

## REVIEWS

### Regulation and Competition

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*Regulation and Its Reform.* STEPHEN BREYER. Harvard University Press, Cambridge, 1982. Pp. xii, 472. \$25.00.

The pendulum of administrative law, marking successive phases of regulation's expansion and its contraction, swings once again in the direction of reform. The rhetoric of deregulation pervades agency pronouncements.<sup>1</sup> Editorials denounce delays in achieving regulatory reform.<sup>2</sup> Bills contemplating less regulation, the reform of the regulatory process, or more legislative and judicial oversight, work their way through Congress.<sup>3</sup> Here and there, some reduction in regulation has actually occurred.<sup>4</sup>

This alternation of regulation and reform is not the result of some mysterious dialectic but reflects the common experience of trial and error. Regulation expands to meet felt needs in an ever more complex and changing society. The momentum carries the process too far. Regulation fails to produce the desired outcome, inflicts unexpected costs, or causes actual harm. Then, after a surfeit of regulation, disillusion and a desire for reform ensue.

The recurring waves of regulation began before the turn of the

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<sup>1</sup> See, e.g., Amendment of Section 64.702, 77 F.C.C.2d 384, *modified*, 84 F.C.C.2d 50 (1980), *modified further*, 88 F.C.C.2d 512 (1981), *petitions for review filed sub nom.* Computer & Communications Indus. Ass'n v. FCC, No. 80-1471 (D.C. Cir. May 5, 1980).

<sup>2</sup> E.g., *For Oil, Magic; for Gas . . .*, N.Y. Times, May 4, 1982, at A30, col. 1.

<sup>3</sup> E.g., S. 1080, 97th Cong., 1st Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982) (The Regulatory Reform Act); H.R. 746, 97th Cong., 2d Sess. (Regulatory Procedure Act of 1982), *reprinted as amended in* H.R. REP. No. 435, 97th Cong., 2d Sess. 1-13 (1982).

<sup>4</sup> See Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45 & 49 U.S.C. (Supp. IV 1980)); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified at 18 U.S.C. § 1114 (Supp. IV 1980) and in scattered sections of 49 U.S.C. (Supp. IV 1980)); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. (Supp. IV 1980)).

century. In 1887, the Interstate Commerce Act,<sup>5</sup> the archetype of regulatory statutes, addressed the monopoly power of the railroads, which then were the dominant means of transportation; in 1890 the Sherman Act<sup>6</sup> outlawed trusts, monopolies, and conspiracies in restraint of trade. The next wave of regulation, in the Wilson era, produced among other regulatory schemes the Federal Reserve System,<sup>7</sup> the Federal Trade Commission,<sup>8</sup> the Clayton Act,<sup>9</sup> and the Packers and Stockyards Act.<sup>10</sup> In the 1930's came a torrent of new agencies,<sup>11</sup> followed in turn by amendments of the original legislation, issuance of numerous regulations, and vast enlargement of the Washington bar.

Although regulation seems almost synonymous with the New Deal, Judge Breyer asserts in *Regulation and Its Reform* that "most of this growth [in the regulation of the American economy] has taken place since the mid-1960's."<sup>12</sup> Until well after World War II, general economic regulation was a rarity, directed primarily at communications, transportation, and public utilities. More limited controls governed a few other sensitive areas, such as food, drugs, and banking. Then, beginning in the mid-1960's, "[t]he federal government began to regulate oil prices and other aspects of energy production; to impose significant controls upon environmental pollution; and to regulate the safety of the workplace, of the highway, and of consumer products. It increased regulatory protection of investors, including pension holders and commodities traders."<sup>13</sup> Noneconomic regulation grew apace, and Ralph Nader, pictured on the cover of news magazines, became a symbol for a

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<sup>5</sup> Ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 10101-11917 (Supp. IV 1980)).

<sup>6</sup> Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976)).

<sup>7</sup> Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at 31 U.S.C. § 409 (1976) and in scattered sections of 12 U.S.C. (1976 & Supp. IV 1980)).

<sup>8</sup> Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1976 & Supp. IV (1980))).

<sup>9</sup> Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-13, 14-19, 20, 21, 22-27, 44 (1976 & Supp. IV 1980) and 29 U.S.C. §§ 52, 53 (1976)).

<sup>10</sup> Ch. 64, 42 Stat. 159 (1921) (codified as amended at 7 U.S.C. §§ 181-183, 191-195, 201-203, 205-218d, 221-229 (1976 & Supp. IV 1980)).

<sup>11</sup> These include, among others, the NLRB, *see* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (1976 & Supp. IV 1980)), and the FCC, *see* Federal Communications Act, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 15 U.S.C. § 21 (1976) and in scattered sections of 47 U.S.C. (1976 & Supp. IV 1980)).

<sup>12</sup> S. BREYER, *REGULATION AND ITS REFORM* 1 (1982).

<sup>13</sup> *Id.*

new wave of regulation.

Some of Breyer's figures measure the recent expansion. During the 1970's, the number of pages of regulations in the *Federal Register* tripled, federal regulatory budgets expanded six times over, and full-time positions in regulatory agencies more than tripled.<sup>14</sup> It is estimated that in 1965 regulated industries produced 8.2% of the gross national product; by 1975 the corresponding figure was 23.7%.<sup>15</sup> The costs of regulation, including costs of compliance, are computed in the billions of dollars.<sup>16</sup>

Intervening between periods of growth have been occasions of somnolence, such as the Eisenhower era, marked by few new statutes and often by reduced enforcement. At other times, Congress has sought to improve or reform regulation—the Administrative Procedure Act of 1946<sup>17</sup> is an example—or to prune its luxuriance. These reforming trends and theories, however, had a narrow focus: the critics accepted the fundamental premises of the regulatory regime and sought only to clarify the legislation and regulations or to reduce misfeasance and corruption.<sup>18</sup> Today, many reformers doubt whether regulation is required at all in certain areas, and in areas where a need for regulation is conceded they favor less restrictive alternatives.

Many sources feed this new tide of reform. Analyses, often associated with the "Chicago School," challenge much regulation as unjustified by economic theory.<sup>19</sup> Dismay at the practical impact of economic regulation, notably in the energy area, has been matched by a few happy results from deregulation.<sup>20</sup> The competitive weak-

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<sup>14</sup> *Id.*

<sup>15</sup> P. MACAVOY, *THE REGULATED INDUSTRIES AND THE ECONOMY* 25 (1979). See also S. BREYER, *supra* note 12, at 1.

