Perspectives
on current developments

The Bubble Upheld

The sporadic review of environmental issues by the courts is a bit like a bridge game in which every tenth card is played by kibitzers who wander in from the kitchen. The Supreme Court's unanimous June 25 decision upholding the Environmental Protection Agency's use of the "bubble" concept was important not only because it supports the use of economics in environmental protection, but also because it proposes to leave more of the game to the players and less to the kibitzers.

The rationale for the bubble is something that every schoolchild knows by now from reading *Regulation*. "Command-and-control" approaches to pollution abatement are likely to be inefficient in the sense that either more pollution reduction could be obtained at the same cost or less money could be spent attaining the same level of pollution reduction. (See "The Emerging Market in Air Pollution Rights," by Bruce Yandle, July/August 1978, and "Bubbles and Efficiency," by M. T. Maloney and Bruce Yandle, May/June 1980, among others.) Many of these inefficiencies are lessened, if not eliminated, if EPA puts an imaginary bubble over all the machines or processes in a plant, allowing firms to redistribute emissions from one point to another so long as the total pollution leaving the bubble does not increase.

Although some news accounts described the bubble as if it were a creature of the Reagan EPA, it really dates back to the Ford administration and had won the support of at least one wing of the Carter administration as well. The agency first embraced the concept in 1975 when it adopted a rule treating each plant as a "source" for purposes of complying with New Source Pollution Standards in areas that had not attained compliance with National Ambient Air Quality Standards. The D.C. circuit court of appeals struck down this effort in the case of *ASARCO* v. *EPA*. Since the purpose of the relevant section of the act was to improve air quality, it said, no increase in pollution could be permitted at all, regardless of any offsetting reductions.

EPA was not discouraged, however, and came back for another try. This time it applied a bubble policy in areas that had already attained air quality standards and in which the objective was to avoid deterioration. In this case, the relevant sections of the statute explicitly mentioned the possibility that a source of pollution could be an entire plant, and the D.C. circuit ruled in the *Alabama Power* v. *Costle* case that the bubble approach was not just permitted, but mandatory.

The current case arose from what looks like a deliberate decision by EPA to relitigate the *ASARCO* result. In 1981 the agency put out rules allowing "non-attainment" states to use bubbles in setting up their permit programs for new or modified major sources of air pollution. While the agency offered various ingenious grounds on which to distinguish this policy from the policy struck down in the *ASARCO* case, none were persuasive to the D.C. circuit, which overruled the agency in an opinion of almost record brevity for a major EPA case (*Natural Resources Defense Council, Inc.* v. *Gorsuch*). The case then went to the Supreme Court, having changed its name to *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*

As a technical legal matter, the case hinged on statutory interpretation, specifically what Congress meant when it talked about "sources" of air pollution. Did it mean each process, or each plant, or did it mean to leave the choice to the EPA? Such questions are not unusual in regulatory litigation, and the canons by which to resolve what Congress intended are familiar. If the words of the statute are not clear, the courts look at the general purposes of the statute and at the materials that comprise its

"legislative history," giving due deference to the agency's interpretation of those sources.

How much deference is due, however, is the subject of a lot of conflicting precedent. At a minimum, agency constructions of statutes are entitled to great weight. Some courts go further, and one can find a respectable pile of cases saying judges must defer to an agency decision so long as it is not totally arbitrary. (Some would say such modesty is most common when the court agrees with the agency.) However, since courts must also ensure that agencies act only within the bounds of their legal mandate, one can find an equally respectable pile of cases saying that courts are the final arbiters of the intent of Congress and of the meaning of statutes. In fact, when it was proposed to codify this judicial supremacy a couple of years back in the "Bumpers Amendment," it was argued that courts do not really defer all that much anyway.

