PANEL CONSISTING OF ROBERT PITOFSKY, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC; CASS R. SUNSTEIN, PROFESSOR, UNIVERSITY OF CHICAGO LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, CHICAGO, IL; AND MARTHA MATTHEWS, STAFF ATTORNEY, NATIONAL CENTER FOR YOUTH LAW, AND FORMER LAW CLERK TO JUDGE STEPHEN G. BREYER, SAN FRANCISCO, CA

STATEMENT OF ROBERT PITOFSKY

Mr. PITOFSKY. Thank you, Senator Kennedy. It is a privilege to be invited to testify in these important hearings.

I believe that Steve Breyer from all points of view is an outstanding nominee to the Supreme Court. I will concentrate today, however, on that part of his record dealing with economic regulation and particularly his record in antitrust. That record has been subject to very thoughtful questions by Senator Metzenbaum and others on the committee, and subject to some criticism by witnesses who testified a little earlier today.

I recognize two themes in the criticism. One is sort of a numbers game approach that Judge Breyer is supposed to have decided an unusual number of cases in favor of defendants in antitrust cases, and then there has been some criticism of specific decisions.

As far as the numbers game is concerned, first of all, if people are going to use the numbers game approach, they ought to get their numbers right. The claim is—I have heard it repeatedly today—that he decided 16 consecutive cases against the defendant. Actually, the score was 14 to 2, and I cited two cases for the plaintiff in my prepared testimony. Also, the fact is that in all Federal courts, 75 percent or so of cases are decided in favor of defendants in antitrust matters. So if the record had been 12 to 4, it would have been average, and in Judge Breyer's court it turns out to be 14 to 2. That is hardly a devastating disclosure.

But, in any event, I did not want to play the numbers game. I think that approach asks the wrong question. The real issue is not whether the plaintiff or defendant wins; it is whether the competitive process and consumers win. And that can occur if the plaintiffs prevail or the defendants prevail. And as I will try to discuss in a moment, I believe in the cases for which he has been most criticized, the competitive process and consumers won.

Also, we are talking here about 14 cases decided in favor of defendants, but many of them involved trivial issues from the point of view of antitrust policy. One case addressed the question of whether Puerto Rico was a State or a territory. Well, it came up in an antitrust case, but that is hardly an antitrust policy question.

Another case involved the issue of whether a judge should recuse himself because of a conflict of interest.

In two cases, Judge Breyer and his colleagues denied a preliminary injunction, but the parties were then free to litigate the merits of the case in the following proceeding, and in two cases, the plaintiff was the large company and the defendant was the small company. So that when he found in favor of the defendant, he was hardly finding in favor of big business.

Turning to the specific cases, three have been criticized, or maybe four—*Subaru* was mentioned in the earlier hour—*Boston Edison, Barry Wright, Kartell* and *Subaru.* First of all, let me start by saying that several of these cases—*Boston Edison* and *Barry Wright* in particular—have something in common, and that is that the plaintiff is a small company, the defendant is a large company, and the plaintiff comes into court and says: My rival is too aggressive, its prices are too low; its strategy is too aggressive, and asks that the antitrust law remedy the losses that it is suffering in the marketplace.

Let me be specific. Frankly, we have heard more about price squeeze in these hearings than the world has heard about price squeeze in 104 years. I am aware of only two price-squeeze cases in the nonregulated market that have ever been won by a plaintiff in 104 years, and both those cases are 50 years old. So the fact that Judge Breyer found against the plaintiff in a price-squeeze case is common rather than unusual.

In a price-squeeze case, as you heard many times over, the plaintiff comes in and says, I must buy from and compete with my supplier. And, therefore, if my supplier makes the wholesale price too high and its retail price too low, I get squeezed, and I cannot earn a decent living.

As I say, those cases are rare, and ordinarily, what the plaintiff is saying is get the retail price up so I can do better in the marketplace. The plaintiff may win that case, but consumers will pay the bill if the retail price goes up.

In *Boston Edison,* I agree with Senator Metzenbaum that had Judge Breyer and his colleagues found the other way around, $36 million would have gone to these two Massachusetts municipal utilities, and I assume it would have been passed on to consumers. But the rule of law would have been that the company exercising the squeeze must get its prices up in order to protect the profits of the small company, and consumers would have lost as a result of that.

Now, I heard today for the first time the argument that that is not necessarily the case. An alternative would have been that the wholesale price would come down and the retail price would stay the same. That is not plausible in this case. The background in this case was that Boston Electric had gotten authority to raise the wholesale price from a Federal regulatory agency, FERC. The same plaintiffs who came into court in the antitrust case then challenged FERC in a judicial proceeding, and they lost there as well.

Therefore, it seems to me that the plaintiffs had to accept the fact that the wholesale price was fair, and the only thing left for them to do—and I read the case as one in which this is exactly what they did. They said get the retail price up as long as the wholesale price is going up. Consumers would have lost.

Barry Wright is even a clearer case because I would grant that *Boston Edison* can be argued both ways. I think Breyer came out correctly. In *Barry Wright,* a small company selling environmental devices says to them, My large rival is giving 25-percent discounts, and as a result, I cannot survive in the marketplace. But Judge Breyer saw the point that when you start regulating how low

prices can be, you interfere with the competitive process, and the result is consumers do not get the benefit of the low price.

