Statement of Cass R. Sunstein

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Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before you today to discuss Judge Stephen Breyer's work on regulatory policy and administrative law. I will restrict myself to these subjects. I will give particular emphasis to Judge Breyer's books, Regulation and its Reform (1982) and Breaking the Vicious Circle (1993). I will spend some time as well on Judge Breyer's other academic work; but I will deal only briefly with his judicial opinions, which by necessity offer a less detailed and sustained statement of his views.

Let me begin with some general notes, offered by way of summary. For many years, Judge Breyer has been one of the most valuable writers on regulation and administrative law. He is an unfailingly constructive, fair-minded, and sophisticated contributor to public and academic discussion. Avoiding dogmatism and ideology, he is highly pragmatic; for this reason he appeals to people of widely varying views. A special virtue of his work is that he focuses insistently on the real-world consequences of law.

With respect to regulation, his chief goal has been to develop approaches that will actually improve people's lives, by (for example) reducing prices, promoting employment, improving the quality of services, or increasing health and safety. He is not "anti-regulation" or "pro-regulation." Instead he seeks sound regulation, where soundness is evaluated with close reference to what regulation does in the actual world. Thus Judge Breyer was sympathetic to deregulation in some areas of transportation, urging competition among airlines to keep prices down. But he sharply opposes deregulation in the areas of health and safety, claiming that marketplace forces are insufficient.

With respect to administrative law, Judge Breyer has tried to work out a sensible understanding of the relations among courts, agencies, Congress, and the President. His work is characterized by appreciation of the constitutional backdrop, healthy pragmatism, attention to actual effects, appreciation for experimentation, and good common sense. His work shows that he believes that his primary obligation as a judge is to the law. He understands that his own judgments about regulatory policy should not determine his interpretation of the law.

No one in these complex, technical, and often controversial fields is likely to agree with everything that Judge Breyer has written or said. Reasonable people have reasonable disagreements. But there can be no doubt that Judge Breyer has been an exceptionally valuable contributor in current debates. His work on government regulation and administrative law is unusually distinguished. In part because of his expertise and sophistication in these fields, he would be an superb addition to the Supreme Court.

I. Regulation in General

Judge Breyer's first book, Regulation and its Reform (1982), offers a comprehensive overview of the subject. The book is a careful, fair-minded, and balanced discussion of regulation. It seeks particularly to identify the regulatory tools that will best promote our common economic, social, and environmental goals. This is a detailed and sophisticated book, one that defies simple summary. I offer a brief outline here.

Judge Breyer's principal complaint is that we have not always sought regulatory tools that are well-matched to regulatory problems. For example, if the regulatory problem is natural monopoly, the best regulatory tool is cost-of-service ratemaking, which can keep consumer costs at the optimal place. If the problem is excessive competition, the best tool is antitrust law, which can prevent predatory behavior. The question of "match" and "mismatch" is the basic theme of the book. In urging good matches between problem and solution, Judge Breyer seeks regulatory approaches that will actually work, and that will do so without increasing prices, promoting unemployment, harming economic productivity, or endangering other important social goals.

Judge Breyer favors deregulation in certain limited but important circumstances -- especially when the evidence suggests that competition, rather than government mandates or government price-fixing, will benefit consumers and the public at large. His approval of airline deregulation grows out of the view that airlines can be made to compete with one another, and that if so, government should not set prices for airline tickets. (There was evidence, receiving bipartisan support, that government price-fixing resulted in unnecessarily high prices for consumers.) Judge Breyer thinks that "excessive competition" is rarely (though not never) a problem; most of the time, so-called "excessive" competition helps consumers and the economy, by lowering prices and improving services. Thus he favors reliance on the antitrust laws to ensure that airlines are truly competing with one another, rather than use of governmental controls to determine prices and services. In short, Judge Breyer urges policymakers to use the marketplace where the marketplace will work.

But Judge Breyer rejects deregulation when he believes that it will fail. His book shows that he is certainly not a member of the so-called Chicago School, which tends to see government failure as pervasive, and to treat deregulation as invariably the remedy of choice. In this way, Judge Breyer does not follow the views expressed by the most prominent and severe critics of regulation. In this book, he claims that deregulation would be a failure in many areas of social and economic life.