In the bubble case, the Supreme Court started off by relying on the "deference" line of cases, emphasizing the complexity of the issue and the importance of regulatory expertise. It then went through the usual detailed parsing of the technical terms of the statute and of the various congressional statements about the legislation. But then, instead of using these sources to conclude that EPA's reading of congressional intent was either correct or at least sufficiently supportable to be entitled to judicial deference, the Court took an unusual leap. It concluded that Congress had been trying to reconcile conflicting interests in environmental protection and economic growth, but that, insofar as the bubble policy itself was concerned, *Congress had no intent.* In such circumstances the agency's decision that the bubble was a good idea was simply not subject to judicial reversal.

> Congress intended to accommodate both interests, but did not do so itself at the level of specificity presented by this case. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

The opinion went on to say that it was for the political branch of government, not the courts, "to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration . . . in light of everyday realities." These words are rich in potential consequences for environmental regulation and for administrative law generally. The word "potential" deserves some emphasis, though, because much depends on whether the Court reads the concepts enunciated here broadly or narrowly.

The most immediate consequences are environmental: the bubble has been legitimized. Since thirty-two jurisdictions have taken advantage of the EPA program, this is significant. More generally, the Court was more receptive to the need to trade costs against environmental factors than it has sometimes been. Granted, this took the form not of announcing a principle on the Court's own behalf but of observing that Congress had shown concern about economic factors. But there have been a number of past cases in which similarly vague expressions of congressional concern counted for little.

The most interesting general outcome of the case is to strengthen the authority of agencies with respect to courts. The crucial question that remains is, by how much? The Court was careful to put in a footnote saying that this complete deference to the agency applied only in the absence of a congressional intent: "If a court, applying traditional tools of statutory construction, ascertains that Congress had an intention on the precise point at issue, that intention is law and must be given effect." Moreover, the Court has come close to proclaiming a similar rule of deference before, though never quite as bluntly, without working any legal revolution (see *Ford Motor Credit Co. v. Milhollin*, 1980).

It is possible that *Chevron* could mean only that a court must make a ritualistic finding that Congress did indeed have an intent before it gets down to the real business of reviewing the agency's reading of that intent. This ritual

would be readily accomplished by a nod at the legislative history of the statute, since it is easy to fish some intent or other, perhaps any desired intent, out of the vast and murky pond of contradictory committee reports and floor statements. The late Judge Harold Leventhal compared interpreting legislative history to looking over the crowd at a cocktail party trying to spot your friends. In a large legislative record, as at a large party, a judge will always be able to find a few.

On the other hand, the case could mean that the Court is starting to crack down on some of the more scandalous ways that legislators and their staffs have learned to manipulate the process of judicial review. Drafters have turned statutory language into an artful patchwork of ambiguous terms and hints to reviewing judges; various interests have competed to fabricate and insert in the record materials purporting to elucidate Congress's true "intent." The Justices have already been expressing occasional irritation about this. In the *Chevron* decision, they may be telling Congress that it can make the crucial policy decisions, or it can let the executive branch make them while expressing its general bounds of concern, but it cannot obfuscate the choices and let the various factions reargue the whole mess in court under the guise of interpreting legislative history. The second shoe to drop could be a general reduction in the seriousness with which much of the material of legislative history is taken, which would broaden the "Congress had no intent" category and result in a considerable increase in agency authority. (Actually, that might be the third shoe, the first being the legislative veto case, which forbids Congress to make amorphous delegations while reserving piecemeal control, and the second being *Chevron* itself.)

The case has some other implications that can only be touched on here. The Court:

- Broadened agencies' power to change their minds on policy. If an agency's policy is based on interpretation of congressional will, it is hard to change it later just because it turns out not to work. The agency must go back to Congress. If the agency is making up its own mind, by contrast, it is allowed to learn from experience.
- Commented that agencies may "properly rely on the incumbent administration's views of wise policy," noting that "while agencies are not directly accountable to the people, the Chief Executive is." This logically suggests that the Court will not be sympathetic to efforts to cut off agencies from the supervision of the institutionalized presidency and its organs.
- Did nothing to undercut the importance of decent rulemaking processes within an agency. It noted with approbation that "the agency considered the matter in a detailed and reasoned fashion."