He recognized that prices sometimes can be so low that they are predatory and ought to be actionable, but he noted in this case that the prices that *Barry Wright* was complaining about were above full cost. And as a result, that company must have been more efficient than its rival and was passing these benefits along to consumers.

Kartell, all I can say about that case is that doctors were trying to get more money. Blue Cross was trying to keep the prices low, and he found in favor of cost containment.

Let me say in conclusion, the suggestion is that Judge Breyer's opinions are arid, theoretical, impractical. I just do not see it. In every one of these cases, the competitive process is what he is concerned about. Consumer welfare is what he is concerned about. He is skeptical of using the antitrust laws to prevent companies from being aggressively competitive, and I do not see that as arid, theoretical, or impractical.

Thank you.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

BIOGRAPHICAL INFORMATION

Professor of Law, Georgetown University Law Center and of Counsel, Arnold & Porter, Washington, DC.

Formerly held positions as Director, Bureau of Consumer Protection, Federal Trade Commission; Commissioner, Federal Trade Commission; Dean of Georgetown University Law Center; Professor of Law at New York University School of Law and Visiting Professor of Law, Harvard Law School.

Co-Author of *Cases and Materials on Trade Regulation* (with Milton Handler, Harlan M. Blake, Harvey Goldschmid), third edition 1990 and author of numerous books and articles on antitrust including *Revitalizing Antitrust in its Second Century* (1992, co-editor); *Proposals for Revised U.S. Merger Enforcement in a Global Economy,* 81 Geo. L. Rev. 195 (1992); *Definition of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805 (1990); *The Political Content of Antitrust,* 127 U. Pa. L. Rev. 1051 (1979); *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Colum. L. Rev. 1 (1978); and *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 1 (1978).

Member of the Council, Administrative Conference (1980–1981); Member of the Board of Governors, D.C. Bar Association (1981–1984); Member of the Council, Antitrust Section of the ABA, (1986–1989).

I appreciate the opportunity to testify in these hearings concerning the confirmation of Stephen Breyer as a Justice of the Supreme Court.

I intend to discuss Judge Breyer's record as a scholar and judge in the field of antitrust. In this testimony, I will focus upon two lines of criticism that have been directed at Judge Breyer's record: (1) it is said that in his judicial opinions, Breyer has consistently ruled in favor of defendants, producing what has been characterized as pro-Big Business and anti-consumer results; and (2) the results reached in several particular cases are said to favor Big Business over the consumer.

In light of the fact that Judge Breyer has so often reached conclusions in antitrust cases that favor defendants, it is most appropriate for members of the Committee to inquire carefully about this antitrust record. My own view is that his opinions, fully examined, do not evidence any antipathy to antitrust enforcement. Certainly, there is no Big Business bias. His opinions, of course, speak for themselves. Given the facts before him in those cases, there is little reason to contend that he could have reached different conclusions.

Before turning to specifics, let me say that I have read all of Judge Breyer's antitrust opinions and many of his books and articles. I believe his approach to antitrust is thoughtful and enlightened. He would leave the free market alone when it is serv-

ing consumer interests adequately, but parts company with conservatives who believe that the market always, or almost always, does a better job of protecting consumers than government regulators. I expect that Judge Breyer, if confirmed, would be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court supporting effective antitrust enforcement.

A. *The Charge of Consistent Rulings for Defendant.* Of the 15 or 16 antitrust opinions written by Judge Breyer, all but two were decided in favor of antitrust defendants. It does not follow, however, from this numbers game that he is pro-Big Business or anti-antitrust.

Judge Breyer has upheld meritorious antitrust claims by both private and government plaintiffs. In *FTC* v. *Monahan*,[1] he upheld the Federal Trade Commission's broad authority to investigate evidence of price fixing in the pharmaceutical industry. In *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*,[2] he upheld a challenge under the Robinson-Patman Act and the Sherman Act to price fixing in the sale of automobiles. I have not seen any case in which he ruled against the government—federal or state—in an antitrust matter.

Even in cases in which Judge Breyer found for defendants, it does not follow that he is unsympathetic to vigorous antitrust enforcement. In several cases, the plaintiff was a large company and the defendant was the small business, so that decisions in favor of the defendant were hardly pro-Big Business. In many other cases, he was deciding technical questions—whether to deny a preliminary injunction, whether a trial judge should be recused based on conflict of interest, whether Puerto Rico should be treated as a state or a territory—which have no significant bearing on antitrust policy. Finally, as discussed below, his most important decisions, while favoring defendants, consistently reach results that protect the vitality of competitive markets and advance consumer interests.

B. *Criticism of Specific Decisions.*[3] A second charge against Judge Breyer is that several of his decisions evidence hostility toward antitrust enforcement. The cases cited are *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 653 F.2d 17 (1st Cir. 1981), and *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922 (1984).

While Judge Breyer did find for the defendants in all three cases, the important point is that the decisions are consistent with enlightened antitrust interpretation and enforcement. In addition, his decisions helped consumers in each instance.

1. In *Boston Edison*, two municipal utilities that bought power from Boston Edison, a large private utility, claimed that Boston Edison had engaged in a "price squeeze" by selling power to them at a high wholesale price but selling to consumers at a low price in competition with the municipals. The plaintiffs' complaint was that Boston Edison was selling at retail at too low a price for them to make a profit. If they had won out on the point, these small business plaintiffs would thrive because Boston Edison would have to raise its retail price, but consumers would end up paying higher bills.