In the context of unhealthy or dangerous food and drugs, for example, Judge Breyer notes that ordinary people usually lack information about risks. A government role is therefore indispensable. It may be best for government merely to provide the relevant information; it may be best for government to ban certain risk-producing substances "where disclosure does not work." Id. at 193. There is a separate problem for many social harms, which involve "spillover costs." Id. at 192. With many products, the price that is charged does not reflect the harm that is actually inflicted, and here laissez-faire would be a mistake. Id. at 192-93. Taxes and fines may be the best solution for this problem, or perhaps government should set minimum standards.

Hence in the area of environmental protection, Judge Breyer suggests that the principal choice is not between regulation and no regulation, but between governmentally-set standards on the one hand and economic incentives (taxes or fines) on the other. Judge Breyer offers a detailed discussion of the risks and benefits associated with these various

strategies. (I might add at this point that Judge Breyer's general if cautious support for economic incentives has now received considerable bipartisan approval. President Clinton's Executive Order on Regulation supports economic incentives, as did Presidents Reagan and Bush, and as does the well-respected environmental group, the Environmental Defense Fund. In the 1990 Clean Air Act, Congress made the same judgment in controlling acid deposition.)

Judge Breyer also urges government to follow some general precepts: to be modest, to aim at the worst cases, and to aim for simplicity. He is concerned that some regulation may cause problems as bad as or worse than the disease, and he seeks approaches that will actually work in the world, rather than prove futile or counterproductive, or amount to symbolic posturing that does little good. All in all, Judge Breyer's analysis of the problem of regulatory "mismatch" is subtle, sophisticated, detailed, and refreshingly nondogmatic.

Regulation and its Reform has proved to be a highly influential and extremely constructive contribution to academic and public debate. Of course the book is not the last word on the subject. Certainly it is possible to question some of its analysis and some of its conclusions. But the book has become something of a classic, and quite deservedly so.

II. Health, Safety, and the Environment

I have said that in the area of safety, health, and the environment, Judge Breyer is sharply opposed to deregulation. In recent years his basic concern has been to ensure that our limited resources will be devoted to areas where they will do the most good. This is a large theme of his first book, and it is the principal goal of his latest book, Breaking the Vicious Circle (1993).

In this book Judge Breyer is not concerned with how much we should be spending on health, safety, and the environment. Instead he is asking how we should allocate our resources for these purposes, assuming that the amount is fixed. In investigating this issue, Judge Breyer identifies a large problem: the apparently large expenditure of resources for relatively small problems, and the failure to devote significant or sufficient resources to relatively large problems. This problem has been found by many observers from many different perspectives, and it is supported by the standard studies from both government and the private sector. See, e.g., W. K. Viscusi, Fatal Tradeoffs (1993), and sources cited; C.R. Sunstein, After the Rights Revolution (1990), Appendix B, and sources cited; Regulatory Program of the United States Government, April 1, 1991-March 31, 1992, and sources cited.

Judge Breyer's book is no attack on government regulation. On the contrary, Judge Breyer insists that regulation is necessary, and that deregulation is a "nonsolution." Id. at 56. He even contends that some popular less restrictive alternatives, like labelling and taxes, may well be inadequate. Id. at 56.

Judge Breyer's basic claim is that we can rearrange our priorities so as to do much more to promote health and safety. His comparison of saved lives with costs is designed to ensure that we have more gains, not that we trade off lives and dollars in some mechanical fashion. See id. at 22-28. Thus he shows that much regulation is highly successful, saving lives and protecting the environment at comparatively low cost. See id. at 24. Thus he urges that we might improve our regulatory outcomes through, for example, better prenatal care; increased vaccinations; better cancer diagnosis; improvements in indoor climates; changes in diet to avoid natural carcinogens; spending more government time and effort on such

serious ecological problems as ozone, forest destruction, and climate change; and much more. Id. at 23, 28. Judge Breyer draws on some recent work by the Environmental Protection Agency to show that attention to priorities can help ensure that we devote our resources to the most serious problems, and thus do a lot of good, rather than more minor problems, and thus do less good.

In short, the basic problem addressed by Breaking the Vicious Circle -- a problem the existence of whose existence there can be no doubt -- is inadequate priority-setting and inadequate allocation of limited regulatory resources. Judge Breyer believes that the American public wants those resources to increase gains to life and health. He does not think that the present inadequate allocations really reflect the public will. Thus he seeks solutions that will do what the public most deeply seeks -- to save many lives and protect health and the environment, without damaging the economy.