Taken together, these three parts of the opinion would seem to limit the potential reach of last year's "air-bag" decision to exactly what the Court said at the time—that the agency had simply failed to explain why it was making the choices it made.

If the Court's de-emphasis of broad legislative history holds up, it could change the nature of arguments to and by regulatory agencies. At present, given the detail and ambiguity of the statutes involved, these too often consist of long rehashes about which Senate or House member said what on the floor or what crucial phrase got smuggled into a footnote on page eighty-three of a committee report that actually appeared two months after the bill passed. Once these matters become irrelevant, people will have to find something else to argue about, and it might even be about the substantive merits of alternative policies. Like a good adventure story, the *Chevron* case leaves one anxious to read the sequel.

Cable Tackles the "Must-Carry" Rules

Not many businesses find themselves in the sad position of being legally obliged to distribute their competitors' product. But then, not many businesses find themselves in the happy position of having a legal right to seize their competitors' product and distribute it without their consent. The cable television industry finds itself in both positions at once—and its problems may have a lot to do with its privileges.

Congress has given cable systems a "compulsory license" to retransmit the signals of distant TV stations without their consent (See Henry Geller, "Making Cable TV Pay?" *Regulation,* May/June 1981). With the sweet, however,

has come the bitter: a regulation of the Federal Communications Commission provides that cable systems *must* carry the signals of the over-the-air TV broadcasters in their area who are their chief rivals. Now the FCC is coming under growing pressure to modify or repeal the "must-carry" rules—setting the stage for another epic Battle of the Communications Interests of the sort that has enlivened the past few years in Washington.

When the FCC adopted the must-carry rules in 1966, its rationale was explicitly to help the over-the-air broadcasters. By using broadcast signals, the commission believed, cable operators acquired an obligation to conform to the "public interest" goals that applied to the broadcast field, and one of those goals was for local broadcast service to be kept healthy and to reach as many residents of an area as possible. In 1968 a federal appeals court sustained the rules as both constitutional and a reasonable exercise of the "ancillary authority" that the FCC claims over cable TV as part of its statutory mandate to regulate over-the-air broadcasting.

The rules remained largely uncontroversial until the explosion in cable offerings in the late 1970s, when such satellite-based services as Home Box Office and Cable News Network grew to be serious competitors to the three broadcast networks. Suddenly there was a large number of channels in high demand from viewers. This was not much of a problem for the newer cable systems in major markets that offered sixty or eighty channels. But 32 percent of all cable systems, representing 18 percent of subscribers, offer twelve channels or less, and 21 percent, representing 15 percent of subscribers, are in the thirteen-to-twenty channel range. Depending on how many local broadcast stations they must carry, such systems may have little or no room for even the most popular cable-only services. This problem will be lessened with time, since older systems are often rebuilt with greater capacity. In the meantime, however, the systems and the cable networks want access now, not a decade from now. Their battle is proceeding on a number of fronts.

The Quincy Cable Case. In late 1979, Quincy Cable TV, Inc., a Washington state cable system, formally asked the FCC to waive the must-carry rules so as to let it drop the signals of three Spokane stations. Quincy argued that its subscribers would find other signals to be of more interest than the Spokane signals and that in any event they could pick up the broadcast signals over the air. The FCC denied the waiver request in March 1983. Quincy then asked the D.C. federal appeals court to reverse the commission's decision, arguing that the rules violate the First Amendment rights of both cable operators (by interfering with their editorial control) and viewers (by depriving them of their right to choose a wide diversity of cable programming). It also claimed violation of the Fifth Amendment guarantee against "taking" private property for public use without compensation.

