

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

1995

Justice Stephen Breyer: Purveyor of Common Sense in Many Forums

Jeffrey Lubbers

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Agency Commons](#), [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), and the [Legal Biography Commons](#)

JUSTICE STEPHEN BREYER: PURVEYOR OF COMMON SENSE IN MANY FORUMS

JEFFREY S. LUBBERS*

Like many others in the field of administrative law and regulatory practice, I readily confess to being a long-time admirer of Stephen Breyer the teacher, judge, and writer. His opinions on a wide variety of cases, while on the U.S. Court of Appeals for the First Circuit, stood up to the glare of intense scrutiny during the process of his confirmation to the U.S. Supreme Court. His seminal articles¹ and books² on regulatory reform (which he helped effectuate as the primary Senate staff architect of airline deregulation), his award-winning article on the curiousness of the Supreme Court's *Chevron*³ decision,⁴ his defense of the use of legislative history as an analytical tool,⁵ and his recent provocative "lay"

* Research Director, Administrative Conference of the United States. B.A. Cornell University; J.D., University of Chicago Law School. The views expressed in this article are personal and do not necessarily reflect those of the Administrative Conference or its members.

1. Stephen Breyer's law journal articles include Developments—1988 Luncheon Address and Commentary and Analysis, *Seminar: The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 ANTITRUST L.J. 771, 771, 777 (1989); *Antitrust, Deregulation, and the Newly Liberated Marketplace*, included in *Symposium: Anticipating Antitrust's Centennial*, 75 CAL. L. REV. 1005 (1987); *Reforming Regulation*, 59 TUL. L. REV. 4 (1984); Afterword, *Symposium: The Legacy of the New Deal: Problems and Possibilities in the Administrative State*, 92 YALE L.J. 1614 (1983); *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979).

2. Justice Breyer's books include BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) [hereinafter BREAKING THE VICIOUS CIRCLE]; ADMINISTRATIVE LAW AND REGULATORY POLICY (1985) (co-authored with Richard B. Stewart); REGULATION AND ITS REFORM (1982); ENERGY REGULATION BY THE FEDERAL POWER COMMISSION (1974) (co-authored with Paul W. MacAvoy).

3. *Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837 (1984).

4. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). The American Bar Association's Section of Administrative Law (since renamed the Section of Administrative Law and Regulatory Practice) presented then-Judge Breyer with its annual award for scholarship for this article in 1987.

5. See Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-61 (1992) (defending judges' use of legislative history to interpret statutes). Also, see Michael D. Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 ADMIN. L. NEWS (Summer

critique of risk regulation⁶ (which placed him at slight risk of being "borked" out of his Supreme Court nomination had it not been so perceptive that it attracted book-jacket praise from *both* Alan Morrison and James Miller)⁷ are must reading for anyone who wants to understand the role of federal regulation in contemporary society.

My contribution to these proceedings is not to analyze Justice Breyer's prolific writings. I will leave that to others more able than I. Rather it is to recognize another of his less-heralded great strengths: his willingness and ability to serve as a common-sense government reformer in other forums. In this regard, I am, of course, most familiar with his service on the Administrative Conference of the United States (ACUS or Conference)⁸ as a liaison representative from the Judicial Conference.⁹

In June 1981, only a year after then-Judge Breyer had joined the First Circuit, Chief Justice Warren Burger agreed with Judge Carl McGowan, then serving as the Judicial Conference's only liaison representative to

1991).

6. BREYER, *BREAKING THE VICIOUS CIRCLE*, *supra* note 2.

7. *Id.*, (book jacket). Mr. Morrison was Director, Public Citizen Litigation Group, and Mr. Miller was former Director of the Office of Management and Budget in the Reagan administration.