To overcome the current misallocations, Judge Breyer offers a straightforward but innovative proposal. This is a new institution, one that would operate within the executive branch and always remain subject to the law as enacted by Congress. The purpose of the institution would be simple: to help ensure better priority-setting. Thus its members would have expertise in science and technology and receive experience in many places, including EPA, Congress, and elsewhere. Id. at 71. The new institution would be authorized to ensure good priority-setting, by allocating resources to serious problems rather than trivial ones, and thus by saving more lives rather than fewer.

This is an intriguing and provocative proposal. It is not unprecedented or radical. On the contrary, it draws on some important precedents in the United States and abroad. Notably, officials in both the Bush and the Clinton administrations have expressed considerable interest in the proposal. The proposal also raises many questions, some of which are addressed by Judge Breyer itself, and some of which require further consideration. I cannot discuss those questions here. But it is important to emphasize that the proposal has already attracted a great deal of bipartisan interest, finding support among liberals and conservatives alike. Much of its analysis is reflected, for example, in the recent report of the Carnegie Commission, Risk and the Environment: Improving Regulatory Decision Making (1993). It is notable that the authors of that report were exceptionally diverse.

I conclude that Breaking the Vicious Circle is an unusually valuable and illuminating book. Like many likely readers, I do not agree with everything that is said in the book. Surely we can quarrel with some of Judge Breyer's particular claims, especially in areas involving such a high degree of scientific uncertainty. Surely we can urge modifications and qualifications to his provocative proposal. Perhaps the proposal should ultimately be rejected (though I think that it is far too soon to make such a judgment). What is important for present purposes is that Judge Breyer has offered a highly promising suggestion for the future. The book is a constructive and informed effort to address a significant problem with modern regulation.

III. Administrative Law

Judge Breyer's work on administrative law has been concerned not with substantive policy, but with the appropriate relations among our various governmental actors -- Congress, courts, the President, and federal agencies. He believes in a limited role for the judges, seeing regulatory policy as, fundamentally, a decision for others, especially Congress and regulatory agencies. See, e.g., Afterword, 92 Yale LJ 1614 (1983). Here too Judge Breyer has done first-rate work. This work is perhaps most relevant

to these confirmation proceedings, since it suggests Judge Breyer's views on the function of the judiciary.

For present purposes, two of Judge Breyer's essays are especially notable. On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992), sharply criticizes the view that legislative history is irrelevant to statutory interpretation. Judge Breyer urges that legislative history has some limited but important functions for judges. His basic claim is that the history helps uncover Congress' instructions, and to that extent legislative history bears on judicial work. He shows that the history may help courts to avoid absurd outcomes that Congress has not intended; that it may help reveal drafting errors; that it may show that Congress wrote with a specialized meaning that courts should respect. Perhaps most important, the history may reveal that Congress has sought to promote an identifiable purpose and that a particular interpretation was Congress' own.

Judge Breyer does not believe that courts should search the legislative history in support of fragmentary quotations establishing the court's preferred policy view. But he thinks that when there is room for interpretive doubt, the history can be a real help. This is a balanced, modest, moderate, and highly intelligent discussion. It shows an appreciation for possible abuses of legislative history, but also responds well to people who think that the history should be abandoned. In Judge Breyer's view, the proper answer to abuse is to stop the abuse, not to drop reliance on the history altogether. Reasonable people may claim that Judge Breyer has not struck the right balance; but the article is a fine one.

Also notable is Judicial Review of Questions of Law and Policy, 38 Ad. L. Rev. 363 (1986). Here Judge Breyer draws attention to Supreme Court cases apparently suggesting (quite oddly) that courts should carefully review policy judgments by agencies, but should defer to agency judgments about the meaning of law. Judge Breyer says that this is an anomalous and unstable set of ideas, since courts are better suited to interpreting law, and poorly suited to assessing policy. Judge Breyer emphasizes that courts are not well-equipped to make policy judgments, since they lack a comprehensive overview of agency objectives and options. Judge Breyer also offers a highly sophisticated discussion of the problem of deciding when courts should defer to agency interpretations of law. He shows that this is a complex or subtle problem, not easily answered by general rule. This is an excellent article too, and it has been quite influential.