In March 1984 the court sent the case back to the FCC because the facts had changed; Quincy Cable had expanded from twelve to thirty-two channels since the ruling. But Quincy has asked the FCC for the waiver anyway, arguing that its particular circumstances make waiver desirable even with its expanded channel capacity and that in any case the expansion did not alter the issue of constitutional rights. The court has given the agency until September to act on the new petition.

The Turner Petition. In October 1980 the Turner Broadcasting System filed a petition for rulemaking asking the FCC to delete the must-carry rules in light of the new developments in the cable industry. The petition failed to rouse the commission to action; so did a petition for expedited consideration that Turner filed in March 1983. Turner went to court to compel the commission to act on its petition, and on April 6, 1984, it did so, rejecting the Turner petition in a short opinion. The commission said that circumstances had not changed enough to warrant a formal review of the rules, but promised to address the constitutional issues further when it rules on the *Quincy Cable* case. Turner is continuing to fight the FCC's order in the D.C. court of appeals, raising most of the same issues it had raised earlier.

Broadcasters strongly oppose any loosening of the rules. First, they say, some viewers would be unable to receive some local signals, because cable subscribers will often dismantle their rooftop antenna or will not bother to use the off-air switch, if they have one; indeed future "cable sets" may not be built to receive

In Brief–

Crimestoppers' Notebook. Federal regulators have begun a nationwide crackdown on another dreaded social evil: candies flavored with alcoholic beverages. The boozy bonbons include rum balls, bourbon toffees, and chocolate-covered Grand Marnier cordials. A 1938 federal law bans the sale of confections that contain more than 0.5 percent alcohol; it was apparently passed to prevent children from besotting themselves at the corner candy store, but it also keeps adults from buying the stuff.

Lax enforcement of the law had led to a proliferation of kirsch kisses and brandied brittle, at least until a recent series of factory raids by federal inspectors. An account in *Reason* says that the Food and Drug Administration admits it catches violators only because competing candy makers inform on them. "Once we slap somebody's fingers, they become real tattletales," said FDA official Raymond E. Newberry.

Petal Pushers? The year's weirdest trade-policy initiative—or something close to it—is a request by Roses Inc., an association of American flower growers, that the U.S. International Trade Commission investigate the Colombian rose industry. Last year spot checks of the more than 10,000 boxes of cut Colombian flowers air-freighted to Miami daily turned up 1,600 pounds of cocaine. Roses Inc. figures that both the exporters and importers of these flowers must be getting bribes from Colombian coke dealers to smuggle the drugs past customs, and it argues that the bribes amount to a subsidy of Colombian rose exports. The group wants the ITC to put a dollar value on the subsidy and impose a countervailing duty to offset it, as authorized by the General Agreement on Tariffs and Trade.

According to the *Economist*, which reported the story, "If the bribes are in any way related to the value of the smuggled drugs, they could be worth a fortune. The 1,600 pounds of seized cocaine alone has a street value of over $70 million—close to the $100 million a year that Colombia earns from exports of cut flowers to America. But the ITC is unlikely to accept Roses' argument. Apart from the difficulty of getting the flower exporters to answer questions like, 'Do you receive payments from cocaine traders?', the ITC is unwilling to raise the thorny issue of private (i.e., non-government) export subsidies."

Consumer Protection Flips Its Lid. Should General Motors be barred from making any more convertibles in order to protect owners' investments in existing cars? That is the question now before a federal court in Baltimore in a lawsuit filed by two Maryland men against the giant automaker.

Convertibles virtually disappeared from U.S. auto showrooms by the late 1970s. Chrysler stopped making them in 1971, Ford in 1973, and GM in 1976. In that year GM announced that it would roll one last batch of 14,000 Cadillac convertibles off its assembly line—"the last convertible in America." Collectors eagerly snapped up the cars, and dealers charged high premiums, according to the *Washington Post*.

In a few years, however, consumer fashions shifted again, and convertibles staged a modest comeback. GM's Pontiac division launched a convertible in 1982, soon followed by Ford and by other GM divisions, including Cadillac.