8. The Administrative Conference of the United States was created by the Administrative Conference Act, Pub. L. No. 88-499 (1964) as amended, codified at 5 U.S.C. §§ 591-96. It is an independent nonpartisan agency dedicated to improving the administrative processes by which the federal government carries out the public's business. The Conference is the only federal agency whose exclusive charge is to make federal benefit and regulatory programs more effective, fair, and efficient. The Conference fulfills its responsibility by bringing together experts from the public and private sectors to research, recommend, and help implement improvements in administrative law and agency procedures. A list of its recommendations and statements can be found at 1 C.F.R. pts. 305, 310 (1994).

9. Other forums where Justice Breyer served with distinction include the U.S. Sentencing Commission, as a member from 1985 to 1989; and the American Bar Association's Section of Administrative Law and Regulatory Practice, as a Council Member from 1989 to 1992. While on the Council, he also served on the Section's Committee on Government Standards that produced an excellent statement on government ethics endorsed by the ABA House of Delegates. ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287 (1993). At the time of Justice Breyer's nomination to the Supreme Court, he had just been elected to the position of vice chair of the section, from which he reluctantly withdrew. Another important panel on which Justice Breyer served was the Carnegie Commission on Science, Technology, and Government. He was a member of the Task Force on Science and Technology in Judicial and Regulatory Decision Making that produced the influential report *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING* (1993).

ACUS, that a second liaison position should be authorized.¹⁰ The Chief Justice appointed Judge Breyer to the position, where he quickly became an active participant in ACUS's process of developing recommendations on administrative procedure reforms.

The breadth and importance of Justice Breyer's participation in ACUS discussions are obvious when one reviews the transcripts of ACUS plenary session debates since 1981. For this note, I read again all of his many statements in these transcripts and was struck by how frequent, perceptive, and influential his comments were.

Administrative Conference plenary sessions are a curious combination of theater and technical parliamentary debate. For those who have not had the pleasure of attending these public sessions, they are the semi-annual occasions when the ACUS membership (numbering more than 100 people) and its liaison representatives gather to debate proposed recommendations to Congress, the agencies, and the courts that were developed throughout the year by ACUS's standing committees.

Proposed recommendations range from pronouncements on government-wide rulemaking or adjudication issues to suggested overhauls of particular programs like the asylum or Social Security adjudication systems. Robert's Rules of Order governing debate procedures are observed loosely and the floor debates can sometimes go off on tangents or threaten to unravel as committee proposals are critiqued. As a long-time staff member of ACUS, I often worry about plenary sessions spinning out of control. Just as often, I marvel that it rarely happens. Instead, the collective assembly reaches a rational and practical outcome. This, of course, only can happen due to the presence of consensus-makers and opinion-leaders within such a large organization. Justice Breyer has always been such a person. It bodes terrifically for his success on the Supreme Court.

Readers are free to examine the plenary session transcripts for themselves.¹¹ I hope the following extracts will persuade you that Justice Breyer's comments are unfailingly engaging and witty, often in the form of a question that helps frame the debate. They normally are concerned with practicalities and ramifications, especially when changes in judicial review of agency action are at issue. Because his comments (like his

10. Letter from Warren E. Burger, Chief Justice, to Reuben Robertson, ACUS Chairman (June 29, 1981). Judge Carl McGowan apparently recommended Judge Breyer and Chief Justice Burger concurred. Currently, D.C. Circuit Judge Stephen Williams serves as the other Judicial Conference liaison to ACUS.

11. Transcripts of the plenary sessions are on file at the Administrative Conference library in Washington, D.C.

writings) also transcend politics, they are influential with all the various blocs of members that invariably coalesce. This helps to move issues forward and to reach a consensus. To give the flavor of Justice Breyer's comments, I have selected the following transcripts.¹²

1. *The Bumpers Amendment*

In 1979 Senator Dale Bumpers (D-Ark.) sparked an administrative law controversy by proposing legislation that would have eliminated the presumption of validity of agency rules by requiring that reviewing courts decide *de novo* all relevant questions of law including agency interpretations of statutes and the meaning or applicability of agency actions. The Conference was addressing a proposal to oppose legislation incorporating these ideas in 1981 when Judge Breyer addressed the issue. His skepticism about the proposed legislation helped form a consensus within ACUS to oppose the new version of the legislation.¹³

Does Congress, to go back to the strong version, really want the judges not to give respect to—or “deference to”—agency judgments on questions of law in interstitial matters?