A price squeeze cause of action is rarely attempted and is usually without merit, regardless of the market in which the alleged squeeze occurred. Judge Breyer found that such complaints are even more questionable in a market in which both the wholesale and retail prices were set by independent regulators. A history of the proceedings shows why. Boston Electric's wholesale rates had been submitted to and approved by FERC, a Federal regulatory agency, over the opposition of the municipals. That decision in turn had been approved by the courts on review. Thus, the plaintiffs were attempting to end-run the regulatory's decision and prior judicial review by framing their complaint about wholesale prices as an antitrust cause of action.

As Judge Breyer noted, it is difficult for courts to decide what constitutes a fair price and a fair profit. When independent regulators establish a "fair price," judges in antitrust cases are understandably reluctant to reverse those decisions—especially where the result would be to raise prices to consumers.

2. *Barry Wright.* In *Barry Wright*, a small producer of an environmental device claimed it had been injured because Pacific, its dominate competitor, sold at " predatory"—*i.e.*, below cost—prices. In fact, the record showed that the defendant's prices were above its full costs. Barry Wright nevertheless sued, asking the court to intervene and prevent low prices to consumers. Breyer recognized that if Pacific's prices were above its full costs, but below the full costs of rivals, it followed that it would

[1] 832 F.2d 688 (1987).

[2] 19 F.3d 745 (1st Cir. 1944).

[3] This portion of my testimony duplicates discussion in a letter to the Committee, dated July 5, 1994, signed by seven antitrust law professors (myself included) analyzing these decisions.

succeed because it was more efficient than its smaller rivals and was willing to pass efficiencies on to consumers in the form of lower prices.

Breyer's decision in *Barry Wright* is part of a growing trend of judges in antitrust cases to shy away from supporting antitrust theories that block low prices to consumers. Breyer recognized that where the prices are so extremely low as to evidence an intent to drive rivals out of business, antitrust has a role to play. But where a company charges prices above its own full costs, it would be senseless—and anti-consumer—for the court to intervene in order to protect less efficient businesses. A few years after Judge Breyer's opinion, the Supreme Court in effect ratified his decision and similar decisions in other circuits that prices above full costs are not predatory, noting that a claim of predatory pricing can only be sustained when the challenged prices are below some standard of cost. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 Sup. Ct. 2578, 2588 (1993).

3. *Kartell.* In the *Kartell* case, a group of physicians challenged Blue Shield because it extracted from participating doctors a promise not to charge patients an amount above the insurance fee paid by Blue Shield. A lower court had found that the effect of the arrangement was to pay doctors at unreasonably low levels and therefore was an agreement in restraint of trade in violation of Section 1 of the Sherman Act.

Judge Breyer found that Blue Shield was not a collection of "buyers," capable of conspiring, but rather an independent single force, and that single buyers have a right under the antitrust laws to bargain for the lowest price available. While the defendant once again won in a Breyer opinion, the real effect was to sustain cost-containment efforts by a major insurer and to prevent doctors from charging higher prices to their patients.

C. *Conclusion.* Judge Breyer stands well within the mainstream of modern antitrust analysis. He is trained and sophisticated in the use of economics, but does not see economics as the exclusive concern of competition policy. He understands that antitrust incorporates a concern for fairness and justice to large and small business, and has an overriding view that those laws should be enforced in order to serve the welfare of consumers.

There is another dimension to Judge Breyer's opinions that deserve comment. His opinions in antitrust, a complicated subject at best, are as clear, sharp and well organized as any judicial opinions in the federal system. Judge Breyer appreciates that individuals and firms, to obey the law and function effectively must be given fair notice of what the law is. He summed up his concern and indicated his approach in a comment in *Boston Edison,* discussed earlier:

> [A]ntitrust rules are court administered rules. They must be clear enough for lawyers to explain them to their clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstances or qualification.

It is true that Judge Breyer is less likely to support interventionist antitrust theories than some Supreme Court judges in the 1960s. For example, he is unlikely to support inhibitions on aggressive competitive tactics by large companies so that less efficient small business will thrive, especially when the consequence of that kind of intervention is higher prices to consumers. But when it comes to the mainstream of current antitrust enforcement—challenges to cartel behavior, to large mergers that produce substantial anticompetitive effects, to restrictions on the freedom of distributors to select products and set prices as they see fit—I expect that Judge Breyer will be strong supporter of effective antitrust enforcement. Indeed, the very fact that he understands this area so well should make him an especially effective advocate within the Court for sensible enforcement.

Senator KENNEDY. Professor Sunstein.

STATEMENT OF CASS R. SUNSTEIN

Mr. SUNSTEIN. Thank you, Senator. It is an honor to be here.

I, too, support this nominee, and I believe that his work in the area of regulation is superb. For those who are concerned about his work in this area, especially in the area of the environment and health and safety, it is probably important to emphasize that Judge Breyer distinguishes very sharply between his role as a judge and his role as a policy adviser.

In his capacity as a judge, he has carried out the instructions of Congress and the will of administrative agencies. He has been a very vigorous enforcer in the sense of he has been very faithful to Congress' own judgments that the environment needs protection. So when he has written as a policy adviser, that is what he has done. And when he has written as a judge, he has not compromised congressional judgments by his own policy views.

Nonetheless, some concerns have been raised about Judge Breyer's views on regulations, so I would like to say just a few words about his work in that area in which he is very widely respected.

