If you are not going to regulate airlines, you must have a strong antitrust law for airlines. The reason is that antitrust law is the policeman. Antitrust law aims, through the competitive process, at bringing about low prices for consumers, better products, and more efficient methods of production.

Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others do not. The justification lies in the fact that that kind of economy is better for almost everyone, and it will not be better for almost everyone unless the gains of productivity are spread. And the gains of productivity are spread through competition. That brings about low prices, better products, and more efficient methods of production. And that is what I think antitrust law is about, and that is what I think that policeman of the free enterprise system has to do. It is called protect the consumer.

Senator THURMOND. Judge, I believe my time is about up. I would just ask you this: I believe you attended Oxford and graduated there?

Judge BREYER. Yes, sir, I did.

Senator THURMOND. And you found that compatible with the military?

Judge BREYER. Yes, sir, I did. [Laughter.]

The CHAIRMAN. I think your time is up, Senator. I was about to say you can have as much time as you would like.

Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Judge Breyer, nice to see you this afternoon.

Judge BREYER. Thank you.

Senator METZENBAUM. Let me start off by saying where I am. I expect you to be confirmed, and I expect to vote for your confirmation.

Judge BREYER. Thank you.

Senator METZENBAUM. You are clearly a man of integrity, exceptional legal skill, high intellectual ability. You have been widely praised for your political and academic credentials. You have had some very able spokespersons speak on your behalf today, four very distinguished and well-respected Members of the U.S. Senate.

There is not much question about the fact that you have exceptional legal credentials. I must say, however, that I am concerned about your position and your views on the fair competition laws which affect the day-to-day lives of all Americans. I am talking about the antitrust laws that Senator Thurmond just raised with you, the antitrust laws that are in place in order to keep prices low and products safe for consumers, to make the competitive market work.

Those same laws protect small businesses against abusive corporate giants and prevent price-gouging monopolies and cartels from harming consumers.

You have been outspoken with respect to the consumer protection laws known as antitrust, but your record suggests, unfortu-

nately, to my mind, that you almost always vote against the very people the antitrust laws are in place to protect.

A 1991 study in the Fordham Law Review reported that in all 16 of your antitrust decisions, Judge Breyer voted against the alleged victim of antitrust abuse. You seem to see antitrust laws in terms of abstract economics. And it seems that theories of economic efficiency displayed in complicated charts, one of which I will use at a later point in the hearing, and graphs replace individual justice for small businesses and consumers.

As you well know, that is not my view of antitrust. I see it as the protector of mom-and-pop businesses and the guardian of consumer rights.

Let me be clear. To me, antitrust is not some mysterious legal theory that only lawyers can understand. Antitrust is just an old-fashioned word for fair competition. It is a word that made sense to the average American 104 years ago when the first antitrust law was passed. At that time, trusts, which were cartels of big companies, such as oil companies, railroads, and other giants, fixed prices or cut prices or boycotted small businesses or used whatever underhanded tactics it took to ruin their rivals. These trusts were so ruthless that small businesses and consumers did not stand a chance against their power.

So Congress came along and outlawed trusts and cartels and monopolies, in President Wilson's words, to protect "the little man." John Sherman, a Republican Senator from my own State, wrote the first antitrust law in 1890 to give every American a fair shot at starting a business and getting a square deal as a consumer. President Teddy Roosevelt, the Nation's legendary trust buster, used the antitrust laws as a weapon against corporate abuse.

Today, I am frank to say that many public officials have forgotten what the antitrust laws are supposed to do. They have let high-paid lawyers and corporate giants convince them that our only legal yardstick should be whatever is good for business. They would have us believe that antitrust lawsuits are too complicated, too difficult to understand for juries of average Americans, and that economic theory is more important than common sense and experienced business judgment. To me, that kind of thinking is simply absurd.

I can tell you from personal experience as a long-time businessperson and as chairman of the Senate's Antitrust Subcommittee that small businesses and consumers rely on the protection of our antitrust laws. I think it is important that in this hearing in some way this Senator try to sensitize you to the fact that, even today, small businesses and consumers are threatened by unfair competition from big businesses.

Fortunately, we do not need new laws to protect them. What we need are judges with the wisdom and courage to use those laws to stop corporate big-wigs from abusing their market power.