My goodness, I have a lot of cases [involving] facts on records. Do these facts make out anti-union motive within the meaning of a rule within the meaning of the statute?

Two questions: What are the facts? How do they fit within the law? Don't I have the right to pay some attention to what the NLRB thinks about? Nobody could not want that.

Second area. Let's say it's really within the agency's expertise. The FCC has something called a separations manual. What's that? That involves telephone use—interstate calls, intrastate calls. The world's greatest minds have struggled for four years to figure out how much of that handset was to be allocated to the interstate rate base, and how much to the intrastate rate base. And I'll tell you there is no answer—but there's a [thick] manual on questions of a similar type, all of which raise legal as well as factual questions. And I can't believe that the District of Columbia Circuit—I hope not the First Circuit—is going to have a hearing and go decide all that *de novo*. Nobody could want that.¹⁴

12. These transcripts were taken *verbatim* by a stenographer, but they were neither reviewed nor edited by the participants. I have very lightly edited the portions of the transcripts selected for this publication, but have omitted nothing of substance.

13. The Conference already had addressed the original version of the Bumpers Amendment. Administrative Conference of the United States, *Recommendation 79-6: Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment*, 1980 ACUS 33. The 1981 debate quoted herein resulted in *The Administrative Conference of the United States, Recommendation 81-2, Current Versions of the Bumpers Amendment*, 1981 ACUS 7.

14. Transcript, 23d ACUS Plenary Session, Vol. II, 155-56 (Dec. 11, 1981).

2. Agency power to order product recalls

This 1984 debate centered on the text of a proposed recommendation that originally had urged Congress to broaden various agencies' power to order product recalls. During the course of the debate, amendments were made so that the text urged agencies to consider whether they needed such authority. Judge Breyer had favored the amendments and now spoke in response to a speaker who still opposed the proposal. The recommendation was then quickly adopted.¹⁵

I think this argument is addressed to the way it was written in the recommendation prior to Alan's recommendation.

There are few things that are more hotly controverted than an agency's power—which typically means staff power—to run into court and ask for recall. Remember the Bon Vivant Company. Remember the Massachusetts cranberry industry. The power to order a recall is the power to destroy a company; all right?

On the other hand, human life, health and safety is at stake—and speedy action is necessary. And certain agencies have power because of (the need to deal with) those problems. Enormous debate exists on both sides.

I can absolutely understand the objection at the point when the recommendation seemed to say, "This is what Congress should do." But at the point where it says "Look, some agencies have the power, others don't. There is at least one instance [in the National Highway Transportation Safety Administration] of confusion. Surely we should study this coherently and get the views of all interested parties." At that point, it seems to me that the debate between you two is no longer quite on the issue.¹⁶

3. Toxic torts

In 1984, ACUS sponsored a plenary session debate on regulatory reform issues. After the presentation by a panel of experts, Judge Breyer offered this observation about toxic torts that presaged his 1993 book on risk regulation.¹⁷

Toxic torts, cancer: you could make an argument, if I exaggerate only a little, that the present system [involves] control standards through administrative regulations telling companies what to do while compensating through the courts—judicial and tort law. You can make a fairly good argument with only a little bit of exaggeration that that's a disaster. I could show employers faced with horrendous liability, maybe a trillion dollars a year. I could make other argu-