Judge Breyer's general attitude toward regulation is highly pragmatic, and in a specific sense, he is very focused on the real world. He is not highly theoretical. His interest is, What do regulations do for the people who are supposed to benefited by them? And to this end, he has looked very empirically at whether agencies make the world better or worse. He has not bashed regulatory agencies in the least. On the contrary, he has found many instances in which regulatory agencies have done a very good job. He is not opposed to regulation as a general rule. He believes that in many areas regulation is indispensable. Indeed, he sometimes describes deregulation as—and this is a direct quote—"a non-solution."

I think because of his pragmatism in the sense of no big theories but attention to consequences, it is because of his pragmatism that he is so widely respected. Most generally in regulation, he sought deregulation and reliance on antitrust law where he thinks the market will work. His very famous work with Senator Kennedy and, in fact, Ralph Nader on airline deregulation is based on the judgment that market competition will work in the area of airlines because it will lower prices and improve services as compared with Government price fixing. This is a judgment supported by facts and evidence, and while a lot of people raise questions about the current status of airline transportation, there is no question that deregulation has brought about many significant gains.

In the area of health and safety, he is against deregulation. He could not be clearer on that. He believes we need Government standards, taxes or fines, and a very significant Government role. What his special concern has been is to ensure that we have a good sense of priorities, that we devote our limited resources to areas in which a lot of lives are at stake rather than to areas in which a few lives are at stake.

Now, there have been a number of concerns raised about Judge Breyer's most recent book. Senator Biden has raised some concerns, and the last panel raised a number of concerns. Let me just offer a few notations on the latest book in order maybe to put it in a more general perspective.

As I have noted, this is a book which is very sharply opposed to deregulation. This is not a free-market book in the least. He has a paragraph in which he dismisses deregulation. This is a book in which he catalogues successes, areas in which agencies have saved human life at low cost. He is not opposed to the EPA, the Nuclear Regulatory Commission, or anything of the sort.

His basic goal has been to ensure that more is done in the way of savings lives rather than less is done in saving lives. And to that

end, he has suggested that we ought to adopt some mechanism by which Government can transfer resources from small problems to large problems. It is very pragmatic, highly common-sensical.

Some people have suggested that the notion is not democratic. With respect to this question, it is important to note that any power that Judge Breyer suggests agencies should have would be exercised within congressional limits. On that he is crystal clear, that there is no increase in executive power over such power as the agencies now have. This approach involving more protection of life rather than less, a body of experts who would ensure that result would Judge Breyer thinks the public would like, is a policy recommendation offered as an experiment. And Judge Breyer is also very clear that this is an experimental idea and not an idea set in stone.

Let me conclude by suggesting that Judge Breyer's work on the law as opposed to policy makes crystal clear that his basic judgment is that law is for courts, policy is for agencies and Congress. Policy judgments, he has said, in the environmental area, everywhere else, are not judicial business, and he has criticized some courts for being too activist in that regard.

This is an especially distinguished appointment to the Supreme Court, really an extraordinary appointment to the Supreme Court, and the Court itself will be better with Judge Breyer on it.

[The prepared statement of Mr. Sunstein follows:]

Statement of Cass R. Sunstein

Karl N. Llewellyn Professor of Jurisprudence
University of Chicago
Law School and Department of Political Science

Statement of Cass R. Sunstein, Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago.

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.

* * *

Curriculum Vitae

Name: Cass R. Sunstein
Home Address: 5751 S. Dorchester Ave., Chicago, Illinois 60637
Work Address: University of Chicago Law School, 1111 East 60th Street, Chicago, Illinois, 60637
Telephone: 312-752-2091 (home); 312-702-9498 (business)
Fax: 312-702-0730
Married to Lisa Ruddick with one child (Ellen)
Born: September 21, 1954, Salem, Massachusetts

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

The CHAIRMAN. Thank you very much.

I apologize, Professor Pitofsky, for not being here while you were here, and, Cass, it is great to see you.

I assume Ms. Matthews has not spoken yet. Correct?

Ms. MATTHEWS. Yes.

The CHAIRMAN. I want to thank Senator Kennedy for chairing this. I have a slight scheduling problem. The reason I was out is we were trying to work out a matter on the crime bill between the House and the Senate, and I apologize for not being here.

Because I am going to have to leave before 5 o'clock, probably about 4:55, before the last panel speaks, I want to indicate for the press that is here what the schedule will be for the remainder of consideration of the Breyer nomination. We will now question this panel and the next panel—and the next panel is a very important panel as well because they represent the various bar associations that have done an awful lot of work on this, and other nominations, and we have come to rely on their judgment a lot.

We will then close the hearing, and we will have an executive session in which we will vote in committee, assuming no Senator exercises his or her right to hold it over for a week—I have no notion anyone will do that—at the latest by next Thursday, possibly as early as Tuesday. I want to confer with the ranking member who I believe is, along with his colleagues, ready to accommodate a Tuesday executive committee meeting. To translate, that means we get to vote on Judge Breyer in committee on Tuesday, I hope, but the latest, Thursday.

If we vote on Tuesday, it is my expectation, absent any opposition—and I know of none—we would be voting on Judge Breyer on the floor as early as the end of next week, but I expect no later than the beginning of the following week.

I do not know if that is at all helpful to the press, who always get stuck having to cover these details, but that is what my expectation is.

Now, Ms. Matthews, again, I apologize for the interruption, and the floor is yours.