My principal task here is to discuss Judge Breyer's scholarship in regulatory policy and administrative law, and I will not discuss his judicial work in detail. But I will note that as a judge, Judge Breyer has been a faithful interpreter of federal regulatory law. To take just one example, he has strongly supported the goals of the National Environmental Policy Act (NEPA). In two especially influential opinions, he emphasizes the need to consider environmental consequences before decisions are actually made, and in this way he has remained faithful to Congress' initial goals in enacting NEPA. See Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1989); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983). The rest of his judicial work on administrative law and regulation reflects first-rate legal skills and respect for governmental institutions and the law.

A reading of Judge Breyer's work shows that he certainly does not impose his policy preferences on the law. He has revealed a strong commitment to a limited role for the judiciary, safeguarding the lawmaking prerogatives of Congress and the policymaking powers of the President and regulatory agencies. This approach is highly consistent with his academic writings.

Conclusion

For a long period, Judge Breyer has been one of the most valuable commentators on administrative law and regulatory policy. He is widely respected and discussed. His work is highly pragmatic, and he is always focussed on real-world consequences. Avoiding dogmatism, abstraction, and high theory, he cannot be characterized as "for" or "against" regulation in general. Instead he is aware that regulation can fail or succeed, and he tries to urge strategies that will actually work, and that will do so while minimally burdening the economy.

His work on administrative law -- probably more relevant for present purposes -- is characterized by a sensible understanding of the strengths and limits of different institutions in the federal government. Hence he urges a limited role for courts, especially in overseeing policy judgments in the regulatory area. But he also insists that courts have an important function in ensuring that agencies have complied with the law as enacted by Congress.

Let me add some final words. Judge Breyer has done his work on regulation not in his judicial capacity, but as an academic and as a policy adviser. There is every reason to think that as a Justice, he would not attempt to "legislate from the bench" by reading statutes in accordance with his own policy preferences. Judge Breyer's work as an academic and as a judge shows that he is fully aware of the sharp limitations of judges in our system of government. In interpreting the law, he has been concerned above all with Congress' instructions, not with his own theories. I think that with his evident skills, unusual expertise, and sense of balance and fair-mindedness, Judge Breyer would be a truly extraordinary addition to the Supreme Court. This is an exciting and distinguished nominee. I very much hope that he will be confirmed.

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Curriculum Vitae

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Employment

1988-Present -- Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago

1985-1988 -- Professor of Law, Law School and Department of Political Science, University of Chicago

1987, spring -- Visiting Professor of Law, Harvard Law School

1986, fall -- Samuel Rubin Visiting Professor of Law, Columbia Law School

1983-July 1, 1985 -- Assistant Professor, Law School and Department of Political Science, University of Chicago

1981-1983 -- Assistant Professor of Law, University of Chicago Law School

1980-1981 -- Attorney-Advisor, Office of Legal Counsel, U.S. Department of Justice

1979-1980 – Law Clerk to the Honorable Thurgood Marshall, Supreme Court of the United States

1978-1979 – Law Clerk to the Honorable Benjamin Kaplan, Supreme Judicial Court of Massachusetts

Education:

J.D. 1978, Harvard Law School magna cum laude (Executive Editor, Harvard Civil Rights-Civil Liberties Law Review; Winning Team, Ames Moot Court Competition)

A.B. 1975, Harvard College magna cum laude (Board of Editors, Harvard Lampoon; Varsity Squash)

Subjects:

Constitutional Law (Three Courses: Free Speech and Religion; Governmental Structure; Equality and Due Process), Constitutional Theory and Interpretation, Constitutionalism and Democracy, Administrative Law, The Theory of the Regulatory State, Environmental Law, Regulation: What Works and What Doesn't, Social Security and Welfare Law, Civil Procedure, Supreme Court Seminar, Rawls and His Critics, Elements of the Law (introductory jurisprudence), Selected Issues in Contemporary Legal Theory

Public Service, Administrative Responsibilities, Related Matters:

Co-Director, Center on Constitutionalism in Eastern Europe, University of Chicago, 1990 - present

Vice-Chair, Judicial Review Committee, Section on Administrative Law and Regulatory Practice, American Bar Association, 1991-present

Commissioner, American Bar Association Commission on the future of the Federal Trade Commission and of economic regulation, 1988