15. Administrative Conference of the United States, *Recommendation 84-2: Procedures for Product Recalls*, 1984 ACUS 11.

16. Transcript, 28th ACUS Plenary Session, Vol. I, 150-51 (June 28, 1984).

17. BREYER, *BREAKING THE VICIOUS CIRCLE*, *supra* note 2.

ments: employees who are compensated not at all, or only randomly; administrators who are totally harassed, not knowing what to do; courts that are besieged with cases they can't handle; and lawyers who are enriched. At least the first four of those are bad. [Laughter]

However, at the same time there exists at least the promise of an alternative incentive-based system which comprises funds financed by industry through taxes on toxics, or a system devised to provide incentives for the industry to behave more safely, paid out through administrative devices which, if they are to avoid Social Security's problems, would have to be administered in ways that take account of those problems. Almost anything would be better than the courts.

There is a possibility that the employers would like it, that the employees would like it, that the unions and trade associations might agree because the added amount of money comes at the expense of the lawyers who now take forty percent of all the funding for no particular social reasons. Therefore, I see a possibility, along the lines that were suggested, of putting together a broad coalition. If there is that broad political coalition, at least the work would not be in vain.¹⁸

4. *Immigration—judicial review in exclusion cases*

In 1985 the Conference debated a proposed recommendation to provide for direct court of appeals review in cases where immigrants challenged their exclusion from the United States. Judge Breyer wondered whether the Conference should make this recommendation because district courts might be better equipped to handle such cases. The Conference ultimately was persuaded, and the resulting recommendation did not address judicial review issues.¹⁹

I have a vision of a lot of people trying to get in. And an immigration judge or somebody somewhere that says "no, you can't get in." Then something has to be done with him. Sometimes I guess they put them in a room and let them stay there. Or maybe sometimes they parole them and they disappear. Basically, many people are trying to get in.

My naive reaction—and I stress "naive" because I want the answer to my naive reaction—is as follows. Most of the time the authorities who are trying to keep them out will be right. Some of the time they will be wrong. Then there is a human being who is threatened to be sent to some place he doesn't want to go to—and I'm asking myself, "How do you get sensible review of the problem of that person, who is either in a room or threatened to be on the boat any minute?" Yet he has a valid claim because they did something wrong to him. At that point, I ask myself, "Is the place to send that person to the court of appeals? What will happen?" I know what happens in our court. This probably works much better [elsewhere].

18. Transcript, 29th ACUS Plenary Session, Vol. II, 38-39 (Dec. 7, 1984).

19. Administrative Conference of the United States, *Recommendation 85-4, Administrative Review in Immigration Proceedings*, 1985 ACUS 17.

In our court there are three judges in different places. They get together occasionally. Something comes up and the case goes to a staff attorney who suddenly gets these papers that often reflect extreme human hardship, and the staff attorney doesn't quite know what to do.

So the staff attorney calls up the three judges who have to think about it. Then you have three people who don't have the papers in front of them trying to make instant decisions. It takes a lot of time at best. Or, at worst, they operate from off the hip.

The judges are tempted to say, "Let them all stay." And believe me, the Justice Department will be in there with fourteen reams of paper which say, "We want to tell you there are two billion people in the world trying to get in—and you have just opened the door to them all." Others will react positively.

Now I'm just comparing that version of what happens in our court with what I think might happen in a district court—because district courts, after all, are accustomed to the problem of emergency situations where a human being comes along and says, "Please look at my case," and a district judge either looks at it or sends it to a magistrate. And the magistrate says "I want to see the evidence." The magistrate is available twenty-four hours a day. He or she gets the lawyers in, and they have papers, and the magistrate can ask questions.

That is my naive reaction to the problem of human hardship, along with the problem of the Justice Department normally being right, but not always. I just ask myself, "Why is it such a great thing to send these to the courts of appeals?"²⁰

5. Agencies hiring outside attorneys

In 1987, the Conference debated a proposal for tightening the procedures by which federal agencies contract with private attorneys. After a colloquy sparked by the following questions raised by Judge Breyer, the recommendation was adopted.²¹

I'd really like to ask for an explanation of the rationale. In this respect, I'm on the Sentencing Commission. The Sentencing Commission is, in fact, considering hiring outside lawyers. We might or might not for a particular legal problem. And in thinking about that and reading through this, my first reaction would have been, well, we'll go over to the Justice Department and find out how to do it if we're going to do it. And now, here are a set of procedures, etc. So thinking about it, I had this question: why are lawyers different than anyone else? Normally, we have some economists, we have some secretaries, and we have some lawyers. We'd normally rely on our own economists, lawyers, and our secretaries.