<sup>16</sup> S. BREYER, *supra* note 12, at 2.

<sup>17</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, and in scattered sections of 5 U.S.C. (1976, Supp. III 1979 & Supp. IV 1980)).

<sup>18</sup> *E.g.*, H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).

<sup>19</sup> For example, see the path-breaking paper written by Professor George Stigler of The University of Chicago. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971). For other such studies, see Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 *J.L. & ECON.* 151 (1972); Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 *J.L. & ECON.* 285 (1971); Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 *J. POL. ECON.* 1049 (1973); Posner, *Theories of Economic Regulation*, 5 *BELL J. ECON. & MGMT. SCI.* 335 (1974); Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 *J.L. & ECON.* 1 (1962).

<sup>20</sup> See, *e.g.*, Stelzer, *Electric Utilities—Next Stop for Deregulators?*, *REG.*, July-Aug. 1982, at 29, 29-30 (noting that the claimed success of airline deregulation is one motivation for deregulation of electric utilities).

ness of the American economy in international trade and the growing success of the Japanese have prompted a search for culprits, among them excessive regulation. The uniquely American distaste for government, combined with an abiding resentment of red tape, taxes, and the insolence of power, also spurs the movement toward deregulation.

Despite its breadth and force, the recent interest in reform and deregulation has sparked few academic overviews, and understandably so. An effective critic must be familiar with a wide range of regulatory regimes and industries, combine legal with economic analysis, and derive conclusions that transcend the particular program or agency. The shortage of broad-gauged criticism makes Breyer's book an especially welcome addition to the literature of administrative reform. He combines his ample knowledge of administrative law with a solid grounding in economics to develop an imaginative analytical framework for evaluating and reforming America's regulatory establishment.

## I

Breyer held several important posts before his appointment to the United States Court of Appeals for the First Circuit, including that of special counsel to a United States Senate Judiciary Subcommittee chaired by Senator Kennedy. There he was intimately and influentially concerned with the legislation that led to airline deregulation and the coming demise of the Civil Aeronautics Board. His present work was partly inspired by and is in part an extrapolation from that endeavor.<sup>21</sup>

After describing the explosion of new regulation and the growing criticism of it, Breyer sets two objectives for his book: (1) to categorize regulatory plans and describe their strengths and weaknesses, and (2) to derive rules identifying areas for regulatory reform and to suggest tentative solutions.<sup>22</sup> Part I of the book first arrays the familiar justifications for regulation. It considers the control of monopoly power,<sup>23</sup> the problem of windfall profits,<sup>24</sup> the need to compensate for "spillovers" (externalities whose costs are not reflected in market prices),<sup>25</sup> the absence of the information

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<sup>21</sup> S. BREYER, *supra* note 12, at vii-viii.

<sup>22</sup> *Id.* at 4-5.

<sup>23</sup> *Id.* at 15-20.

<sup>24</sup> *Id.* at 21-23.

<sup>25</sup> *Id.* at 23-26.

needed for an unregulated market to function properly,<sup>26</sup> and the claim that regulation is needed to avoid "excessive competition."<sup>27</sup> A group of other, less commonly used rationales, including "rationalization," "moral hazard," and "paternalism," are considered more briefly.<sup>28</sup>

Part I then examines in detail six conventional modes of regulation<sup>29</sup> and, more quickly, seven "alternatives to classical regulation," each of which, except one, is a "less restrictive alternative."<sup>30</sup> Breyer describes the workings of each traditional mode and scrutinizes its strengths and weaknesses. For example, he considers the case of historically based price controls, which establish as the maximum permissible prices of goods their highest prices during a certain historical period. This form of regulation is typically justified as simple, effective, and efficient. Breyer relates how this claim inevitably is proven false. In each instance in which price controls have been instituted (World War II, the Korean War, and the early 1970's), some prices (the costs of imports, for example) remained uncontrolled and continued to rise. To operate fairly, the system had to allow cost pass-throughs for at least those costs. Instead of setting simple, fixed prices, the regulations became complex. In the end, neither simplicity nor effective control was achieved.<sup>31</sup>

In the final chapter of Part I, Breyer derives four rather modest "rules of thumb" from his survey: (1) the need for regulation should be clearly proven, because regulation introduces its own distortions; (2) regulators should use simple solutions aimed at "worst cases," because the cost of curing every minor defect is too high; (3) even if the need for some kind of intervention is proven, classical regulation should be "a weapon of last resort" after "less

<sup>26</sup> *Id.* at 26-28.

<sup>27</sup> *Id.* at 29-32.

<sup>28</sup> *Id.* at 32-34. "Rationalization" justifies regulation on the ground that, without it, an industry would remain too fragmented to operate most efficiently. "Moral hazard" means that someone other than the buyer is paying for the buyer's purchase (e.g., certain medical insurance arrangements) so that marketplace constraints may not operate effectively. "Paternalism" relies upon the public's lack of expertise or upon various irrational impulses of consumers to justify government regulation. *Id.*

<sup>29</sup> The traditional methods are cost of service ratemaking, *id.* at 36-59; historically based price regulation, *id.* at 60-70; allocation under a public interest standard, *id.* at 71-95; standard setting, *id.* at 96-119; historically based allocation, *id.* at 120-30; and individualized screening, *id.* at 131-55.

<sup>30</sup> The alternatives are antitrust, *id.* at 156-61; disclosure requirements, *id.* at 161-64; taxes, *id.* at 164-71; marketable property rights, *id.* at 171-74; changes in tort liability, *id.* at 174-77; bargaining, *id.* at 177-81; and nationalization, *id.* at 181-83.

<sup>31</sup> *Id.* at 61-63.

restrictive alternatives" have been proven wanting; and (4) accurate knowledge of the defects of a particular type of regulation may well guide the legislator toward a different mode.<sup>32</sup>

In Part II of the book, Breyer develops the central thesis: failures of classical regulation often are due not to collateral weaknesses, such as a poor agency staff, political influence, or inferior procedures, but to a fundamental "mismatch" of the regulatory tool and the particular evil.<sup>33</sup> Breyer posits three "maxims" to identify areas where mismatches are probable, although not certain:

Classical regulation should not be used to control excessive competition. Deregulation and reliance upon antitrust are more suitable. . . .

Classical regulation should ordinarily not be used for purposes of [economic] rent control. Taxes or deregulation offer preferable alternatives. . . .