Associate Editor, Ethics, 1986-1988

Board of Editors, Studies in American Political Development, 1989-present

Board of Editors, Journal of Political Philosophy, 1991-present

Board of Editors, Constitutional Political Economy, 1991-present

Contributing Editor, The American Prospect, 1989-present

Chair, Administrative Law Section, Association of American Law Schools, 1989-1990

Vice-Chair, American Bar Association Section on Governmental Organization and Separation of Powers, 1986-1987

Council, American Bar Association Section on Administrative Law, 1987-1988

Vice-Chair, American Association of Law Schools, Section on Administrative Law, 1987-1989, 1990-present

Member, American Law Institute, 1990-present

Member, American Academy of Arts and Sciences, elected 1992

Have testified on numerous legal subjects, usually involving separation of powers, administrative law, regulatory policy, and constitutional law, before a number of national and local government bodies, including Senate Judiciary Committee, Senate Government Affairs Committee, House Rules Committee, Attorney General's Commission on Pornography, and Illinois House of Representatives

Have advised on law reform and constitution-making efforts in various nations, including Ukraine, Romania, Poland, South Africa, Bulgaria, Lithuania, Albania, Israel, and China

Have worked on briefs pro bono on various subjects in United States Supreme Court, United States Court of Appeals, and United States District Courts

Publications:

Books:

Democracy and the Problem of Free Speech (The Free Press, 1993)

The Partial Constitution (Harvard University Press 1993)

After the Rights Revolution: Reconceiving the Regulatory State (Harvard University Press 1990; paperback 1993)

Constitutional Law (Little, Brown & Co., 1st edition 1986; 2d edition 1991) (co-author)

The Bill of Rights and the Modern State (University of Chicago Press 1992) (co-editor with Geoffey R. Stone and Richard A. Epstein)

Feminism and Political Theory (editor) (University of Chicago Press 1990)

Articles:

Rules and Analogies, The Tanner Lectures in Human Values (forthcoming 1994)

Well-Being and the State, Harvard Law Review (forthcoming 1994)

The Anticaste Principle, Michigan Law Review (forthcoming 1994)

Conflicting Values in Law, Fordham Law Review (forthcoming 1994)

Homosexuality and the Constitution, Indiana Law Journal (forthcoming 1994)

The Politics of Constitutional Amendment in Eastern Europe (with Stephen Holmes), forthcoming in Constitutional Amendment (S. Levinson ed., Princeton University Press)

Economic Incentives, Environmental Law, and Democracy, Ecology Law Quarterly (forthcoming 1994)

Standing Injuries, 1994 Supreme Court Review (forthcoming)

Liberal Constitutionalism and Liberal Justice, Texas Law Review (1994)

Incommensurability and Valuation in Law, Michigan Law Review (1994)

Incommensurability and Modes of Valuation: Some Applications in Law (forthcoming in Incommensurability, R. Chang ed., Harvard University Press 1994)

Gender, Caste, Law, in Human Capabilities (J. Glover & M. Nussbaum eds. forthcoming, Cambridge University Press, 1994 or 1995)

The President and the Administration, 94 Columbia Law Review (1994)

Article III Revisionism, 92 Michigan Law Review (1993)

Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems, Academe (1993), and forthcoming in Academic Freedom (Louis Menand ed. 1994)

Information, Please, Eastern European Constitutional Review (1993)

The Enduring Legacy of Republicanism, in A New Constitionalism (K. Soltan & S. Elkin eds., University of Chicago Press 1993)

On Legal Theory and Legal Practice, NOMOS: Theory and Practice (forthcoming 1994)

Endogenous Preferences, Environmental Law, J. Legal Studies (1993)

Environmental Economics, The American Prospect (1993)

Words, Conduct, Caste, University of Chicago Law Review (1993)

In Defense of Liberal Education, J. Legal Educ. (forthcoming 1993)

On Analogical Reasoning, 106 Harvard Law Review (1993)

Truisms and Constitutional Duties: A Reply, Texas Law Review (1993) (with David A. Strauss)

Presidential Power and the Council on Competitiveness, Am. Univ. J. of Ad. Law (1993)

On Finding Facts, in Questions of Evidence (James Chandler, Arnold Davidson, and Harry Harootunian eds, forthcoming 1994)

What's Standing After Lujan? Of Citizen Suits, Injuries, and Article III, Michigan Law Review (1992)