While I will begin my questioning of you by focusing on antitrust, I would like to point out another matter that troubles me. As you know, Judge, I have made clear my concerns about your participation in cases that involve environmental pollution issues, given your investments in Lloyd's of London. In your opening statement this morning, you very properly this morning promised to divest

yourself of all insurance holdings as soon as possible, and I am frank to say that I appreciate your sensitivity and willingness to respond to some concerns that I had expressed to representatives of the White House about that subject and about any appearance of impropriety.

I still have a number of questions concerning your involvement in Lloyd's and the distinctions you drew when recusing yourself from asbestos. This one I had difficulty in understanding, why you recused yourself in the asbestos cases but not other environmental cases.

Now, I am frank to tell you, Judge, that you are the first nominee to come before us who is actively involved in Lloyd's of London, and I got to tell you, I am grateful to you. I have learned more about Lloyd's of London in the last several days than I learned in my entire previous 77 years. I thought that I knew something about what was happening in the business world and even in the insurance area. But I am frank to say that by my studying that which I understand to be approximately 100 investments of yours in different syndicates at Lloyd's, that is pretty unusual for an American businessperson, because each investment involves unlimited liability that can vastly exceed the actual amount of money invested.

I am frank to tell you I am not sure whether the 100 figure is right. At one point, I heard it was 69, and at one point, I heard it was something else. But I gather sometimes one syndicate rolls over into another syndicate, and it is a question whether that is two numbers or one number.

While most of your syndicates have been closed, and an approximate amount of profit or loss ascertained, one syndicate that has become a high-profile issue—Merritt 418, which was the syndicate from 1985—cannot be closed. Merritt 418 includes extensive environmental pollution coverage that no one has been willing to take over. So, as I understand it, you remain personally liable for a portion of Merritt 418's massive losses, and we are not talking about insignificant amounts of money. We are talking about significant hundreds of thousands of dollars, as I calculate it.

You may remain liable on that investment sometime into the future, and I do not think you know how long that will be or I know, but I think you are hopeful to get out of it as soon as possible. And you made that clear in your opening statement. But I also understand it is a rather difficult one to get out of.

At a later point in the hearings, I intend to ask you about environmental decisions which might affect you financially. For today, I will go back to the subject of antitrust, but in a subsequent round of hearings, I do expect to get into that entire matter.

Coming to the question of antitrust, I must say I am extremely troubled by your reasoning in *Town of Concord* v. *Boston Edison*. You overturned a jury verdict and a district court judge's review of that verdict. As I understand the case, the jury found the consumers in Concord, MA, were overcharged on their electricity bills by $13 million. That verdict was trebled to $39 million as an antitrust penalty against Boston Edison, which sold Concord 95 percent of its electricity.

After hearing testimony for 13 days from experts on both sides, the jury found that Concord's small, municipally owned electric company could only get most of its energy from Boston Edison, a huge power company which generates, transmits, and sells electricity. Boston Edison serves the communities adjacent to Concord. The jury found that by raising Concord's wholesale rates, which Federal regulators automatically rubberstamp and only review later, Boston Edison unfairly raised Concord's costs and actually stole some of their customers as well.

In overturning the jury decision to provide the consumers of Concord $39 million, you wrote, "Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm."

Here the regulation could not bring back lost business. The district court judge found the jury had ample evidence of competitive harm. And my question is: In view of the jury verdict, the court's verdict, the position that the city of Concord and the people of that community were in, why did you disregard all of those facts and replace them with a graph and a chart that are completely hypothetical? Let me show you the graph and the chart. It says here—I do not know what the chart means. It says up there *"Town of Concord* v. *Boston Edison,"* and then it says "Total M's cost price." Down here it says, "It costs $1 to make a widget. A single monopolist M will maximize his profit by setting a price of $6, and selling five widgets, his profit is $25 [represented by the area RSTU]," and it goes on.

Now, frankly, I do not know whether the people of the city of Concord had too much interest in the widgets, but I think they were very interested in the $39 million verdict that they had and, frankly, that you took away from them. And I wonder if you could explain how you arrived at this conclusion to reverse the lower court in that case?

Judge BREYER. I think, Senator, that I should start with a general point, a negative general point, then a positive general point, and then something rather specific.

The negative general point is, of course, I don't count up how many victories are for plaintiffs or defendants and do statistics. Sometimes plaintiffs did win in antitrust cases I have had. And, as you point out, defendants often won. The plaintiff sometimes is a big business, and sometimes is not. The defendant sometimes is, and sometimes is not.