Classical regulation is not able to deal comprehensively with spillover problems. Taxes, marketable rights, and even bargaining are likely to prove useful as substitutes or supplements.<sup>34</sup>

Breyer illustrates each of the maxims with examples occupying one or more chapters: he illustrates the first with airline<sup>35</sup> and trucking<sup>36</sup> regulation; the second with natural gas regulation;<sup>37</sup> and the third with pollution control programs.<sup>38</sup> Not surprisingly, the examples bear out the maxims.

Part III of the book discusses the practical problems of statutory reform. The first chapter<sup>39</sup> describes the mechanics—planning, information gathering, hearings, political interplay of conflicting forces—of the enactment of the Airline Deregulation

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<sup>32</sup> *Id.* at 184-88. These are described as "rules of thumb" in an earlier work in which Breyer had a hand. See COMMISSION ON LAW & THE ECONOMY, ABA, FEDERAL REGULATION: ROADS TO REFORM 51 (1979) [hereinafter cited as ROADS TO REFORM]; see also *id.* at 24-67.

<sup>33</sup> *E.g.*, S. BREYER, *supra* note 12, at 191. Thus, in a "tentative match" table, he pairs regulatory problems with presumptive solutions: natural monopoly is matched with cost-of-service ratemaking or nationalization; control of economic rent is matched with taxes or deregulation; spillovers are matched with marketable rights or bargaining; excessive competition is matched with a mix of deregulation and antitrust; and inadequate information is matched with a set of alternatives including disclosure. *Id.* at 191.

<sup>34</sup> *Id.* at 195 (emphasis omitted).

<sup>35</sup> *Id.* at 197-221.

<sup>36</sup> *Id.* at 222-39.

<sup>37</sup> *Id.* at 240-60.

<sup>38</sup> *Id.* at 261-84.

<sup>39</sup> *Id.* at 317-40.

Act of 1978.<sup>40</sup> In the second chapter,<sup>41</sup> Breyer first classifies and largely discounts a number of "generic" regulatory reforms—reforms that do not address the substantive aspects of any particular program but instead attempt to reform the general administrative process.<sup>42</sup> Breyer then focuses on two proposals that he finds particularly promising. The first, embodied in a bill proposed by Senator Kennedy in 1979,<sup>43</sup> calls for a "competitive impact statement," akin to the environmental impact statement now required, for all major federal regulatory action.<sup>44</sup> The second proposal, which Breyer finds more appealing, is compulsory "high noon" review of existing regulatory programs to see how they might be restructured where mismatches exist, a concept also included in Senator Kennedy's 1979 bill.<sup>45</sup>

## II

One major theme of Breyer's book is that, where regulation is concerned, less is presumptively better. One of his four rules of thumb is a presumption against regulation and another presumes that, if regulation is to be used, it should be the least stringent alternative. All three of his maxims argue for deregulation or less severe types of regulation. Both of his legislative remedies—the competitive impact statement and the "high noon" reexamination of statutes—aim to reduce regulation. Taken together, they suggest a central question: how can one prove or disprove Breyer's rules and presumptions?

Unfortunately, there are serious flaws in all of the methods available to prove Breyer's thesis. The most "scientific" method would be to quantify costs and benefits and to measure the net gain or loss from imposing each of the regulatory solutions. This method, however, is often impractical. Indeed, even to isolate costs

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<sup>40</sup> Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. (Supp. IV 1980)).

<sup>41</sup> S. BREYER, *supra* note 12, at 341-68.

<sup>42</sup> These approaches include reforms such as improved personnel, internal procedural changes, greater representation of public interest spokesmen, more legislative or presidential control, and new institutions (e.g., ombudsmen or a consumer protection agency). *Id.* at 342-63.

<sup>43</sup> S. 1291, 96th Cong., 1st Sess. § 201 (1979).

<sup>44</sup> This proposal would require an agency, before taking action that would lessen competition substantially, to show that its measure, rather than a less restrictive alternative, is necessary to meet the statutory objectives. Breyer admits that it "risks creating a significant amount of additional bureaucratic paperwork and consultant studies with only a small change in substantive results." S. BREYER, *supra* note 12, at 365.

<sup>45</sup> S. 1291, *supra* note 43, § 301; see *infra* notes 72-81 and accompanying text.

and benefits is likely to be difficult: the number of variables may be immense;<sup>46</sup> the causal relationships are often obscure; and some values are difficult to quantify.<sup>47</sup> Even if one could show that a particular regulatory mode—or no regulation at all—produced the greatest net benefit in one case, the same conclusion might not hold for a similar regulatory problem on somewhat different facts.<sup>48</sup>

An alternative approach is to extrapolate from experience. Airline deregulation is an example of this approach because it was inspired in considerable measure by experience in California and Texas, where unregulated intrastate fares were lower than fares for comparable interstate distances.<sup>49</sup> Similarly, one can inquire what the experience has been in other countries.<sup>50</sup> A state or foreign market, however, may differ from the United States market in ways that defeat such comparisons. Even where a federal regulatory statute is amended to alter the regulatory mode, the evidence after the change is often ambiguous,<sup>51</sup> and new events intervene.<sup>52</sup>

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<sup>46</sup> For example, suppose one were measuring the costs and benefits of deregulating motor carriers: one would have to project possible reductions in service to certain communities and evaluate the direct and indirect economic impact; estimate the extent to which competition would lower rates on certain routes and raise them on others; estimate the economic effects of those steps; compute economic loss from certain restrictive operating practices induced by regulation; measure the cost of regulation itself; and account for possible increased capital costs inherent in a more competitive environment.

<sup>47</sup> In its cost-benefit analysis provisions, S. 1080 recognizes the significance of "non-quantifiable" costs and benefits. See S. 1080, *supra* note 3, § 4(a), 128 CONG. REC. at S2715 (proposing new 5 U.S.C. § 622(e)(1)).

<sup>48</sup> See, e.g., Stelzer, *supra* note 20, at 29-30 (although "airline deregulation has been fabulously successful," *id.* at 29, airline experience is not a proper model for deregulating electric power distribution because electricity distribution, unlike air transport, is a natural monopoly).

<sup>49</sup> See S. BREYER, *supra* note 12, at 201-05.

<sup>50</sup> For example, economists are now comparing domestic and Canadian experience with railroads. See, e.g., Caves, Christensen & Swanson, *The High Cost of Regulating U.S. Railroads*, REG., Jan.-Feb. 1981, at 41. Canadian railroads are subject to far less regulation than are United States railroads. Caves and his colleagues concluded from comparing the two that the annual direct and indirect costs of U.S. regulation exceeded six billion dollars. *Id.* at 41-42. See also Caves, Christensen & Swanson, *Productivity in U.S. Railroads, 1951-1974*, 11 BELL J. ECON. 166 (1980).