Federalism in South Africa? Lessons From the American Experience, American University J. of International Law (forthcoming 1993) and in From Apartheid to Democracy (N. Kittrie, ed., forthcoming 1993 or 1994)

Democracy and Shifting Preferences, in The Idea of Democracy (Cambridge University Press, 1993, edited by David Copp, Jean Hampton, and John Roemer)

Half-Truths of the First Amendment, Univ. Chi. Legal Forum (1993)

Independent Agencies and the New Deal Model, in Independent Agencies (Cambridge University Press, forthcoming 1993)

Against Interest-Group Theory: A Comment, Journal of Law & Economics (1993)

Informing America, Fla. State L.J. (1993)

On Marshall's Conception of Equality, 44 Stanford L. Rev. 1267 (1992)

The Negative Constitution: Transition in Latin America, University of Miami Law Review (forthcoming 1993), reprinted in Transition to Democracy in Latin America: The Role of the Judiciary (I. Stotzky ed. 1993)

Public Choice, Endogenous Preferences, International Review of Law and Economics (1992)

The Senate, the Constitution, and the Confirmation Process, 103 Yale L. J. (1992) (with David A. Strauss)

Economics and the Environment: Trading Debt and Technology for Nature, 14 Colum. J. Env. L. (1992) (with Catherine O'Neill), to be republished in 24 Land Use and Environment Law Review (1993) as one of best articles on environmental and land use law in 1992

On Property and Constitutionalism, Cardozo L. Rev. (1992)

Free Speech Now, 59 Univ. Chicago L. Rev. (1992)

Neutrality in Constitutional Law (with special reference to pornography, abortion, and surrogacy), 92 Columbia L. Rev. (1992)

Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe, Constitutional Political Economy (1991)

Democratizing America Through Law, 20 Suffolk L. Rev. (1991)

Constitutionalism and Secession, 58 University of Chicago Law Review 633 (1991)

Ideas, Yes; Assaults, No, The American Prospect (1991)

Politics and Preferences, 20 Philosophy and Public Affairs 3 (1991), reprinted in Democracy: Theory and Practice (J. Arthur ed. 1992)

Three Civil Rights Fallacies, 79 California Law Review 751 (1991)

Political Economy, Administrative Law: A Comment, Journal of Law, Economics, and Organizations (1991)

Law and Administration After Chevron, 90 Columbia Law Review (1991)

The Limits of Compensatory Justice, NOMOS: COMPENSATORY JUSTICE (1991)

What Judge Bork Should Have Said, Connecticut Law Review (1991)

Republicanisms, Rights: A Comment on Pangle, Chicago-Kent Law Review (1991)

Republicanism and the Preference Problem, Chicago-Kent Law Review (1991)

Why Markets Won't Stop Discrimination, 8 Social Philosophy and Policy 21 (1991), reprinted in Reassessing Civil Rights (E. Paul ed., Basil Blackwell 1991)

Why the Unconstitutional Conditions Doctrine Is An Anachronism, 70 Boston University Law Review (1991)

Political Self-Interest in American Public Law, in Beyond Self-Interest (J. Mansbridge ed., U. of Chi. Press 1990)

Administrative Substance, 1990 Duke Law Journal

Remaking Regulation, 3 The American Prospect 73 (1990)

Principles, Not Fictions, 57 University of Chicago Law Review (1990)

Norms in Surprising Places: The Case of Statutory Construction, Ethics (1990)

Paradoxes of the Regulatory State, 57 University of Chicago Law Review (1990)

Constitutional Politics and the Conservative Court, in The American Prospect (1990)

Interpreting Statutes in the Regulatory State, 103 Harvard Law Review (1989), recipient of 1990 award of American Bar Association for best annual scholarship in administrative law

Unity and Plurality: The Case of Compulsory Oaths, 2 Yale Journal of Law and Humanities (1989)

Disrupting Voluntary Transactions, in NOMOS: Markets and Justice (1989)

On the Costs and Benefits of Aggressive Judicial Review of Administrative Action, Duke Law Journal (1989)

The First Amendment and Cognition, Duke Law Journal (1989)

Low Value Speech Revisited, Northwestern L. Rev. (1989)

Introduction: Notes on Feminist Political Thought, Ethics (1989)