Now, we prefer to do this because it's usually cheaper and they know more about the subject. Sometimes, a situation could come up where we'd want to get an outside economist. Sometimes a situation would come up where we might want to get an outside lawyer. I suspect that doesn't happen very often because

20. Transcript, 31st ACUS Plenary Session, Vol. I, 120-23 (Dec. 12, 1985).

21. Administrative Conference of the United States, *Recommendation 87-3, Agency Hiring of Private Attorneys*, 1987 ACUS 15.

we have the Department of Justice which has terrifically good lawyers, and a lot of them. But in the situation where you want to go outside, why is it any different going outside for a lawyer than it is going outside for an economist or for a secretary? In no instance should an agency waste the taxpayers' money, but I should think you wouldn't waste the taxpayers' money any more when you're looking for economists than you would waste the taxpayers' money when you're looking for a lawyer. In other words, what's so special about hiring outside lawyers that you say, "as opposed to all other people?" Even though you might need them to an equal degree, you should be specially certain not to go outside to hire a lawyer rather than an economist or a secretary or anybody else that we happen to need. That's my first problem.

My second problem is, how do all these rules and regulations, which I see here for the first time, stack up against what the Department of Justice might have told me if I had just gone over and asked them? Or against what would apply if I were going to go out and hire an outside economist, which we might do? And if they are different, then where are they different, and why? Those are my questions.²²

6. *Review of Social Security disability adjudications*

In 1987 the Conference debated a proposal to revise significantly the role of the Social Security Administration's Appeals Council—the agency appeal board which at the time was reviewing 50,000 appeals a year from SSA administrative law judge decisions. There was a general consensus that the appeal process was not working, but Judge Breyer was concerned about a diversion of such cases into the courts. He first discussed his annual caseload on the First Circuit, and then raised concerns about the relationships between agency review and judicial review.²³

I'll sit on 180 full cases and I'll write approximately sixty real opinions, or maybe fifty. We have another 200 or 300 in which I will participate by signing my name. Those are done by staff attorneys who circulate cases to three judges. The staff attorney pays pretty close attention. I pay less attention. Most Social Security cases are in that category. Indeed, almost all.

Now, that is relevant to what I have to say and to my different perspective. It sounds to me as if this debate which runs throughout government concerns the natural assumption that only the agency in which I participate is incompetent. All the other ones work well. [Laughter]

That's what I see. I don't think the courts handle Social Security cases well. That is in my own mind a great understatement. I only make the understatement so as not to get myself into a lot of trouble.

22. Transcript, 34th ACUS Plenary Session, Vol. I, 84-86 (June 11, 1987).

23. The discussion resulted in the Administrative Conference of the United States, *Recommendation 87-7, A New Role for the Social Security Appeals Council*, 1987 ACUS 36.

Why? Let me go through seven quick points. First, I believe courts do not handle them well because seven levels of review [in the SSA and judicial process] is too many. It is like eating 100 pounds of spinach a day, or jogging 100 miles a day, to be healthy. It will have the opposite effect—each person thinks someone else is doing the job and, in fact, no one is.

Second, the judicial part of this process does not work well. Believe me. It doesn't. The cases are on the summary judgment calendar. And I assume a gross mistake is found. Maybe we consider it fairly well, but certainly it doesn't get the treatment that the fully argued cases get. And you can argue that this practice is evil, wrong, et cetera, as much as you want. The person who has a claim that they have a bad back, while of enormous importance to that person, is not going to get full non-summary treatment in the U.S. Court of Appeals for the First Circuit—whether he should or he shouldn't. Maybe he should, but he won't.

