusky & George A. Miller, eds., 1970) (stating what has become known as "Michels's iron law of oligarchy"). Publicly held corporations potentially present the same problem. But the market for corporate control, by which outsiders who perceive the possibility of a more lucrative use of the corporate assets can express their judgment in a form that can be tested in the market — for example, a bid with a higher dollar value than the current market value of the stock — constrains the risk of shirking in the corporate context. *See* Edgar v. MITE Corp., 457 U.S. 624, 633 (1982) (discussing the

tribute does not disprove this theory; the same rational ignorance that gives rise to the initial problem limits the meaning of this apparent ratification by donation.

What form might shirking by environmental groups take? Harris and Milkis suggest one possibility: the reluctance to settle disputes, on the ground that settlement has little dramatic appeal and thus weakens fundraising. They quote a public interest lawyer:

> Environmental groups thrive on conflict. It's a standard joke that the basic environmental groups[*] fundraising letter begins, "Babies will die if you turn the page [and don't contribute]." The impact would be very different to say, "If you don't open this envelope, we won't be able to open negotiations with the other side."[30]

They even quote one environmental activist for the observation that legislative victories may be a setback to fundraising, again because they undermine the sense of urgency.[31] The surge in contributions triggered by Reagan's appointment of James Watt as Secretary of the Interior suggests the advantages of an atmosphere of menace. Another — perhaps in part contradictory — theory of possible shirking is Michael Greve's argument that citizen enforcement suits against noncomplying private parties have a low return in environmental enhancement but a high one in pecuniary payoff for national organizations, especially when they are settled with a so-called mitigation or credit paid to the suing organization.[32] Either tendency might tend to thwart the efforts of Breyer's experts.

A further impediment to effective regulation is that the environmental group's leadership and staff may benefit more from command-and-control approaches to regulation than pollution taxes or marketable pollution rights. Suppose that market-mimicking methods of pollution regulation are more likely to lead to a stable regulatory equilibrium than command-and-control methods. Such a result may occur because under such methods, polluters would have market incentives to search for and to deploy pollution-reducing technology, just as they search for and deploy other tech-

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Court's endorsement of the role of the market for corporate control). In addition to the problem of shirking, members of nonprofit associations are unlikely to agree on any readily measurable criterion of success.

30. RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE 305 (1989). According to Keith Schneider, "[A] recent fund-raising mailing from the National Audubon Society said the group could 'project with some accuracy the eventual end of the natural world as we know it.' 'That is no trees,' the letter said. 'No wildlife.'" Keith Schneider, *Big Environment Hits a Recession*, N.Y. TIMES, Jan. 1, 1995, § 3, at 4.

31. HARRIS & MILKIS, *supra* note 30, at 305.

32. Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, *in* ENVIRONMENTAL POLITICS, *supra* note 16, at 105-27. Greve's theory may nonetheless be reconciled with Harris and Milkis's by imagining an optimal litigation portfolio, consisting of advantageous pecuniary settlements spiced with some dramatic nonpecuniary wins and losses.

nologies that improve products or reduce costs, so that environmental quality would steadily — and "naturally" — grow, like other parts of the economy. By contrast command-and-control methods tend to create a market for the activities in which the leadership and staff have a comparative advantage — litigation and the lobbying of Congress and the agencies. Further, both litigation and lobbying, though typically not lucrative for environmental staff, provide the excitement of participating in high-level policymaking and agenda-setting.[33]

To the extent that the possible divergence between the leadership and members of interest groups poses a problem, the press seems not to exercise a corrective influence. The media problem is implicit in Breyer's observation, noted above, that legislators, eager to appear in interesting and positive news stories, are far more likely to engage in criticisms of EPA officials for leniency than for strictness (pp. 40-41). Viewed again from a simple interest-group perspective, this observation is hardly surprising. Would newscasts revealing that alar is probably not a cause of cancer attract many viewers? Risk sells.[34]

Bruce Yandle compares the interest groups in the environmental arena with the bootleggers-Baptist alliance on alcohol.[35] The bootleggers not only add political heft to the Baptists' regulatory impulses, but their presence in the winning coalition shapes the resulting regulation. Yandle notes that liquor laws normally do not restrict the consumption or the possession of liquor in general — as one might expect if the goal were solely to reduce consumption — but rather, its sale on Sundays or during late hours.[36] The former strategy of general restriction would yield no special advantage to bootleggers. Yandle summarizes the all-round satisfying nature of Sunday liquor restrictions:

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33. *See, e.g.*, JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989) (arguing that public interest groups are able by their litigation strategies to determine, or at least radically affect, agencies' regulatory agendas). According to the current head of EPA, Carol Browner, "The litigation is essentially setting the priorities." WALL ST. J., May 24, 1993, at B1, B6.