<sup>51</sup> See, e.g., Mabley & Strack, *Deregulation—A Green Light for Trucking Efficiency*, REG., July-Aug. 1982, at 36 (more time needed for adequate assessment of past five years' trucking regulation reform); Ellis, *U.S. Airline Competition: The Sifting Has Begun*, Christian Sci. Monitor, May 17, 1982, at 1 (airline deregulation probably beneficial in long-term, but airlines troubled by it in short-term).

<sup>52</sup> In the case of the troubled airline industry, substantial increases in oil prices over the past decade have strained many airlines, as has the worldwide recession, which affects air travel for all airlines, including the best managed. See Meyer & Oster, *Introduction*, in AIRLINE DEREGULATION 4 (J. Meyer & C. Oster eds. 1981) (recession and rising fuel costs have

Moreover, the time horizon over which changes must be judged is often quite long.<sup>53</sup> Thus, even where it is possible to put deregulation to the test of actual experience, the lesson may be less than clear.

Perhaps the best basis for a presumption against regulation, therefore, is not a proof at all, but a pragmatic insight. Once imposed, regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats.<sup>54</sup> Moreover, almost any regulatory program, whether well conceived or not, becomes the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded.<sup>55</sup>

Given this reality, Breyer's presumption is more appropriate when framing a new regulatory program than when appraising one that already exists. Whatever the mismatch theory might say, one ought to hesitate to change an existing program that *seems* to work, regardless of the solution that theory may prefer. The best argument for leaving the telephone system alone was that it appeared to be providing very good service, and the best argument for railroad reform legislation was the number of railroads in bankruptcy. Similarly, the best argument against imposing any regulation or in favor of choosing less restrictive alternatives may well be that it is difficult to choose a good regulatory scheme, and that it is harder still to eliminate even a bad one. Whether evaluating the need for regulation or the need for reform, the right rule of thumb

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made the airline industry less profitable since deregulation); Ellis, *supra* note 51, *passim* (higher fuel prices, recession, and PATCO strike combined with deregulation to bankrupt Braniff Airlines).

<sup>53</sup> See, e.g., Mabley & Strack, *supra* note 51, at 56 (concluding "[i]t will be several years before we can make a complete assessment of the long- and even short-term effects of [the] trucking regulation reform" of the previous five years).

<sup>54</sup> See, e.g., Downs, *Up and Down with Ecology—the "Issue-Attention Cycle,"* PUB. INTEREST, Summer 1972, at 38, 41.

<sup>55</sup> A classic example is the medallions issued for taxicabs in New York City, each of which now represents an investment of thousands of dollars. It is all very well to say that the taxi industry is not a natural monopoly and should not be subject to entry regulation, even if rate regulation is utilized for other reasons. Nevertheless, there may be some equity, as well as political muscle, in a claim that a new policy of open entry, introduced without any warning or recompense, would unfairly injure many individuals whose entire capital may be represented by such medallions. See *New York City Looks at Taxi Regulation*, REG., Mar.-Apr. 1982, at 11, 11-13, 36 (describing the problem of taxi medallions and discussing possible solutions); see also Kitch, Isaacson & Kasper, *supra* note 19, *passim* (discussing entry barriers and their effect).

might be, if it isn't *badly* broken, don't try to fix it.<sup>56</sup>

### III

Throughout the book, Breyer asserts that fear of predatory pricing is no justification for classical regulation and that it is more suitable to rely on the antitrust laws.<sup>57</sup> His emphasis on the antitrust alternative raises the question how well antitrust strictures can function in industries, such as trucking, banking, railroads, and airlines, that have been or are most likely to be deregulated in accordance with Breyer's maxims.

Regulation has long been seen as a substitute for policing industries through antitrust laws. Thus, either by statute or by judicial action,<sup>58</sup> regulated industries often have enjoyed substantial immunity from antitrust laws.<sup>59</sup> In recent years, regulation has been thought to justify a smaller degree of antitrust immunity,<sup>60</sup> and when an industry is wholly or partially deregulated, its antitrust immunity is likely to contract further or to vanish altogether.

Existing antitrust doctrine, however, is not always well suited to industries that have evolved under classical regulation. Not history alone, but permanent characteristics of such industries, produce the clash. For example, although it is true that railroads no

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<sup>56</sup> Admittedly, whether a regime is worth preserving depends on the alternatives available. Breyer might reasonably argue that although an existing regime of regulated airlines or regulated trucks may seem to be providing adequate service, unnecessary costs are buried in such regulation and deregulation would improve service and reduce rates. No one can brush this objection aside. On the other hand, there are so many things in the regulatory world and society at large that do not work well even on the surface that it is at least arguable that those that do seem to work ought to be low on the list for reform.

<sup>57</sup> See, e.g., S. BREYER, *supra* note 12, at 30-32, 195. Breyer also questions the other rationales sometimes clustered under the same "excessive competition" heading. He criticizes, for example, arguments for regulation based on "the cyclical nature of demand," where an industry asks for protection against competition on the ground that necessarily large fixed investments, comparatively small variable costs, and substantial swings in demand will produce a succession of shortages and bankruptcies. *Id.* at 31.

<sup>58</sup> See 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 221 (1978). For discussion of immunity for specific industries, see *id.* at ¶ 228 (agricultural and fishermen's cooperatives), ¶ 229 (labor unions), ¶ 230(a) (export associations), ¶ 230(b) (national defense), ¶ 230(c) (small business), ¶ 230(d) (newspapers), ¶ 230(e) (banks), ¶ 230(f) (professional sports).

<sup>59</sup> Compare *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (no immunity) with *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 721-22 (1975) (immunity) and *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 300-02 (1973) (regulatory agency has primary jurisdiction to make determinations under its authority prior to judicial hearing on civil antitrust claims).