Is There An Unconstitutional Conditions Doctrine?, San Diego L. Rev. (1989)

Six Theses on Interpretation, Constitutional Commentary (1989)

Beyond the Republican Revival, 98 Yale Law Journal (1988)

The Beard Thesis and the New Deal, George Washington Law Review (1988)

Standing and the Privatization of Public Law, 88 Columbia Law Review (1988)

Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 University of Chicago Law Review (1988)

Changing Conceptions of Administration, Brigham Young Law Review (1988)

Compelling Government Action: The Problem of Affirmative Rights, in The Cambridge Lectures (1988)

Pornography and Free Speech, in Civil Liberties in Conflict (L. Gostin ed. 1988)

Protectionism, National Markets, and the American Supreme Court, in volume on National Integration and the Future of the European Economic Community (European University Institute, 1988)

Constitutions and Democracies: An Epilogue, in Constitutionalism and Democracy (Cambridge University Press. 1988) (J. Elster & R. Slagstaad eds.)

Constitutionalism After the New Deal, 101 Harvard Law Review 421 (1987)

Lochner's Legacy, 87 Columbia Law Review 893 (1987), reprinted in Law and Liberalism in the 1980s (V. Blasi ed., Columbia University Press 1991)

Routine and Revolution, Northwestern Law Review (1987), reprinted in Critique and Construction (R. Lovin & M. Perry eds., Cambridge University Press, 1990)

Lochner's Misunderstood Legacy, Columbia Observer (1987)

Judicial Review of Administrative Action in a Conservative Era, Administrative Law Review (1987)

Legal Interference with Private Preferences, 53 University of Chicago Law Review 1127 (1986)

Two Faces of Liberalism, University of Miami Law Review (1986)

The Role of the President in Informal Rulemaking, Administrative Law Review (1986) (with Peter Strauss)

Government Control of Information, California Law Review (1986)

Pornography and the First Amendment, 1986 Duke Law Journal (1986)

Madison and Constitutional Equality, 9 Harvard Journal of Law and Public Policy 146 (1986)

Notes on Pornography and the First Amendment, 3 Journal of Law and Inequality (1986)

Factions, Self-Interest, and the APA: Four Lessons Since 1946, 62 Virginia Law Review (1986)

Deregulation and the Courts, 5 Journal of Public Policy and Management (1986)

Interest Groups in American Public Law, 38 Stanford L. Rev. 29 (1985), recipient of American Bar Association award for distinguished scholarship in administrative law

Reviewing Agency Inaction After Heckler v. Chaney, 51 U. Chi. L. Rev. 636 (1985)

Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984), reprinted in book of readings on constitutional law (Foundation Press)

In Defense of the Hard Look: Judicial Activism and Administrative Law, 7 Harvard Journal of Law and Public Policy 51 (1984)

Hard Defamation Cases, 25 William & Mary L. Rev. 877 (1984)

Rights, Minimal Terms, and Solidarity, 51 U. Chi. L. Rev. (1984)

Legislative Attacks on School Desegregation, in Civil Rights in the Eighties: A Thirty Year Perspective (1984)

Deregulation and the Hard-Look Doctrine, 1983 Supreme Court Review 177

Is Cost-Benefit Analysis a Panacea for Administrative Law?, University of Chicago Law School Record (1983)

Politics and Adjudication, 94 Ethics 126 (1983) (review-essay)

Public Employees, Executive Discretion, and the Air Traffic Controllers, 50 University of Chicago Law Review 731 (1982) (with Bernard Meltzer)

Participation, Public Law, and Venue Reform, 49 University of Chicago Law Review 976 (1982)

Public Programs and Private Rights, 95 Harvard Law Review 1193 (1982) (with Richard Stewart)

Section 1983 and the Private Enforcement of Federal Law, 49 University of Chicago Law Review 394 (1982)

Public Values, Private Interests, and the Equal Protection Clause, 1982 Supreme Court Review 127

Cost-Benefit Analysis and the Separation of Powers, 23 Arizona Law Review 1267 (1981)

Short Essays and Reviews:

Founders, Keepers., The New Republic (1993) (reviewing Samuel Beer, To Make A Nation)

Valuing Life, The New Republic (1993) (reviewing W. Kip Viscusi, Smoking, and W. Kip Viscusi, Fatal Tradeoffs)

Against Positive Rights, 2 Eastern European Constitutional Review (1993)