That was unwelcome news for the plaintiffs in the Baltimore suit, Abraham P. Korotki and Richard K. Adolph. Korotki says his '76 Eldorado lost some of its collectors' interest and declined in resale value after GM resumed production. His suit asks the court to stop GM from making any more convertibles and pay $50 million in damages to the 14,000 owners of '76 Cadillacs.

The suit has been going on for a year now and was argued in July. GM declines to comment on the case except to say that the allegations are "ill-founded" and should be dismissed.

Walter Mondale's Position on Deregulation. "I think it's gone far enough for a while. We ought to digest the results of a mammoth deregulation period: airlines, railroads, financial communities, communications, and so on. I have not suggested re-regulating."

—From an interview with the Democratic presidential nominee excerpted in the June 25, 1984 issue of Fortune.

over-the-air broadcasts. Without must-carry, they claim, at some point the growth of cable service will so weaken broadcasters economically as to force some of them out of business, leaving cable operators with a dominant position in local video markets. This would diminish the range of free video services and disrupt the universality of local service. Cable interests reply that there are less intrusive ways to assure that viewers get access to local TV, such as special switches that permit viewers to switch more easily from cable to over-the-air television. This, they argue, is a most reasonable accommodation, giving the cable viewer access to both local TV and the new cable services.

In Congress, there are proposed bills to please each side. Senator Paul Trible (Republican, Virginia) has introduced a bill (S. 2539) that would codify the must-carry rule into statutory law. The Senate Commerce Committee appears to lean toward keeping the rule. When it reported S. 66, the cable deregulation bill, to the Senate floor, its report stated:

> The committee recognizes the importance of local programming and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately [be] found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing must carry rules to protect the public interest. Of course, the FCC may need to resolve problems that may arise.

Some members of the House of Representatives are looking farther ahead. Representative Barney Frank (Democrat, Massachusetts) has introduced a bill (H.R. 1388) that would phase out many cable regulations, including must-carry, in favor of wide latitude for marketplace forces. In particular, the Frank bill would repeal the "compulsory license" that currently gives cable the right to carry the signals of distant TV stations without asking their consent.

The Frank bill will not pass this Congress. It does, however, make an attempt to resolve the real problem that underlies the dispute, namely the mutual dependence of cable and broadcast. So long as cable relies on government intervention to give it broadcast signals on government-specified terms, it can hardly expect government to free it from the regulatory obligations of the broadcast system, including that of local service. And so long as broadcasters rely on government intervention to get their signals onto local cable systems, they can hardly expect government to protect their right to keep those signals from escaping further.

If Congress reacts to this clash of two strong industries in its usual way—by running for cover—the issue may wind up in the lap of the courts. The outcome is unclear. For there are two conflicting judicial trends, both epitomized by decisions in the latest Supreme Court term. One is a growing tendency to grant First Amendment protection to telecommunications (as in the case of *FCC* v. *League of Women Voters*, in which the Court allowed public broadcasters to editorialize). The other trend, which is perhaps even stronger, is to sustain FCC policies that purport to strike a balance between contrasting goals (as in the case of *Capital Cities Cable, Inc.* v. *Crisp*, in which the Court allowed the commission to preempt state regulation of cable). Even if the latter trend eventually carries the day, the FCC will continue to face the question whether the best way to achieve such a balance would be to cut the Gordian knot and remove marketplace constraints from both sides, cable and broadcast, at the same time.

A Legislative Boost for Risk Assessment?

Cost-benefit balancing in health and safety regulation has still not attained universal popularity. Few of its critics concede, of course, that they wish to regulate even in cases where the costs outweigh the benefits. But many argue that cost-benefit analysis is inherently biased in favor of risk creators. The costs of risk regulation, the story goes, are usually easy to assess, whereas the benefits in disease, injuries, and deaths avoided are elusive and prone to undervaluation. Better not to conduct the balance at all, it is argued, than to indulge in a calculation that might be fraudulent or manipulable.