<sup>60</sup> See, e.g., *National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388-89 (1981) (antitrust immunity to be implied only when necessary to make regulatory scheme work and then only to the minimum extent necessary).

longer have a monopoly of the freight business and arguably ought to be deregulated, most of the rail freight in the United States is interchanged between railroads. The railroads therefore are joint venturers as well as competitors; such carriers *must* engage in extensive cooperative arrangements for freight cars to travel from one end of the country to the other over a complex series of routes.<sup>61</sup> If one were to apply the pure antitrust doctrines developed for highly competitive industries in the face of the need for cooperation in railroading, it could produce very strange results indeed.<sup>62</sup>

The problem of unsatisfactory doctrine is by no means confined to regulated industries,<sup>63</sup> but as deregulation progresses, formerly regulated industries do pose a special problem with which antitrust law has scarcely begun to cope. Antitrust doctrine must adapt to industries, such as the railroads, that are only partly competitive. With some imagination, courts can probably adjust ex-

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<sup>61</sup> The number of specifics requiring some type of agreement and coordination among these "competitors" to make such a system function is apparent with a little thought: bills of lading; repair of freight cars; arrangements on billing, credit, and collection for through movements; damage responsibilities; technical specifications for equipment; restrictions on hazardous materials and adjunct safety precautions; and dozens of other matters have to be the subject of some type of regulation, agreement, or both to make the intercarrier system function.

<sup>62</sup> This is no less true of many other such necessarily cooperative industries. For example, in *Radiant Burners, Inc. v. Peoples Gas & Coke Co.*, 364 U.S. 656 (1961) (per curiam), a gas sellers' association denied approval of the Radiant Burner, and the members of the association refused to sell gas to any customer who planned to use the burner, alleging that it was unsafe; the burner's manufacturer claimed that approval was denied to serve anticompetitive purposes. The Court held that the manufacturer stated a cause of action under the Sherman Antitrust Act, § 1, 15 U.S.C. § 1 (1976), because the association's activity fell "within one of the 'classes of restraints which from their "nature or character" [are] unduly restrictive, and hence forbidden by both the common law and the statute.'" *Radiant Burners, Inc.*, 364 U.S. at 659-60 (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911))). If this language were applied literally to the product approval procedures in which interconnected pipeline companies or electric power companies engage to protect workers and the public, such minimal and reasonable safety precautions might be held to be group boycotts in violation of the Sherman Act.

<sup>63</sup> For example, there is still substantial disagreement on what constitutes below-cost or predatory pricing even in highly competitive, never-regulated industries. See Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 263-64 (1981). Likewise, new business arrangements in competitive industries require an adaptation of antitrust precedent, as is illustrated by the evolving antitrust law concerning franchising. See, e.g., *Principe v. McDonald's Corp.*, 631 F.2d 303, 308 (4th Cir. 1980) (franchisor's requirements that franchisee operate franchise in premises leased from franchisor and deposit \$15,000 as security do not constitute illegal tying arrangements, where franchise is more than mere license to use trademark but is entry into elaborate business structure), cert. denied, 451 U.S. 970 (1981).

isting antitrust doctrine to retain cooperative arrangements that are important to the efficient development of an industry.<sup>64</sup>

In other situations, some type of explicit legislative antitrust immunity will remain necessary to capture certain efficiencies, even in an industry deregulated in many respects. For example, railroads and consumers would sacrifice millions of dollars in savings if all railroad mergers were subject to section 7 of the Clayton Act<sup>65</sup> rather than the public interest standard of the Interstate Commerce Act, which grants explicit antitrust immunity for approved mergers.<sup>66</sup>

What reformers should work towards is a kind of "mixed economy" in the regulation of such industries, relying for the most part on a sophisticated development of antitrust law, but falling back on statutory regulation and immunity in some areas.<sup>67</sup> In fairness to Breyer, it should be noted that he concedes that his "alternatives" to classical regulation (such as antitrust) may prove more useful as supplements to continued regulation than as complete substitutes.<sup>68</sup> In looking to the future, one suspects that developing a more sophisticated antitrust regime for the industries Breyer

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<sup>64</sup> An example of fruitful flexibility is *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1163 (D.C. Cir. 1979) (finding congressional mandate that FERC encourage cooperation among power districts, and holding that price-fixing arrangement "reasonably necessary to the functioning of the cooperative arrangement" does not violate antitrust laws). See *United States v. AT&T*, 524 F. Supp. 1336, 1360-61 (D.D.C. 1981) (in assessing interconnection of AT&T facilities with non-AT&T carriers, "problems of feasibility and practicability . . . [to] be taken into account"); see also *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237-38 (2d Cir. 1975) (rules providing per se antitrust violation inapplicable to stock exchanges), *cert. denied*, 423 U.S. 1053 (1976); 1 P. AREEDA & D. TURNER, *supra* note 58, ¶ 223(d) ("legality of a challenged practice under the antitrust laws will often depend upon a court's judgment of the degree of social harm that might result from the challenged practice, the social benefits that might be obtained through that practice, and the availability of significantly less restrictive alternatives").

<sup>65</sup> Clayton Act, § 7, 15 U.S.C. § 18 (1976) (forbidding corporate acquisitions where "the effect . . . may be substantially to lessen competition, or to tend to create a monopoly").

<sup>66</sup> 49 U.S.C. §§ 11341-11351 (Supp. IV 1980) (requiring ICC to approve common carrier mergers and acquisitions upon finding merger "consistent with the public interest," and explicitly exempting such transactions from antitrust laws).

It is clear that in some cases cooperative activities may produce the most efficient market structure. See R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 393-95 (2d ed. 1981) ("per se rule against mergers and other methods of fusion of competitors would . . . catch within its net . . . transactions that had a positive effect on efficiency," *id.* at 393); see also Bradley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1525, 1527-29 (1982) (joint ventures produce economic efficiencies that justify special treatment under antitrust laws).

<sup>67</sup> In the railroad industry, for example, pooling arrangements and divisions of collective earnings may remain vital features even after deregulation.

<sup>68</sup> See S. BREYER, *supra* note 12, at 156.

proposes to deregulate will be scarcely less important than the deregulation itself.

#### IV

Of all the proposals for "generic" reform, the "high noon" device for reviewing existing statutes is Breyer's favorite. Breyer is doubtful about almost all of the others.<sup>69</sup> Most of these proposals have been around for a long time,<sup>70</sup> and Breyer discounts some of them with a bit of mild mockery.<sup>71</sup> The high noon device is also unlikely to be very effective.

The high noon concept has initial appeal precisely because it would compel Congress to deal with basics, to address the substantive plan of regulation rather than tinker with its mechanism. For example, Senator Kennedy's high noon proposal<sup>72</sup> contemplated presidential commissions to study regulatory programs under a prescribed schedule and to propose reform legislation to Congress. Congress would have to vote on either the proposed bill or its own bill; in either case it would be sure to address some substantive reform proposal.<sup>73</sup> The version of high noon that Senator Kennedy's bill proposed also had a decided bias toward efforts to increase economic competition and "[a]chieve the statutory goals of the agency by less restrictive or nonregulatory means, including, but not limited to, the use of taxes, penalties, market-based incentives, bargaining techniques, required disclosure, or the creation of new causes of action."<sup>74</sup>

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<sup>69</sup> See *id.* at 341-68.