STATEMENT OF MARTHA MATTHEWS

Ms. MATTHEWS. Thank you. It is a privilege to be here, Senator Biden, Senator Kennedy.

First, I have to offer a disclaimer. I know absolutely nothing about antitrust or regulation.

The CHAIRMAN. That qualifies you, with the exception of Senator Kennedy and a few others, to be a member of the Judiciary Committee.

Ms. MATTHEWS. I am not sure if that is a disappointment or a relief. [Laughter.]

I am a civil rights lawyer and poverty lawyer. I am a staff attorney at the National Center for Youth Law, which is a legal services national backup center specializing in legal issues affecting poor children and families. What I actually do is mostly class action litigation on behalf of foster children, and other litigation and administrative advocacy related to benefit levels, children's access to health care, and other vital legal issues affecting poor children. So

I am not qualified to speak on the debate that we have just heard on antitrust and regulation.

The reason that I think that I was asked to testify today is because several years ago I had the rare opportunity to work both with Judge Breyer and with the distinguished Justice that he was nominated to replace. I served as a law clerk for Judge Breyer from 1988 to 1989. I served as a law clerk for Justice Blackmun from 1989 to 1990. And so I had the somewhat unique opportunity to be there on a day-to-day basis at the elbow of each one of these jurists and see what they do every day.

So I would like to direct my remarks not so much to their overall jurisprudence. You have heard law professors who are far more experienced than I to do that, but as to what Judge Breyer was like on a day-to-day basis, what he was like working——

The CHAIRMAN. Did you write the *Ottati* opinion? [Laughter.]

Ms. MATTHEWS. Law clerks do not write opinions.

The CHAIRMAN. I know. Maybe you are the one we should have speaking to all this time.

Ms. MATTHEWS. I am sure that any fatal errors in antitrust opinions are entirely—well, I cannot say they are due to mistakes of law clerks, because he checks everything that we write so carefully.

Actually, the biggest case that I researched for Judge Breyer during the year I was there was a case about futures trading on the London options market, something I knew nothing about before I came and I knew nothing about after I left, either.

The CHAIRMAN. Well, he has made an Anglophile of almost all of us since we have had to learn about Lloyd's of London.

Ms. MATTHEWS. I was saddened to hear of Justice Blackmun's retirement, but I cannot think of anyone better qualified to replace him than Judge Breyer. Like Justice Blackmun, he cannot be easily labeled as a liberal or conservative judge. His views on cases have never been predetermined by any political agenda. Nobody could accurately say about him that he always rules for the plaintiff in a civil rights case or always rules for the Government in a criminal case or any such generalization.

Judge Breyer has shared with Justice Blackmun a profound commitment to judge each case fairly as it comes before him, with rigorous honesty, intellectual clarify, lack of bias, and with a deep respect for the limits of judicial authority.

It is striking to me that Judge Breyer has been nominated to replace Justice Blackmun because there are some profound similarities between them, even though their temperaments are quite different.

Again, like Justice Blackmun, Judge Breyer has never forgotten that each case that comes before a Federal court is of great importance to the parties involved in the case and to other people who are going to be affected by the decision in the case. Each case he has treated with——

The CHAIRMAN. How do you know that? People say that. But did either of the judges ever turn to you and the clerks and say, By the way, Martha, keep in mind when you look at these cases—I mean, when you—how do you know that?

Ms. MATTHEWS. Well, in Judge Breyer's case, by the rigorous attention he has paid to the record. Judge Breyer makes sure that

every—I mean, the records sent to the Federal circuits are voluminous. He is familiar with every page of those records, makes sure that we really understand how the case came about, who the parties are, what happened to them, what is going to happen to them if they win or if they lose.

I do not think that he is the kind of judge that takes a case as an opportunity to explore some academic legal theory or to write a Law Review article, you know, in the guise of a judicial opinion. I think that he profoundly cares what happens to the people in the cases.

That is shown, for example, by the tone of his questioning at oral argument, and like Justice Blackmun, in fact, is famous. The questions that he asks at oral argument show that kind of concern for what is going to happen as a result of this case.

Another thing that I would like to say about oral argument is that one thing that deeply impressed me as I watched arguments before Judge Breyer is the respect and courtesy that he treated the lawyers who argued the cases with. Not everyone who appears before a Federal circuit court of appeals is brilliant. Some of them are eloquent. Some of them stumble over their words. Some of them drop their papers off the podium.

Every single lawyer who comes before him gets a fair chance to plead his cause. His questions to the lawyers show that he is prepared on their cases. He genuinely wants to hear what they have to say and wants to give them a fair chance. And I think that that is one of the most profound ways in which a judge as a public figure can show respect for the law and show respect even for the positions of lawyers with whom he disagrees.

Another thing I would like to comment on is—this may be prosaic, but the hours that Judge Breyer works. He is there every day. He is completely prepared on each case. The cases that are argued before the court, he is fully briefed. He sits on the bench, understanding each case, and I am not talking about interesting—well, to me, interesting cases. I am saying that the same amount of attention to detail goes into a case on, say, the proper interpretation of a Social Security regulation as to a cutting-edge issue of first amendment law that his law clerks find fascinating. And that gave me a deep sense of respect for him, that it did not matter if a case seemed to my mind to be boring. He would believe that it deserved the same amount of respect and the same amount of detail.