Where Politics Ends, The New Republic (1992)

Hans, University of Chicago Law Review (1992)

Something Old, Something New, 1 Eastern European Constitutional Review (1992)

Judicial Remedies and the Public Tort Law, 92 Yale Law Journal 450 (1983) (book review of Schuck, Suing Government)

Review of Baer, Equality Under the Constitution, 95 Ethics (1984)

Review of John Keane, Public Life and Late Capitalism, 96 Ethics (1986)

Feminism and Legal Theory, 101 Harv. L. Rev. (1988) (book review of MacKinnon, Feminism Unmodified)

The Spirit of the Laws, The New Republic (1991) (reviewing L. Tribe and M. Dorf, Reading the Constitution)

Rightalk, The New Republic (1991) (reviewing M. Glendon, Rights Talk)

New Deals, The New Republic (1992) (reviewing B. Ackerman, We the People)

Is The Court Independent?, The New York Review of Books (1992) (reviewing W Rehnquist, Grand Inquests, and G. Rosenberg, The Hollow Hope)

Speeches, Honors, Invited Papers, Workshops

Invited lectures and papers within United States (selected): National Science Foundation/Columbia University Conference on administrative law and political economy; Urban League Conference on Civil Rights in the Eighties: A Thirty Year Perspective; The Midwest Constitutional Law Professors Conference at Wayne State University; William & Mary College Symposium on Defamation Law; Samuel Rubin Lecture at Columbia Law School; Distinguished Lecture at Boston University; Distinguished Lecture at the University of Connecticut; Principal

paper at University of Pennsylvania Symposium on First Amendment in honor of 250th anniversary of trial of John Paul Zenger; Marx Lecture at the University of Cincinnati Law School; Duke Law Journal Lecture; Distinguished Lecturer, Bicentennial Celebration, Law Day, University of Texas at Austin; Annual Meeting of Federalist Society; Law Day Lecturer, Georgetown University; Yale University symposium on Law, Language, and Compulsion; Midwest Faculty Seminar; in Washington, DC, at joint US-South Africa Conference on new South African Constitution

Invited lectures and papers outside of United States (selected): Israel, on freedom of speech and the proposed Israeli Constitution; Florence, Italy, at international conference on the future of the European Economic Community, on the lessons of American federalism for federalism in Europe; University of Beijing, Beijing, China, on American administrative law and constitutional law; Munich, Germany, for German Celebration of Bicentennial of American Constitution, on the New Deal and the Constitution; Cambridge, England, at The Cambridge Lectures, on negative and positive rights in the American Constitution; Salzburg, Austria, as instructor at the Salzburg Seminar, on constitutional and administrative law; Toronto, Canada, on government regulation of the economy; Paris, at conference on French and American constitutional experiences; Warsaw, Poland, on constitution-making in Poland; Prague, on constitution-making in Ukraine

Legal or political theory workshops (selected): Boston University, Columbia University, Northwestern University, McGill University, University of Southern California, Princeton University, Harvard University, Stanford University, Yale University, University of Toronto, University of Michigan, Washington University, New York University, University of Pennsylvania, University of California at Los Angeles

Professional meetings: American Association of Law Schools Annual Convention, panels on poverty law (1985), administrative law (1986 and 1989) republicanism (1987), separation of powers (1987), constitutional law (1988), law and interpretation (1989), and jurisprudence (1988); Annual Meeting of Public Policy and Management Society, panel on Deregulation and the Courts; Annual meeting of American Political Science Association, panels on various subjects (1986, 1987, 1989, 1990)

Certificate of Merit Award of American Bar Association for contribution to public understanding of American legal system, 1991, for After the Rights Revolution

Award of American Bar Association for best scholarship in administrative law, 1987, for Interest Groups in American Public Law, 38 Stanford Law Review

Award of American Bar Association for best scholarship in administrative law, 1989, for Interpreting Statutes in the Regulatory State, 102 Harv. L. Rev.

Visiting Scholar, University of Minnesota Law School, Rutgers University, George Washington University

Goldsmith Book Award, Harvard University, 1994, for Democracy and the Problem of Free Speech

Current projects:

1. Book on theory and practice of environmental protection

2. Various projects on constitutionalism and constitution-making, with particular reference to Eastern Europe

3. Book on legal reasoning