<sup>70</sup> *Id.* at 354-55. Breyer notes that the independent agencies have been criticized at least since the 1930's as management failures. *Id.* at 354. "Their mechanism is inevitably slow, cumbersome, wasteful, and ineffective, and does not lend itself readily to cooperation with other agencies." *Id.* (quoting THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE 32 (1937)). Such conclusions were reiterated in the reports of the first and second Hoover Commissions, the Landis investigation, and the Ashe Council. See *id.* at 355.

<sup>71</sup> He quotes with deserved irony the Senate Commerce Committee complaint that many appointments to the FTC and FCC "can be explained in terms of powerful political connections and little else." *Id.* at 342 (quoting SENATE COMM. ON GOV'T OPERATIONS, *The Regulatory Appointments Process*, in 1 STUDY ON FEDERAL REGULATION, S. DOC. NO. 25, 95th Cong., 1st Sess. 1, 7 (1977) (citing an earlier report to the Senate Commerce Committee)). Commenting on the suggestion that higher standards be applied in the appointments process, Breyer observes "[t]hose [standards] suggested tend to be embarrassingly general, such as the suggestion by the [Senate] Governmental Affairs Committee that 'by reason of background, training or experience, the nominee' be 'affirmatively qualified for the office to which he or she is nominated.'" *Id.* at 343 (quoting unspecified source).

<sup>72</sup> See *supra* note 45 and accompanying text.

<sup>73</sup> S. BREYER, *supra* note 12, at 366-68.

<sup>74</sup> S. 1291, *supra* note 43, § 301(a).

Breyer himself is skeptical about the prospect of major regulatory reform<sup>75</sup> and his skepticism is well warranted.<sup>76</sup> The inertial resistance of an existing program or regime is legendary, and Congress, with its various mechanisms for delay, permits opposition groups to resist changes for years.<sup>77</sup> Airline deregulation—a significant change accomplished in the absence of a real crisis—may be something of a sport, owing more than a little to the cast of characters involved, including Breyer. Far more typical may be the proposed criminal code reform<sup>78</sup> and the proposed telecommunications legislation,<sup>79</sup> both of which now have languished through successive Congresses.

Nevertheless, little would be lost by pursuing the Kennedy high noon proposal. Indeed, its requirement that Congress conduct hearings on and debate specific reform proposals<sup>80</sup> would shine publicity on some of the worst abuses and generate the kind of editorial criticism and public attention that can eventually move Congress to action. Furthermore, high noon's imposition of a schedule for considering reform of particular areas of regulation may overcome the inertia that today makes reform more difficult. In any case, it is surely more promising than the sister provision in the latest major reform bill in which the Senate proposes to require *agencies* to undertake such a systematic review of existing major agency rules.<sup>81</sup> But Congress is not inclined to burden itself with the same periodic review obligations, and the Kennedy high

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<sup>75</sup> S. BREYER, *supra* note 12, at 368.

<sup>76</sup> Even the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45 & 49 U.S.C. (Supp. IV 1980)), providing some deregulation of the railroad industry, does so only to a limited degree and through compromise provisions of such complexity that lawyers will be employed for years, if not decades, unraveling them.

<sup>77</sup> For a discussion of this aspect of the legislative process, see Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963), reprinted in H. FRIENDLY, *BENCHMARKS* 41 (1967).

<sup>78</sup> For a brief history of attempts to reform the criminal code, see Shattuck & Landau, *Civil Liberties and Criminal Code Reform*, 72 J. CRIM. L. & CRIMINOLOGY 914, 916-22 (1981).

<sup>79</sup> See *Court's AT&T Ruling Refocuses Attention on New Legislation*, 40 CONG. Q. WEEKLY REP. 1986, 1986 (1982) (telecommunications reform will be delayed until at least 1983 because Rep. Wirth has withdrawn his bill, accusing opponents of "delaying tactics"); 36 CONG. Q. ALMANAC 18-19 (1981) (noting that a "four-year effort to rewrite the 1934 Communications Act was again unsuccessful in 1980"). For an example of proposed telecommunications legislation, see H.R. 5158, 97th Cong., 1st Sess. (1981), reprinted in *Telecommunications Act of 1982 (pt. 1): Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance, of the Comm. on Energy and Commerce on H.R. 5158*, 97th Cong., 2d Sess. 3-122 (1982).

<sup>80</sup> See *supra* notes 72-73 and accompanying text.

<sup>81</sup> See S. 1080, *supra* note 3, § 4, 128 CONG. REC. at S2716-17.

noon proposal has not prospered.

Breyer may undervalue other means of improving agency processes, especially those designed to make an agency act more quickly, if not more rationally. Curiously, Breyer gives little attention to such deadline requirements, even though his own description of airline regulation dwells with outrage on the secret moratorium once imposed by the CAB on new competition.<sup>82</sup> An agency device more typical than refusing to hold any hearings is to commence proceedings but never decide issues, a process that some agencies have reduced to a fine art through the folding of old uncompleted dockets into new ones.<sup>83</sup> Ever willing to hold agencies to higher standards than it imposes on itself, Congress has begun to deal with such tactics<sup>84</sup> and the courts are learning to do so.<sup>85</sup>

Although far less striking than major deregulation measures, such time constraints can be very important. Competition, as Breyer's CAB example illustrates, can be frustrated as much by endless delays in agency action as by baseless policy decisions. The costs of delay, in idle investment, litigation, and uncertainty, are formidable. At the very least, time limitations on proceedings advance the day when a reviewing court can get its hands on the

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<sup>82</sup> S. BREYER, *supra* note 12, at 208.

<sup>83</sup> See *Nader v. FCC*, 520 F.2d 182, 187-91, 206-07 (D.C. Cir. 1975) (court "sympathetic" with characterization of FCC's 10-year machinations as "interminable proceeding, the principal function of which has been that of a giant regulatory wastebasket," *id.* at 206).