Third, this system is somewhat screwy, if it works at all. Here is where I have to revise my view. I felt comfortable thinking that at least the individual cases are getting some review in the agency so that, indeed, the egregious cases will be screened out. Well, I'm now hearing that is not so. Even if that's not so, I'm not sure the solution is to get rid of [the system] altogether.

Fourth, suppose you get rid of it altogether. What do I see happening? Do I see the judiciary then reviewing the individual cases more carefully? No, I do not see that happening. Whether that should happen or not, I don't see it happening.

Fifth, if not, what do I see coming about? Greater randomness in the system. I think the randomness is illustrated by what may have been a loss of confidence in the Council in 1984 with more reversals—and I bet some were and some weren't—because of the loss of confidence. Gradually, rebuilt confidence in the agency resulted in reversals going down. I'm not certain that it is necessarily a good result.

Sixth. Now, this is my self-interest. I think from reading this that there are 40,000 to 50,000 cases before this agency appeals board. I think that there are only 8,000 in court. And what will happen to the other 42,000 once, in fact, this middle-level review is out? One possibility is that they don't come to court now because the [party] can't afford it, which is bad. It isn't that expensive; there are many lawyers, at least in our district, who will handle this for a fifty or seventy-five dollar fee. There are quite a few who will not make it—maybe they don't appeal because they don't know about this option. Maybe they don't come because they have been satisfied with some review. And if the answer to that third part is even partially right, you will then discover—if 50,000 more cases come, even if 20,000 more cases come—you will discover an increase in the judicial workload approximately equal to the appellate workload for all federal criminal cases; that is, all criminal cases in the federal system. You are talking about an unbelievably large number of cases compared to the workload of the federal system. The question is, "What will happen?" I think the answer is that no one knows. I think it might be possible to look into it, but I suspect it hasn't been looked into.

Finally, what I fear is the loss of a germ of what would be a sensible system that, if improved to provide specialized adjudicatory review, perhaps within the agency, would leave the courts to the really unusual case where, in fact, they might be able to do a better job. I don't have an answer, but I wanted those

points in front of you when you think about it.²⁴

7. *When courts should give Chevron deference*

In 1989, the Conference returned to the knotty issue of scope of judicial review—this time with a proposal suggesting to agencies how they best can obtain judicial deference. Judge Breyer's support of the proposed recommendation's approach proved instrumental to its adoption.²⁵

In a room with 118 experts on this question, I have overcome my natural reluctance to say anything about [the recommendation]. [Laughter] It seems to me that the point I want to make, particularly in response to the last remark, is that I read through the recommendation, and I read through the study, and I thought it was actually helpful.

I don't understand what the argument is about. The reason that I rather like the way it was all set out is because it is suggestive. The reason this is a tough question to write a recommendation for is because there are 17 million statutes and only 16 million sets of circumstances, and it is hard to classify. Courts inevitably look at the circumstances and try to figure out what makes sense in this set of circumstances. That's why it is hard to get something specific.

But I thought two things about this recommendation were good. First, it suggests that when a court is tempted to defer to the agency because the situation is the type where Congress would have wanted courts to defer to agencies under those circumstances, you should get more deference. The more the court feels that the agencies seriously considered the underlying problems, that must be true. This recommendation sort of focuses on that.

The second thing that I rather liked about it was that there are other circumstances—and this is where I'm sort of surprised about the [Department of Justice's concern]—where Congress really didn't want to say to the court, "Court, leave it up to the agency here to a degree because it makes sense for them to figure it out." There are still other circumstances where you might want to defer. And that's where the agency simply knows a hell of a lot more about it. The statute seems to be written in gobbledegook. It was actually written with the help of the agency. [Laughter]

There is actually a human being over there. There is a human being there who contacted the staff of the House or Senate, and they can tell you about it in a way no one else can.