What I am interested in is is the case correct as a matter of law, and I consider the cases one at a time, and I consider the merits, the legal merits of the arguments in front of me.

My general positive point is this, where I hope and expect very much that you will agree, because, frankly, I have read what you say often on antitrust, and you are going to think that this comes from things that you have said to business people, because I have read them and I think it does.

But there is a keystone to antitrust, and you have said it before and you say it again, and the keystone to antitrust, what antitrust is all about is getting low prices for consumers, not high prices, and getting better products for consumers, not worse products, and get-

ting more efficient methods of production. And that simple three-part key which I carry around I think engraved in my brain I try to use to unlock these incredibly complex, unbelievably technical legal arguments that are brought up in an area like the one in the case that you mentioned, something called the price squeeze.

Now, in fact, as I will explain now in detail, that key does unlock that door. But in order to show how would I have thought our court's decision, our unanimous decision there, how I thought that that key, low prices, led to the technical result, what I want to do is write an opinion that will explain these technical matters, boy, this was very technical, but will explain it so that a person who is willing to put in time and effort, even without economic training, will see the point intuitively.

And the chart that you mentioned, which has a numerical example and has a graphic example, is designed to help a person who is really interested in following every bit of that, to use the chart or use the numbers or use the language three different ways to show how the key, which is the low price, unlocks the complicated door of the case.

Now, this is how in my mind it did in that case. How can I explain what a price squeeze is? My goodness. Basically, the idea is this: Electricity is made by big integrated companies. They make electricity by having turbines go around.

Let's say—and I will use a hypothetical, I don't like to use that here, because I know this isn't a classroom and I know these are serious matters and I don't like to be professorial, frankly, but I think in this instance, maybe thinking of, say, they turn this wheel around and they charged 8 cents for the electricity, and that might help.

They then transmit it across a wire. They then sell it to themselves, because they are in the retail operation, too. And they sold it, let us say, for 10 cents. So they make it for 8 cents and they sell it to themselves for 10 cents, and the price to the consumer is 10 cents.

Now, the plaintiff in this case came along and said, you see, 8 cents is what we have to pay for it, because they sold a little bit to independent retailers, too, and that plaintiff was an independent retailer. And that independent retailer was saying, wait, I buy this for 8 cents and they resell to themselves for 10 cents, that 2 cents isn't big enough as a space, I am getting squeezed.

And if he had won that case, if that plaintiff had won that case, what would have happened is, instead of that price being 10 cents for all the consumers in Massachusetts, that price would have gone up to 11 cents or 12 cents. That is how I saw the case.

So, while I know you could make theoretical arguments the other way, the practical argument was that if plaintiffs here won—by the way, the plaintiffs here were not losing an amount of money, they were making a little bit of profit—the principle under which they would win I thought, and my court thought, would drive up the price of electricity to consumers all over Massachusetts.

Now, two things: One, the State regulatory commission is holding that price down. The State regulatory commission says 10 cents is the right price. And if you have a State regulator out there protecting the citizens of Massachusetts and saying 10 cents is right, then

I do not think an antitrust court should come along with a rule of law that makes for a higher price. There is too big a risk of that happening.

But, after all, there could be a lot of special circumstances. So, we are fairly careful in that case in the opinion to say we are not saying this could never be bad. We are not saying this is absolute. We are not saying there could not be circumstances where the price squeeze would be a bad thing. But in these circumstances here, it is not good for consumers for the plaintiff to win.

By the way, all the facts in the case, the court of appeals, as you correctly point out, are assumed in favor of the plaintiff. That is because the jury found in favor of the plaintiff. Then the question is, assuming all the facts in the plaintiffs in the favor, does the antitrust law require a verdict for the plaintiff. And I absolutely grant you that is a highly controversial area. It is a difficult area, and I cannot be certain as I sit here now that we have come to the exactly correct result.

What I can be certain of is what our court tried to do. We tried to focus on where the ball really is, which is the low price for the consumer, and we tried to work our way through a very complicated area to see if antitrust law, which has as its objective, technically would come to that result. I do not guarantee I was right. I do not guarantee that others do not have good arguments the other way. What I do guarantee is what we were trying to do, how we were trying to interpret the law.