<sup>84</sup> The Interstate Commerce Act is now littered with statutory deadlines, imposing meticulous timetables on the agency. See, e.g., 49 U.S.C. § 10322(b) (Supp. IV 1980) (ICC must make all initial decisions within 80 days (270 days when oral evidence is taken) in all matters unrelated to rail carriers), § 10322(e)(2) (if initial decision is appealed, final decision must issue within 50 days), § 10322(i) (ICC in extraordinary circumstances may extend these deadlines, but total of extensions cannot exceed 90 days), § 10326(a) (when petitioned to make rail carrier rules, ICC must grant or deny petition within 50 days), § 10237(b) (in rail carrier matters, all evidentiary proceedings to be completed within 120 days thereafter), § 10237(e) (Commission has 20 days to act on initial decision).

<sup>85</sup> See, e.g., *National Ass'n of Recycling Indus. v. ICC*, 585 F.2d 522, 542-43 (D.C. Cir. 1978) (on reh'g) (per curiam) (two-year delay in ratemaking violates statutory requirement, 45 U.S.C. § 793 (1976), of "expedited proceedings"; ICC ordered to conduct investigation within six months), *cert. denied*, 440 U.S. 929 (1978); *Caswell v. Califano*, 583 F.2d 9, 15, 18 (1st Cir. 1978) (construing statutory requirements that agency proceed "within reasonable time," 5 U.S.C. § 555(b) (1976), and that court may compel agency action "unlawfully withheld or unreasonably delayed," *id.* § 706(1); ordering Social Security Administration to reduce administrative delays by providing disability claims hearings within 90 days); *Nader v. FCC*, 520 F.2d 182, 206-07 (D.C. Cir. 1975) (construing 5 U.S.C. §§ 555(b), 706(1) (1976), court finds 10-year delay in ratemaking dispute unreasonable and orders FCC to present timetable for resolving dispute). See also 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.12, at 53 (2d ed. 1980), arguing that practitioners should more frequently invoke the courts' power under 5 U.S.C. § 706(1) (1976) to compel agency action unreasonably delayed.

problem (and the agency). A prompt agency decision is also beneficial because it is likely to bear a closer relation to the facts than is one based on an ancient record.

The same concern that calls for imposition of time deadlines should also encourage reforms that permit an agency to do its job more swiftly and discourage those that raise new procedural hurdles for the agency to jump.<sup>86</sup> Even a well-intended procedural safeguard necessarily will import new delays and defeat prompt agency action. Thus, reform proposals ought to be judged at least in part by whether they expedite or retard agency proceedings.

Congress is considering a number of reform proposals that one might scrutinize in this way. The version that has progressed the farthest is S. 1080.<sup>87</sup> Although the bill has too many provisions<sup>88</sup> and too many implications to discuss adequately in a few pages, it does teach several lessons about efficiency and the politics of generic reform.

The first lesson is that in the inevitable tension between agency speed and procedural safeguards, Congress continues to favor the latter at the expense of the former. Sometimes the price—agency delay—is worth paying. It is probably wise, for example, that S. 1080 insists on a defined record even for informal rulemaking;<sup>89</sup> this not only aids judicial review but also permits litigants to respond to the evidence upon which the agency has relied. Similarly, the bill's requirements that the rulemaking agency perform and publish a cost-benefit analysis for rules involving more than \$100 million in annual impact<sup>90</sup> should help protect the public from unduly inefficient regulation. Other provisions of S. 1080, however, simply create procedural hurdles without providing any assurance that the outcomes will be any more sound. For example, while evidentiary hearings are sometimes needed for sound rulemaking, the bill's provision for cross-examination in major

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<sup>86</sup> A salutary development in recent years has been the agencies' own reduced use of evidentiary hearings in favor of swifter methods, a process that can be carried too far, but that is usually sound where policy issues are to be decided. *See generally* 3 K. DAVIS, *supra* note 85, §§ 14.1-14.5.

<sup>87</sup> *Supra* note 3.

<sup>88</sup> The bill includes provisions concerning, inter alia, improved notices of rulemaking; public hearings; cross-examination, a restricted record, and required record support in informal rulemakings; cost-benefit analysis and periodic reexamination of major rules; agency deadlines; new standards for judicial review; and congressional veto of agency rules. *See* S. 1080, *supra* note 3, 128 CONG. REC. at S2713-21.

<sup>89</sup> *See id.* § 3, 128 CONG. REC. at S2714 (proposing new 5 U.S.C. § 553(d)(2)), § 4(a), 128 CONG. REC. at S2715 (proposing new 5 U.S.C. § 622(c)-(e)).

<sup>90</sup> *Id.* § 4(a), 128 CONG. REC. at S2714-15 (proposing new 5 U.S.C. §§ 621-622).

rulemakings<sup>91</sup> is loosely phrased and promises trouble for agencies seeking to bring their proceedings to a timely conclusion. Similarly, a provision requiring republication of a proposed rule if the original notice did not apprise the public of "the substance of the [final] rule"<sup>92</sup> invites useless delay, since one purpose of the rulemaking procedure is to develop and consider modifications of the proposed rule.

The second lesson for the reformer is that Congress continues to be pointlessly mesmerized by standards of judicial review, even though these standards do not matter very much in real cases.<sup>93</sup> Of course, a *prohibition* on review could be very significant, but such provisions are rare. Delicate linguistic adjustments in standards are not worth the time spent in debate, much less the countless briefs and decisions that will be devoted to implementing them. For example, much time was spent refining a requirement in S. 1080 for an "independent" judicial appraisal in deciding legal questions concerning "agency jurisdiction or authority."<sup>94</sup> The bill directs courts to stress statutory language rather than legislative history or agency discretion.<sup>95</sup> It is especially amusing that a central concept in this provision—the term "authority"—is so ambiguous that it requires resort to the legislative history, and that history *itself* is unclear. This is not a propitious beginning for a directive to the courts to rely primarily on statutory language.

A final lesson of S. 1080 lies in its providing for a congres-

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<sup>91</sup> S. 1080 provides that an agency proceeding on a major rule "shall include an opportunity for direct and cross-examination" of persons who have prepared data on which the agency substantially relies, where "other procedures . . . are determined to be inadequate for the resolution of significant issues of fact." *Id.* § 3, 128 CONG. REC. at S2713-14 (proposing new 5 U.S.C. § 553(c)(3)(A)).