You can say all you want that the courts will not defer. They will because, in fact, they have human beings in front of them who know more about this situation. There are fifteen different situations like that, and this recommendation focuses on the fact that there are sometimes special reasons. Therefore, "Look, agency, show that you can be entrusted with that responsibility."

24. Transcript, 35th ACUS Plenary Session, Vol. I, 73-76 (Dec. 17, 1987).

25. Administrative Conference of the United States, *Recommendation 89-5, Achieving Judicial Acceptance of Agency Statutory Interpretations*, 1989 ACUS 31.

Even where those considerations are not present, there still could be, in the myriad of factual circumstances, other reasons for paying attention to the agency. I don't care if it is set out in a preamble or set out in the recommendation or even set out in the article, but that type of feeling for this complex situation is exhibited here, and I think it is a good thing.²⁶

8. *Regulation of biotechnology*

In 1989 the Conference debated a proposal to reform the government's approach to regulation of the emerging area of biotechnology. Some members criticized the text for showing a bias in favor of regulation. Judge Breyer helped shift the proposal toward the need for better coordinated regulation.²⁷

Excuse my tinkering, but I can't help it. [Laughter]

If you just eliminated the next-to-the-last sentence—you would then have no bias because the reason this [appears] biased is nobody has ever heard of going to Congress and saying, "Look, we want you to have a hearing. At this hearing you are to ask every agency why they are not regulating. And now we want to hear the answer to that." As soon as you ask Congress to do that, it is pretty hard to imagine that you are going to come out of this and discover that the answer is that you're regulating too much. My own reading in the area suggests to me that in substance, people are pretty satisfied with what is going on.

What you've identified as a problem is a turf battle, and the answer to the turf battle is coordination. Therefore, the thrust of this shouldn't be either regulation or no substantive regulation. It should be greater coordination. The way to do that is to add the word "coordination," take out this thing saying, "Why the hell aren't you regulating?" and put in either "regulate" or "don't regulate." I would add the word "coordination" somewhere, get rid of that sentence, and I think maybe you'd have agreement.²⁸

9. *Judicial review of visa denials*

The Conference in 1989 debated reforms in the State Department's procedure for issuing visas. Part of the proposal concerned a proposed statutory change to permit judicial review of visa denials. Judge Breyer, again representing the Judicial Conference, dramatically illustrated his fear of overburdening the courts, and persuaded the Conference not to

26. Transcript, 39th ACUS Plenary Session, Vol. II, 130-33 (June 16, 1989).

27. The debate resulted in *The Administrative Conference of the United States, Recommendation 89-7, Federal Regulation of Biotechnology*, 1989 ACUS 42.

28. Transcript, 40th ACUS Plenary Session, Vol. I, 63-64 (Dec. 14, 1989).

recommend any changes in judicial review.²⁹

We do review some cases of visa denials. I sat on the case involving Mrs. Allende. So it isn't the case that where somebody wants to get somebody else into the United States, they have no judicial review. They do have judicial review. So what you're talking about are the cases where somebody abroad wants to come here. There are probably six billion people in the world, and probably five billion would like the United States to do something for them in some way. So the question is: To what extent should those people have procedure in our bureaucracies and our courts?

With respect to that question, I want to state a fact, make a general point, and then do a specific pleading for a special interest that I represent. I expect you will discount that special pleading but, nonetheless, I want to make it.

The fact is this: When I read this report I didn't know how many visas are denied. In the first part of the report it gave the figure nine million granted, it suggested that was ninety percent, so I thought probably you're talking about one million being denied. In later parts, the report cited numbers like forty percent in Mexico denied and sixty percent somewhere else, and so I began to think you were talking about four million denied. I began to think we're talking about between one and four million potential cases. I don't know. Maybe it is much less.