Senator METZENBAUM. Judge, I have to take issue with you about your wanting to bring about lower rates. The jury wanted to bring Concord's electric rates down and hold down rates for Boston Edison with proper regulation, and, with the jury's verdict, the rates would have been lower. But you stepped in and you said juries will be permitted to second-guess the regulators' allocation rules or its specific investment allocation decisions. What antitrust benefit would be gained by permitting juries to speculate in this way, is your question?

Let me answer your question: Congress did not give the regulators the power to make antitrust determinations. We gave antitrust determinations to the juries and the courts. This jury was protecting consumers who were gouged, and a small company, a very small company, the Concord company was a very small company, that was unfairly squeezed.

Unfortunately, as I see it, you seemed more worried about ruffling the regulators' feathers than protecting the consumers. My question is why was it appropriate for you to discount the expert testimony, disregard the jury factfinding that the district court found fully supported by the record in this case, and reverse the lower court and the jury's verdict?

That is where I have difficulty, and your answer is that you were helping to keep rates down, but here was a $39 million verdict for the city of Concord, and I have difficulty in following your line of reasoning as to how your verdict against the plaintiffs and taking way the jury verdict helped to keep prices down.

Judge BREYER. Basically, the reason, Senator, was that I think it was our obligation, in trying to interpret the antitrust law, to work out how the rule of law in that case, perhaps in that case it

would have meant lower prices for Concord, though I am not sure how, but even there the issue is what about all the citizens of Massachusetts, what happens to all the citizens who buy electricity.

And my belief was, and what we wrote in the case and tried to explain why, is if a little company—and he was small—can insist that that rate go up from 10 cents to 12 cents, everyone all over Massachusetts, not just Concord, is going to be paying 12 cents and not 10 cents, and that is higher prices, not lower prices, and the antitrust laws ought not to allow that, if we are following their basic principles. And then I trace through in the opinion why I think that is what would happen if the plaintiff won.

As I said, I do not think we took away any factfinding from the jury, and I understand that the plaintiffs in the case may disagree. I understand people who study this in very good faith may disagree. I understand that there are two sides to the issue. But I do think that what the court is trying to do in that case is trying to follow through the basic thrust of the antitrust law and to determine how that aim at low prices works out in this complicated area. And I think that the holding in the case, rather than the contrary holding, means lower prices for electricity consumers in Massachusetts and elsewhere.

I can give you another example, if you like.

Senator METZENBAUM. Judge, I only have about 5 minutes left, and may I go on?

Judge BREYER. Please.

Senator METZENBAUM. Thank you. I do not think we are going to come to an agreement.

Judge BREYER. In good faith, I think people do disagree about many of these holdings.

Senator METZENBAUM. In one of your earliest cases, *Allen Pen Co., Inc.* v. *Springfield Photo Mount Co., Inc.,* you sided with the defendant. The plaintiff was a small firm that bought school supplies from the Springfield company. The way I read the case, Springfield offered lower prices to its favored customers and everyone else had to pay more. The undisputed evidence was that when Allen Pen fell out of favor with Springfield, it had to pay 5 percent more for the same supplies. So it sued Springfield for discriminatory pricing under the antitrust laws.

The district court judge did not let the jury decide the case. Instead, he directed a verdict for the defendant. You affirmed that decision. What you said was that Allen Pen, which was a small company, could not win its case, because

> It produced no economic expert, it did not go out of business, it showed no absolute drop in the sales, the sales affected were but a tiny fraction of its total business, and there was no causal connection between any antitrust violation and any significant actual injury.

Let me ask you, does a small company have to go out of business before our fair competition laws apply? Is that the sine qua non?

Judge BREYER. No, no; I think that case was a matter of evidence, and I would guess that how much evidence there was was a matter of the court looked at it and thought there was not enough evidence. I cannot repeat to you now. I mean it is just that sometimes—look, let me give you *Cartel. Cartel* is a good case. *Cartel* is a case in which a defendant won. *Cartel* is a case in which

the big defendant won. *Cartel* is a case in which the smaller plaintiff lost. *Cartel* is a case in which that big defendant was an insurance company in the health insurance area.

What the big defendant was trying to do to the insurance company was to hold down the price of health care. The plaintiffs were people who wanted to raise the price of health care. They wanted to raise the price of health care and they thought the antitrust laws helped them do it.