But in spite of the kind of standards that he held himself to, I would also like to say that he was a joy to work for. He was always courteous and polite to his clerks. He was fascinating to talk to in conversation. We used to—Judge Breyer has a taste for sweets, and we used to leave cookies out on the table in the room where we worked as clerks so that we could sort of tempt him to come in and sit down and talk to us. We called this "judge bait." We would always leave out judge bait because, no matter what subject that you talked to him on, he had something fascinating to say. And he had a broad range of interests beyond the subjects on which he has written books. It was amazing the number of areas of legal scholarship that he kept up with.

I do not want to take too much time with personal reminiscences, but that has always stood out to me.

The CHAIRMAN. They are worthy reminiscences, and one of the things that is important—it has been clearly established, I think, but you have reinforced it—is his temperament and his concern for the litigants and the way in which he treats those before him. That is an important consideration.

I thank you for your testimony, and, again, I thank Senator Kennedy and apologize to the last panel for not being able to be here, but I appreciate your testimony.

[The prepared statement of Ms. Matthews follows:]

PREPARED STATEMENT OF MARTHA MATTHEWS IN SUPPORT OF THE NOMINATION OF JUDGE STEPHEN BREYER TO THE U.S. SUPREME COURT

Thank you for the opportunity to appear and present testimony before this Committee. My name is Martha Matthews; I currently work as a staff attorney at the National Center for Youth Law, a national support center for legal aid attorneys focusing on issues affecting poor children and families.

I believe that I was asked to testify today because, several years ago, I had the rare good fortune to work both for Judge Breyer and for the distinguished Justice he has been nominated to replace. I served as a law clerk for Judge Breyer from 1988 to 1989, and for Justice Blackmun from 1989 to 1990. As a law clerk, I had the opportunity to work closely with Judge Breyer at the First Circuit Court of Appeals, performing legal research, reviewing the case records, and discussing with Judge Breyer the cases argued before that court.

Although I was saddened to hear of Justice Blackmun's retirement, I cannot think of anyone better suited to take his place than Judge Breyer. Like Justice Blackmun, he cannot be easily labeled as a "liberal" or "conservative" judge, because his views on cases are never predetermined by a set political agenda. Nobody could accurately say about him, he always rules for the plaintiff in a civil rights case, or he always rules for the government in criminal cases, or any similar generalization. Judge Breyer shares with Justice Blackmun a profound commitment to judge each case fairly as it comes before him, with rigorous honesty, intellectual clarity, lack of any bias or preconception, and with a deep respect for the limits of judicial authority.

Like Justice Blackmun, Judge Breyer has never forgotten that each case that comes into federal court is of great importance to the parties involved, and to other people who may be affected by it. Each case is treated with the same high standards of thoroughness and clarity—whether it involves a cutting-edge First Amendment issue, or an arcane Social Security regulation. Each litigant receives a judicial opinion written clearly, thoughtfully, and in language he or she can understand (and without any footnotes!), explaining the basis for the decision rendered. Each lawyer who appears at oral argument before Judge Breyer, whether brilliant or stumbling, is treated with respect and courtesy, and is given a fair chance to plead his cause.

Judge Breyer, like Justice Blackmun, habitually works long hours to ensure that he is fully prepared for every case heard by the Court, and that every detail of every opinion is accurate, every sentence clear and well-crafted every legal theory explored. Yet, during the year I worked for him, Judge Breyer somehow also found time to teach, to lecture, to serve on numerous committees, and to keep abreast of developments in legal scholarship in many areas. His dedication to a life of public service has been an inspiration to me in my own work.

Yet despite the rigorous standards to which he holds himself, Judge Breyer was a joy to work for, courteous to his clerks and staff, gracious and engaging in conversation, with a broad range of interests and talents.

I would like to share with you a memory of Judge Breyer that I will always treasure. On a cold winter night in 1989, after a long day of work, Judge Breyer still found the time and energy to attend a Valentine's day party at my house, to sit on the floor with us and make construction-paper valentines for his children. This memory assures me that the application of Judge Breyer's formidable intellect to the cases that come before the Supreme Court will always be tempered with warmth and compassion, with a keen awareness of how the lofty decisions of judges affect the everyday lives of the people of this nation.

It is a privilege to be here, to express my admiration for Judge Breyer and to applaud his nomination to the Supreme Court. Thank you.

BIOGRAPHICAL SKETCH

Martha Matthews is originally from Tucson, Arizona. She received the National Merit Scholarship and Presidential Scholar awards on graduation from public high school in 1980. She attended Swarthmore College, graduating with high honors in panilosophy in 1984.

Ms. Matthews attended Boalt Hall School of Law at the University of California at Berkeley, while concurrently enrolled in a Ph.D. program in Jurisprudence & Social Policy. Upon graduation from law school in 1987, Ms. Matthews received the Order of the Coif and Student Writing awards. Ms. Matthews was admitted to the California Bar in fall 1987.

During 1987–1990, Ms. Matthews served as a law clerk at all three levels of the federal court system, first for Congress [now Chief Judge] Thelton E. Henderson in the U.S. District Court for the Northern District of California, then for Judge [now Chief Judge] Stephen Breyer in the U.S. Court of Appeals for the First Circuit, and finally for Justice Harry A. Blackmun in the U.S. Supreme Court.

In fall 1990, Ms. Matthews returned to California to work as a staff attorney at Legal Services for Children in San Francisco. She represented inner city children in Abuse/Neglect cases, guardianship and emancipation petitions, and other civil cases.