Risk *assessment*, on the other hand, is an analytic technique that might seem immune to these objections, since it measures *only* the potential benefits of regulation. Moreover, its role in regulatory decisions is correspondingly modest: all it presumes to do is to help regulators identify the worst problems and select the best candidates for regulation. It is hard, at first blush, to think of any reason to be against it.

But, as Benjamin Cardozo once observed, the springs of conduct are subtle and varied. Which explains why H.R. 4192, the "Risk Assessment Research and Demonstration Act" presently pending before Congress, is not likely to be enacted by unanimous consent.

The bill, introduced by Rep. Don Ritter (Republican, Pennsylvania) and eighteen cosponsors, is certainly modest enough. It instructs eight federal agencies—FDA, EPA, OSHA, NRC, DOE, CPSC, DOT, and USDA—to conduct coordinated demonstration projects in risk assessment over two years. Each agency's project would assess the risks of one product or activity typical of those the agency normally regulates. The projects would explore the risk

implications of alternative courses of action, compare risks of substitutes, identify needed areas of research, and place the hazard studied in the broader context of other environmental hazards. The agencies would then prepare and submit to Congress a report on the entire exercise, and also make some effort to educate the public about the relative magnitudes of risk in different settings.

Innocuous as these objectives may seem, and despite a good bit of support for the bill in the scientific community, the bill has more than a few opponents. Many witnesses testified against it at the latest House hearings on the bill this May and June. Although the bill passed the House in 1982, it died in the Senate, and prospects for its passage remain uncertain.

Perhaps the reasons for the bill, and for the opposition to it, can be found in the ways in which risk assessment can be used—and abused. On the one hand, intelligent risk regulation is impossible without adequate information. If a regulatory agency does not assess the magnitude and relative severity of different risks, it ends up looking and acting ridiculous. The Consumer Product Safety Commission, for example, tried at one time to regulate risks on a first-come, first-served basis, investigating regulatory targets simply in the order in which it received complaints about products. This proved most unsatisfactory, for obvious reasons. And as Peter Huber has pointed out in these pages, regulators who do not adequately assess the risks of alternatives may end up banning the less hazardous substances and driving consumption toward the more hazardous substitutes.

On the other hand, risk assessment is typically attacked as burdensome and dilatory, leading to "paralysis by analysis." There is something to this. The returns on risk assessment diminish rapidly once the magnitude of a risk has been bracketed in relation to the risk of substitutes and alternatives. The one exception is in cases where a regulation can be fine-tuned along a continuum to achieve a more detailed balance of costs and benefits, as in setting a maximum exposure level for a chemical. But in most other settings, laboring further to perfect risk estimates simply perpetuates the status quo, with all its attendant hazards.

Nevertheless, if the opposition to the risk assessment bill is grounded on a fear that more elaborate risk assessment will result in less stringent risk regulation, it is misguided. Excessive risk assessment is the enemy of change, not of regulation. Stasis and safety, though often mistaken for each other, are by no means the same thing. Overly fussy and cautious risk assessment can hold up regulation. But it can also hold up deregulation, whether in the form of the "wholesale" repeal of regulatory standards or in the "retail" deregulation that occurs when an agency issues a permit for a new risk. Likewise, inadequate risk assessment can lead to hasty and ill-considered cases of either regulation or deregulation.

In fact, half the world finds risk assessment a burden about half the time. Which half you belong to depends very much on whether there is a statutory presumption for or against the class of products or activities you are interested in. If you have invented a new drug, pesti-

Regulatory Reform, c. 1525

From the *Twelve Articles of Peasantry*, a document stating the demands of the rebellious German workers at the time of the Peasant Wars of 1525. The author, Sebastian Lotzer, was a journeyman in the Furriers' Guild:

Article Nine. We protest against the extreme arbitrariness with which new regulations are constantly made, so that we are penalized, not according to the nature of the case, but at times with animosity, at times with favoritism. We believe we should be penalized according to well-established written law, and that the case shall be treated accordingly, not on the basis of caprice or favor.