It seems to me that by looking at the basic purpose of the antitrust laws, which is to keep prices down, to protect the consumer, when you do that, you get the key to a lot of these matters, and that is basically what I have tried to do, and I cannot tell you I have always done it right.

Senator METZENBAUM. Well, in this particular case we are talking about, the small company put its president on the stand to testify about how much money it lost when it had to pay higher prices. It gave the jury his best estimate of what the company's losses were, based on his knowledge of the business and the company's history. You actually criticized the company for using a businessman, instead of an economist, to show that it was injured by unfair competition.

Again, this is a case of whether a small business company has to pay for an expensive economic expert who can charge $500 or more just to get his case to the jury. What concerns to me, and I think some who have studied your record, is that you are more inclined to follow some esoteric theory of the law or maybe some regulatory approach to the law, than you are the whole concept of letting free competition work, and the whole question of protecting that small business person.

I have a number of other cases I will ask you about that come to a similar conclusion, where the little guy gets squeezed out, was not able to buy parts and has to buy a particular automobile package in order to get—I think it was Subaru cars—and, one after the other, Judge Breyer is not sensitive to the fact that the little guy does not have a chance, except for the antitrust laws, and Judge Breyer routinely—there are some exceptions. In the *Cartel* case, you are correct, you ruled with the plaintiff. But the fact is, in too many cases, time after time, as the Fordham article indicates, your hold against the little guy, the small business person, the consumer.

I do not think you did anything wrong or improper. All I am hoping to do in these hearings is maybe sensitize you enough, and when you get on the Supreme Court, maybe you will remember, gee, I remember those questions I had when I was appearing before the Judiciary Committee, maybe the milk of human kindness will run through you and you will not be so technical.

Judge BREYER. I guarantee you, I will remember. [Laughter.]

Senator METZENBAUM. I have other questions, Mr. Chairman. My time has expired, but I know we are going around.

The CHAIRMAN. Senator, I am sure at the first conference, after the first case, he will turn to Justice Scalia and say, you know, let's think how Metzenbaum would do this. [Laughter.]

Senator METZENBAUM. I know that you and Justice Scalia will work it out.

Senator HATCH. I just want to know if Howard finally got it.
Senator METZENBAUM. What did you say?
The CHAIRMAN. He wanted to know if you finally got it, he said. Senator Simpson.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you very much, Mr. Chairman.

I am glad I was not involved in that line of inquiry there about the milk of human kindness. My friend Howard Metzenbaum and I do not always agree, but I mean sincerely I shall miss his presence. He and I have sharpened our rapiers on each other for 15 years, and it has been an experience that started I think with suspicion, and certainly ends with mutual respect. I enjoy him. As I say, we do not agree, indeed. But if he is speaking on antitrust, you want to listen.

Well, it is a pleasure to see you here. I listened intently this morning and thought I had known a great deal of your background. But when they got to the part about architecture, I want to find more about that.

It is time to talk of many things, of shoes and ships and ceiling wax. I want to find out more about that, and I shall.

It is good to see your family here, and I remember meeting them when I was a freshman on this committee. Michael, while you are out there hiking through the country, I will be astride a horse out in Wyoming. You will be walking, and I will be riding. I hope you will enjoy the Wind Rivers. It is a marvelous area, if that is where you are going. I hunch you are.

Seldom I think in these times, certainly in this century, certainly not at any time in my 15 years on this committee, have members had an opportunity to consider a nomination to the Supreme Court of a person who many of us personally know so well.

And I would note that while the consent role of the Congress has always been strictly observed, in this case of your nomination, I believe the advice provision of article II for the first time in my experience has been a significant factor, because many of us on this side of the aisle and on the other side, as well, have offered the advice that your nomination would be quite well received by the Judiciary Committee.

Nearly half of the members of this committee knew you when you served as the chief counsel of this committee. We all are personally familiar with your intellect, your ability, your professional bearing, and your sense of fairness. A term that I noted was used several times in your statement, fairness or fair. And you were very courteous and helpful to me, as a freshman Senator, never judging or measuring things with a political yardstick, interestingly enough, always grounded in fairness. That is a word I think that typifies what I know about you from my personal observation post.

And you have had a fine, remarkable education. I loved your statement about the things you learned about people which you didn't learn from books, or something to that effect, and I think that is certainly true in my life. Yet, the books took me to where