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## ***Economic Reasoning and Judicial Review*** **Associate Justice Stephen G. Breyer**

The judicial review of regulatory agencies' decisions, and of statutory enactments with important economic content, presents unique and persistent problems. These decisions are often technical and complex, and the judicial review is usually performed by non-specialists who often seek to provide clear rules and predictability, not case-by-case economic balancing of their own. Sound economic policy requires a balancing of both costs and benefits and demand and supply.

In *Economic Reasoning and Judicial Review* (AEI Press, March 2004)—an essay first presented in December 2003 as the AEI-Brookings Joint Center for Regulatory Studies' 2003 Distinguished Lecture—Stephen G. Breyer, Associate Justice of the United States Supreme Court, discusses these dilemmas in the context of recent Supreme Court decisions and offers suggestions for addressing them.

In order to bring economic reasoning to bear in legal fields, such as antitrust law, intellectual property law, and economic regulation, Justice Breyer recommends the following:

- The law must take into greater consideration the underlying human purposes of the law, rather than simply favor strict legal categories.
- Courts should consider using independent experts for economic reasoning in technical areas rather than sending judges to economic seminars. These experts should understand the role that administrative considerations, such as the need for rules, play in the law.
- Given the law's reluctance to rely upon novel approaches, institutions outside the judiciary should debate and adopt economic methods for the courts to model.

The legal process, Justice Breyer argues, "is too important to be left simply to the legal specialists, to the lawyers, or even to the judges." Those with basic economic or regulatory policymaking expertise need to participate in the judicial process. Whether serving as experts in individual cases or informed court watchers and critics, these experts can help lawyers and judges understand the tools of analysis and encourage their use.

Justice Breyer has long been a leader in the quest to build a rational consensus on the appropriate role of government intervention in a market-based economy. As counsel to the Senate Judiciary Committee, he was one of the chief architects of airline deregulation. As a Harvard University law professor and a Supreme Court Justice, he has made seminal contributions to the understanding of social and economic regulation, copyright law, and administrative law. Justice Breyer is the author of *Regulation and Its Reform* (Harvard, 1992) and *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard, 1993).

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