Further, being a "player" in Washington may help raise funds from sources that members might regard as contaminated. *See* MARK DOWIE, LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY 113-14 (1995) (reporting that the head of the National Wildlife Federation attended a breakfast meeting between the head of the EPA and the chief executive officer of a large toxic waste disposal company that contributed generously to the Federation, one of the breakfast topics being regulatory relief for the firm) *reviewed by* Keith Schneider, *Back to the Grass Roots,* N.Y. TIMES, Apr. 23, 1995, § 7 (Book Review), at 15.

34. *Cf.* MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 122 (1982) (arguing that in certain subcultures sects compete for adherents by depicting the outside world as dangerous and impure).

35. YANDLE, *supra* note 25, at 23.

36. *Id.* at 24.

> Interestingly, regulations of the Sunday sale of booze tie together bootleggers, Baptists, and the legal operators of liquor stores. The bootleggers buy from the legal outlets on Saturday, sell at higher prices on Sunday, and the Baptists praise the effort to enforce the regulatory cartel. Meanwhile, the political suppliers of the regulation reap the support of all the groups, and the Internal Revenue Service works to prevent market entry by those who would produce alcoholic beverages on homemade stills.[37]

Of course to observe a theoretical basis for a divergence between interest group elites and their members, or for interest-group distortions of environmental policy, is not to prove their existence or significant impact. On that issue we lack firm data. In thinking about whether the issue deserves investigation, however, one must realize that there is a serious question whether the federalization of environmental regulation since 1970 has yielded significant environmental benefits. The data for the periods both before and after that benchmark are spotty and questionable on a number of grounds.[38] Nonetheless, although they show pollution declining after 1970, the rate of decline in important areas such as ambient levels of carbon monoxide and sulphur dioxide is slower than in the 1960s. Crandall concludes that "these data suggest that pollution reduction was more effective in the 1960s, before there was a serious federal policy dealing with stationary sources, than since the 1970 Clean Air Act Amendments."[39] Of course, the rate of improvement may have slowed simply because increments of cleanup get more and more expensive as progress is made — Breyer's "last ten per cent" point again. Still, without affirmative evidence that federal involvement has yielded real improvement — compared to the preexisting trend line — it certainly seems worthwhile to study whether interest group activities are skewing the whole project. If they are, then merely enhancing the skill and authority of OMB mandarins seems woefully inadequate.

After all, in a process that Breyer carefully notes, presidents since Nixon have struggled to coordinate and rationalize executive regulatory activities (pp. 68-71). Indeed, Breyer sees OMB's Office of Information and Regulatory Affairs, a prime instrument of that effort, as a starting point for his reform (p. 72). These presidential activities are intuitively plausible: if any elected official has a political incentive to consider the interest of the nation as a whole, it should be the president, whose luster depends, more than others, on the condition of the economy as a whole. Yet despite years of presidential initiative, we are where we are. Although it is hard to

37. *Id.* at 25.

38. *See* CRANDALL, *supra* note 22, at 16-31.

39. *Id.* at 19.

quarrel with the idea of trying to shore up OIRA with more personnel, more scientific skill, and a broader mandate, those increments seem modest. If an important reason for its limited success has been the ability of line agencies to mobilize their interest groups in support of their actions, as some observers suggest,[40] the reformers seem likely to be outgunned.

If interest group distortions are indeed serious, what measures might work? Possibly none. The only recent models for successful challenge to interest groups seem to be the 1986 tax reform and the use of commissions to recommend the closure of obsolete military bases, many bases at a time. The unifying principle behind the two is that clipping the special privileges of many interest groups in a single cut may yield a large enough increase in social surplus to attract media attention and political support.[41] This action at least has the capability of producing adequate rewards for political entrepreneurs — the only people who mobilize the sort of broad coalition necessary for radical change in the status quo. Breyer's analysis surely can illuminate — but his remedy cannot supplant — the necessary political battles.

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40. *See* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 560 & n.151 (1989).

41. *Cf.* Dalton v. Specter, 114 S. Ct. 1719, 1729-32 (1994) (Souter, J., concurring) (recognizing that the political feasibility of the congressionally established base-closing project depended on its all-or-nothing character).