In 1991, Ms. Matthews went to work as a staff attorney at the National Center for Youth Law, a legal services support center focusing on issues affecting low-income families and children.

Ms. Matthews currently specializes in litigation and administrative advocacy to improve child protective services, foster care, and children's mental health systems. She has served as counsel in two major class action cases on behalf of foster children *Angela R.* v. *Clinton* and *David C.* v. *Leavitt*. In these cases Ms. Matthews helped to negotiate settlements providing for comprehensive reform of the child welfare systems in Arkansas and Utah. Ms. Matthews also directed the California Children's SSI Campaign, an outreach project to help low-income families with disabled children obtain benefits and health care. Ms. Matthews serves as the training coordinator for NCYL, planning and conducting trainings and conferences on children's advocacy.

Ms. Matthews resides in San Francisco, California.

EDUCATION

Legal: Boalt Hall School of Law (J.D. 1987) University of California at Berkeley.
Graduate: Jurisprudence & Social Policy Program (coursework towards Ph.D. 1984–1987), University of California at Berkeley.
Undergraduate: Swarthmore College (B.A., high honors in philosophy 1984).

PROFESSIONAL ASSOCIATIONS

California Bar Association (admitted 1987).

LEGAL EMPLOYMENT

Staff Attorney, National Center for Youth Law, San Francisco (1990–present).
Staff Attorney, Legal Services for Children, San Francisco (1990).
Law Clerk, Justice Harry A. Blackmun, United States Supreme Court (1989–1990).
Law Clerk, Judge Stephen Breyer, United States Court of Appeals, First Circuit (1988–89).
Law Clerk, Judge Thelton E. Henderson, United States District Court, Northern District of California (1987–1988).

SELECTED PUBLICATIONS

"Family Preservation Programs May Benefit Legal Services Clients, "*Youth Law News* May–June 1993.
"Troubling Report on Care of Children with Emotional Problems," *Youth Law News* May–June 1993.
"Youth with Mental or Emotional Problems May Be Eligible for SSI," *Youth Law News* May–June 1992.
"Major Victory for Arkansas Children," *Youth Law News* March–April 1992.
"Supreme Court Denies Children's Right to Sue for 'Reasonable Efforts," *Youth Law News* March–April 1992.
"Supreme Court Rejects Challenge to Child Witness Hearsay," *Youth Law News* Jan.–Feb. 1992.

"Wilderness Programs Offer Promising Alternative for Some Youth; More Regulation Likely," *Youth Law News* Nov.–Dec. 1991.
"Many More Infants Eligible for SSI Under *Zebley* Regulations," *Youth Law News* Sept.–Oct. 1991.
"Supreme Court Upholds Title X 'Gag Rule,' Major Impact on Adolescents Expected," *Youth Law News* May–June 1991.
Comment, "Suicidal Competence and the Patient's Right to Refuse Life-Saving Treatment," *California Law Review* 75:2 (1987).

The CHAIRMAN. I would yield to Senator Kennedy.

Senator KENNEDY [presiding]. Thank you very much.

That was fascinating insight, Ms. Matthews. I do not think over the time I have been on the committee we have probably had the kinds of recollections both in terms of work habits, personal kinds of insights that you have about Judge Breyer. I would certainly, in the time that I have known him, agree with all the characterizations that you have made. I think the seriousness with which he addresses these matters, the work habits, his consideration of people, his real interest in the impact of the decision on real people. I think you have commented on it, and it is certainly something that I have noted. And I think those of us who have watched him as a judge have certainly seen it as well. I think that will be enormously important in the work on the Court, so we thank you for those insights.

Let me ask just very briefly, Professor Sunstein, could you tell us, with Judge Breyer's legal philosophy, what your sense is about the issues in protecting health and safety that will come to him in different forms and shapes that will come to the Supreme Court? If people were to ask you what in his background, his writings, and his decisions that should give us some satisfaction on those issues relating to health and safety, that he has demonstrated a real commitment to assuring the rights of individuals in those two important areas?

Mr. SUNSTEIN. I will give you a specific answer and then a general answer. The specific answer has to do with the National Environmental Policy Act, which is sometimes thought to be the Magna Carta of the environmental movement. It says that every agency before it takes action that might affect the environment has to prepare a careful environmental impact statement.

Now, Judge Breyer in two cases has said that if the Government fails to do that when it has to, the court will issue an injunction to stop the Government from going forward with its act.

Now, he has been somewhat unusual—not by any means out of the mainstream—but somewhat unusual in allowing the injunction to go forward. The idea that he has spoken for is that the Government has to consider the environmental impact before the action is taken, and that means that we cannot wait for the environmental impact statement to be prepared while the action is taken; he has insisted the injunction will stop the Government from acting until it has considered the environmental impact.

Now, that, I think, is a signal of how seriously he takes environmental issues and a signal of how seriously he takes his understanding of congressional purposes. That is the specific answer.

The more general answer is he is first and foremost dedicated to faithful interpretation of the law. So the key question is what have you, what has Congress, instructed the courts to do, and the agen-

cies to do. That is why he is so insistent that legislative history plays a role in statutory interpretation. For him, the principal role of the judge is to make sure that Congress' instructions have been complied with, and these cases involving issuing injunctions, stopping Government from acting until the environmental impact has been considered, those are testimony to that judgment of his.