But as soon as I see numbers anywhere approaching that, I think it is no longer possible simply to operate on the question of what appears to be nice, or what sounds fair on paper. It then becomes a question of what the shape of the institution is before and after we implement the proposal. Now, that doesn't cut one way or the other. It just means I want to know. What I can't find is the answer to my question.

The general point is this—and I make it because I think it is so important for millions of studies and for many of the studies that this group does—that I think where we're talking about large numbers—and it's my fault, and it is Clark Byse's fault, and Peter Strauss's—we tend to jump from—

PROFESSOR CLARK BYSE: Speak for yourself. [Laughter]

JUDGE BREYER: No. It is. It is more you than me. [Laughter] We jump from a premise, which is [that] judicial review is a nice thing. Indeed, it is a great thing. Indeed, I love it. I probably wouldn't even get any pay check if I didn't do it. [Laughter] You jump from that to the conclusion that, therefore, we ought to have it. Normally I jump to that conclusion. But when you suddenly talk about potentially thousands of cases, at that point I want to go a little deeper into it and I want to ask what the institutional implication is. That is, what other method might there be of curing the problem, short of layers of bureaucracy ending up in court? Now, maybe that's the right answer here. All I'm saying is I don't see it yet.

Now, let me make the specific point, and this is the instance of special pleading. There are 30,000 to 40,000 cases in the federal courts of appeals. If any-

29. The Administrative Conference of the United States, *Recommendation 89-9, Processing and Review of Visa Denials*, 1989 ACUS 51.

where near these numbers of hundreds of thousands or millions, in anywhere near a percentage like one-tenth of one percent of the cases, ask for review in court, you've doubled the caseload of the federal courts of appeals. Maybe you've only increased it by ten percent. I don't know. But there is an impact here, and I don't know what the numerical impact is. It looks significant.

I'm making this point strongly because this isn't the only group of lawyers that goes on the premise that judicial resources are free, or goes on the premise that the solution is just to appoint more judges. In my opinion, neither of those propositions is true. I sit there and see certain systemic problems of a serious sort that develop through the fact that the caseload of the federal courts of appeals has risen by thirteen times since 1945 and the number of judges has risen by three times. The kinds of problems—and I'll spare you the long speech—that develop are that the opinions which federal courts of appeals write are not criticized—because they are invisible. Law professors only can deal with the Supreme Court opinions. The result is that large firms which can find the inconsistencies have unbelievable advantages over the sole practitioners who do not. Another result is that it tends to be door-closing time in the federal courts.

Although I'd like to have [visa applicants] there too, there are other people I don't want to close the door on even more. As a result, what tends to happen and what will happen is that you will have a fourth tier in the federal system. That fourth tier will mean, in our lifetimes, additional judicial delay for all the people who are there now.

As much as I want to see the cases, I think you can't go ahead and recommend things that may have impacts on the system without at least looking into those impacts and finding out what you want. That's the special pleading for the special interest that I represent.³⁰

As the Judicial Conference's liaison to the Administrative Conference, Justice Breyer obviously was not shy about his self-proclaimed "special pleadings" concerning the burgeoning caseload in the federal courts.³¹ However, his beneficial influence on ACUS in particular and on the development of the law in general—in many forums—gives this observer great confidence in his ability to have a similar effect on the U.S. Supreme Court.³²

30. Transcript, 40th ACUS Plenary Session, Vol. II, 45-49 (Dec. 15, 1989).

31. His concerns on this score have become widely shared by his fellow judges in the Judicial Conference. For a discussion of these issues, see COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, *Proposed Long Range Plan for the Federal Courts* (Draft for Public Comment) (Nov. 1994).

32. I cannot resist noting that Justice Breyer joined two other alumni of the Administrative Conference who serve on the Supreme Court: Chief Justice William Rehnquist, who as Assistant Attorney General served on ACUS's presidentially appointed Council in 1971-72, and Associate Justice Antonin Scalia who served as ACUS Chairman, 1972-74.