—German Humanism and Reformation, *edited by Reinhard P. Becker, copyright 1982 by the Continuum Publishing Company. Reprinted by permission.*

cide, or food additive, you will tend to believe that FDA risk assessment already goes into too much detail. On the other hand, if you are an employer, an established industrial polluter, or someone else who operates under a regime of act-now-regulate-later, you may discern considerable virtue in more exhaustive risk assessment. It depends on whether you profit from regulatory delay.

Each side can point to its horror stories of excessive cost and delay. Risk assessment for a new drug typically takes four to ten years and tens of millions of dollars; for a new pesticide, two to seven years and an average of almost $7 million; for a new food additive, three to ten years and an estimated $500,000. Consumer and environmental groups, for their part, complain that OSHA and FDA moved at a glacial pace to regulate a number of established workplace toxins and food additives, such as red dye number two and saccharin, even after test data had turned up to indicate a hazard.

And each side, by contrast, has had its turn in successfully arguing to the Supreme Court that too little risk assessment has been conducted in other matters. The antiregulation forces won their round in the *Benzene* case; the proregulation troops prevailed last term when the Court disapproved the attempted repeal of the air-bag standard. In both cases the Court concluded there had been too little risk assessment to justify the proposed change in the regulatory climate.

The crucial decisions on how much risk assessment to conduct are routinely kicked to the courts, because they hinge on the interpretation of extraordinarily vague legislative code words. When a law refers to "safe and healthful working conditions," "unreasonable risk of injury from consumer products," or "safe" drinking water, it is inviting an agency to assess risks, though it rarely specifies how precise a risk assessment and on what evidentiary basis. Is it "reasonably necessary or appropriate" to regulate a proven animal carcinogen introduced into the workplace, or must a "significant risk" to the health of the *human* employees be demonstrated? Only the courts can tell us for sure.

Reviewing courts thus can play risk assessment like an accordion, tightening or loosening regulation by the simple expedient of making never-ending demands that one side provide more detailed risk estimates. The D.C. circuit court of appeals is quite experienced at saying no to *regulatees* by saying yes to more risk assessment; other circuits have mastered the same art in saying no to *regulators*.

Only the Supreme Court can tell us once and for all how much risk assessment is just enough and no more. But the Court's pronouncements are painfully slow in coming (no wonder, since one side or the other always has an incentive to master the art of dilatory litigation). And often they are not definitive at all. The upshot is that agencies frequently have to operate without any clear understanding of when and how much risk assessment is appropriate under the statutory mandates Congress has given them.

The executive branch, even without congressional encouragement, recently took an independent initiative to try to clarify matters. Five agencies formed an Interagency Risk Management Council that is starting to work on these problems. Nevertheless, congressional participation is essential in any serious reform, because health and safety agencies are so hampered by the fragmented delegations of authority and opaque descriptions of duties in their controlling statutes. Without legislative action, the quantity and quality of risk assessment required of particular agencies must continue to be determined by the mood of judges and the skill of appellate lawyers. Though the Risk Assessment and Demonstration Act is not likely to clear up the whole muddle, it might be a first step.

There is no doubt that risk assessment is still a primitive art, and the numbers that emerge from its practice will often be subject to political manipulation. Nevertheless, some assessment of risks will always be implicit in agency conduct, whether or not Congress chooses to act. There will be those who prefer that administrators ignore the magnitude of a risk when regulating it, just as there are those who prefer not to think about regulatory costs. But if cost can sometimes be ignored when regulating risk without producing unmitigated foolishness, risk itself cannot. It is one thing to declare that a snake is loose in the garden and must be hunted down at any cost. It is quite another to insist that the snake hunter should proceed with eyes firmly closed.