<sup>92</sup> See *id.* § 3, 128 CONG. REC. at S2713 (proposing new 5 U.S.C. § 553(b)(4)). Congress should have been content with the bill's alternative requirement of republication of the notice when the provisions of the final rule differ so substantially from the provisions of the proposed rule that the original notice did not "fairly apprise the public of the issues ultimately to be resolved." *Id.*

<sup>93</sup> Notably, litigants have argued for years about whether particular fact findings should be reviewed under the "arbitrary and capricious" or the "substantial evidence" standard, although the standard's label does not make much difference. *Associated Indus., Inc. v. United States Dep't of Labor*, 487 F.2d 342, 347-50 (2d Cir. 1973); *Active Judges and Passive Restraints*, REG., July-Aug. 1982, at 10, 11 (arguing that there is no difference between "substantial evidence" and "arbitrary and capricious," but noting that Congress *intends* the former to be stricter).

<sup>94</sup> S. 1080, *supra* note 3, § 5, 128 CONG. REC. at S2718 (proposing new 5 U.S.C. § 706(c)), would direct that a reviewing court require agency action to be "within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent."

<sup>95</sup> See *supra* note 94.

sional veto of agency rules under various conditions.<sup>96</sup> Without debating the constitutionality or merits of such a provision, complex questions themselves,<sup>97</sup> the veto provision illustrates how far Congress is from a willingness to grapple with substantive reforms of the type Breyer recommends. If the division of labor means anything in legislation, Congress should be worrying first about the broad design of regulatory statutes and last about whether, for example, an FTC used-car rule is anathema to constituents.<sup>98</sup>

### CONCLUSION

Surveying nineteenth-century England, David Cecil reports that in one parliamentary debate, "when an opponent had raised a point against the Government, Althorp replied that he had some facts with which he was sure he could answer it, but for the moment he had mislaid them. Both sides of the House at once accepted his answer as perfectly satisfactory."<sup>99</sup> This charming confidence is no longer with us, and reformers who propose or oppose major legislative changes are expected to furnish reasons. Breyer's very fine work will provide such reformers with many of the answers they need.

Breyer deserves ample "points for difficulty" in taking on the task of generalizing about administrative reform. It is easy enough for a critic to appraise the strengths and weaknesses of a specific program of regulation, usually after the fact. It is far harder, but potentially far more useful, to frame precepts that sweep across the regulatory landscape, as Breyer has done in *Regulation and Its Reform*. If his arguments are not conclusive, they are certainly persuasive.

Among those whom Breyer has persuaded are the distinguished members of a regulatory reform commission of the Ameri-

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<sup>96</sup> S. 1080, *supra* note 3, § 13, 128 CONG. REC. at S2719-21 (proposing new 5 U.S.C. §§ 801-803).

<sup>97</sup> For discussions of these and related issues, see generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977).

<sup>98</sup> Congress vetoed the FTC's proposed rule that would have required dealers to disclose major defects in used cars and to state the extent of any outstanding warranties. *Congress Vetoes F.T.C. Rules On Disclosure of Car Defects*, N.Y. Times, May 27, 1982, at A1, col. 1. The U.S. Court of Appeals for the District of Columbia Circuit, however, held the veto unconstitutional. *Consumers Union of United States v. FTC*, No. 82-1737, slip op. at 6 (D.C. Cir. Oct. 22, 1982) (en banc) (per curiam).

<sup>99</sup> D. CECIL, MELBOURNE 235 (1966).

can Bar Association.<sup>100</sup> Breyer's maxims were expressed earlier in work he did for the commission, and the commission adopted all three of the maxims<sup>101</sup> as its own.<sup>102</sup> It is a rare academic proposal that is subject to such scrutiny by so experienced a group; it is rarer still for one to win so firm a measure of endorsement.<sup>103</sup>

Helpful as the maxims may be as "first cut" presumptions, my own view is that the book is even more useful because of the analysis, collection of insights, review of alternative modes, and checklists of regulation's strengths and weaknesses that Breyer assembles along the way in developing his maxims. Perhaps these insights illuminate possibilities rather than probabilities, but they can be sharp tools when wielded by a critic or reformer. Whether or not Breyer's maxims are ever implemented through a proposal like the Kennedy "high noon" legislation, they will remain valuable in other contexts where the opportunities for reform may be greater: in framing new regulatory measures, in opposing bad proposals for unnecessary or excessive regulation based on narrow or transient interests, and in the overhauling of legislation when a crisis finally shows that existing regimes are unworkable.

Although the book emphasizes legislative reform, legislative reformers are not the only ones who can apply the arguments offered. Many regulatory statutes leave the regulators ample flexibility to change the basic mode of regulation without resort to Congress, at least where a reviewing court is sympathetic to the new approach.<sup>104</sup> The President, too, has the ability in many cases to alter the thrust of regulatory programs, especially through decisions on staffing and enforcement. This is, in sum, a book for all branches.

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<sup>100</sup> This was the ABA Commission on Law and the Economy. The Commission had at different times over 30 members, including former Secretary of Transportation William Coleman, Washington lawyer and former White House Counsel Lloyd Cutler, Judge Henry Friendly, whose opinions and articles on the administrative process are classics, a number of individuals with extensive regulatory experience (including former Commissioners Thrower (IRS), Wheat (SEC), and Wiley (FCC)), and several distinguished economists (MacAvoy, Meyer, Sommers, and Wallace).

<sup>101</sup> See *supra* note 34 and accompanying text.

<sup>102</sup> *ROADS TO REFORM*, *supra* note 32, at 24-67.

<sup>103</sup> There was only one express dissent to the recommendation embodying Breyer's maxims. *Id.* at 144.

<sup>104</sup> A dramatic example of such a change was the FCC's decision to convert long-distance specialized telephone service from a public utility monopoly administered largely by the Bell System to one of virtually unlimited entry for specialized carriers. *Specialized Common Carrier Servs.*, 29 F.C.C.2d 870, *reconsid. denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom.* *Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

In the end, however one may view Breyer's maxims, it is no small help to be reminded by them that the regulatory problem may not lie in the fine tuning of the regime, better information, prohibitions on "revolving door" personnel and ex parte contacts, or any of the usual paraphernalia of reform proposals. Instead, the regime may be founded on a basic misapprehension about the right regulatory medicine to treat the disease. As William James once wrote in an anonymous editorial for a reforming magazine, "[h]owever skeptical one may be of the attainment of universal truths . . . one can never deny that philosophic study means the habit of always seeing an alternative, of not taking the usual for granted, of making conventionalities fluid again, of imagining foreign states of mind."<sup>105</sup> By adopting this outlook, Breyer has advanced the prospects for real regulatory reform.

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<sup>105</sup> 23 NATION 178 (1876), reprinted in 1 THE LETTERS OF WILLIAM JAMES 190 (H. James ed. 1920).