Senator KENNEDY. I know we did not go into with Judge Breyer on the old issue—some of my other colleagues did—of interpreting statutes and also interpreting some of the discussions and debates. I can think of a case that is so clear, and that is the *Grove City* case, where, rather than looking at the particularity of the words in the statute, if the Court had ever looked at what this institution had been doing for a whole period of time, that is, not permitting taxpayer money to be used in a discriminatory way—that is just boilerplate from the period of the 1960's on. And as you remember, in that case, since there was not discrimination in the financial office, it did not make any difference whether there was discrimination in the hiring or the treatment of, in this case, women at Grove City. They said, well, there is no discrimination in the office where the money is going. And that is really what Congress—because look at these words—rather than looking at what was stated in the floor debates, what was stated in terms of the legislative history and in the perspective of the actions that had been taken by Congress in a period of time where, as a policy matter, they were not going to permit taxpayers' money to be used in a way that would permit discriminatory action.

There were some references, certainly, to the value of looking just, at a time when there was confusion about particular words, at some of the other factors in terms of the history. Of course, we overrode that case for that very reason, and in that case, certainly, it seemed to me that the courts had looked at a broader perspective.

Professor Pitofsky, you mentioned *Kartell* v. *Blue Shield of Massachusetts,* which involved cost control measures in the health care area, which is not irrelevant in terms of the current discussion and debate now in Congress. Can you explain how the *Kartell* case is an example of a Breyer opinion in favor of the defendant that in fact protects consumers?

Mr. PITOFSKY. Yes; it is an excellent example. What happened there was that Blue Cross/Blue Shield essentially imposed on the doctors in Massachusetts a rule that they accept the insurance payment as complete discharge of any moneys that were owed to the doctors. The doctors then got together and sued, claiming that Blue Cross/Blue Shield had set the level too low, and they were not being reasonably compensated for their services. They wanted to charge the patient additional money over and above the insurance money, and they claimed that Blue Cross/Blue Shield was engaged in a boycott.

Technically, Judge Breyer found that Blue Cross/Blue Shield was a single entity; it was not a conspiracy, and therefore they had the right to bargain for the lowest price.

As a practical matter, there is little question that the consequence of the case was that Blue Cross/Blue Shield's efforts at cost containment were sustained. And an antitrust effort to block

that, which would have allowed the doctors to charge the patients more money otherwise, was struck down by Judge Breyer.

That is hardly a big business, anti-antitrust conclusion. On the contrary, it seems to me, looking at it in a common sensical, practical way, that is a proconsumer result.

Senator KENNEDY. Well, it certainly is, and that is a pretty common issue, and different States have had different laws in attempting to deal with that, and we have at the Federal level as well. It is a very key area in terms of a public policy issue, and you have certainly stated accurately what the conclusion was on that holding, and that is that the consumers' pocketbooks and wallets were protected.

We have seen in Massachusetts, Professor Sunstein in the cases on environment, one of them obviously was the *Georgia Banks* case, and that action was, I think, an enormously important environmental action. I think the estimate in terms of what was going to be out there was in the hundreds of thousands or millions of barrels, and then the reassessment down to what would have been a 6- to 7-day consumption of the country, and what would have happened in an area of the country that provides about a quarter to a third of all of the fish product that is actually consumed by the United States—a very, very important area—was certainly very, very significant and profound.

I thank all of you for your presence here today and for your testimony.

I will put in the record the letter that was sent to Senator Biden, which I referenced earlier. I placed it in the record, but I will just quote here:

> In our view, Judge Breyer is a thoughtful and enlightened advocate of antitrust enforcement. He understands and appreciates the effectiveness of a free market protected by the antitrust laws and serving the welfare of consumers. He also understands the need for vigorous enforcement of the antitrust laws to correct market failures. We expect he will be a vigorous foe of anticompetitive behavior and a powerful voice in the Supreme Court, supporting effective antitrust enforcement.

That is certainly my conclusion, also, having worked with him when I was chairman of the antitrust subcommittee here in the Senate, and I think for those who have studied his work.

So I will include the full letter in the record.

We thank you very, very much. We appreciate it.

Mr. PITOFSKY. Thank you.

Mr. SUNSTEIN. Thank you.

Senator KENNEDY. Our final panel—and here, the old saying, "last, but not least," really does apply—the committee welcomes the presidents of bar associations around the country. Barbara Paul Robinson is here today on behalf of the Association of the Bar of the City of New York; Ms. Robinson is the president of the Association and a partner in Debevois & Plimpton. The committee welcomes you, Ms. Robinson.

Also on the panel are representatives of other nationwide bar associations. Paulette Brown is president of the National Bar Association and is here today on behalf of the Coalition of Bar Associations of Color. With her this afternoon are members of the coalition representing their respective memberships.

Brian Sun is the president of the National Asian-Pacific American Bar Association.

Richard Monet is president of the Native American Bar Association.

And Wilfredo Caraballo is president of the Hispanic National Bar Association.

We welcome all of you here. I want to mention that, as the youngest member of a large family, I was often the last one to be heard at a large table. I think we want to thank you all very much for your patience here. We have had a series of interruptions which were unavoidable in the course of today's hearings. Generally, we do not have the type of interruptions that we have had today, with the floor activity. So you have been very patient. We are very grateful. This is very important. I know I speak for all of my colleagues when I say that we will be looking forward to examining in very careful detail your commentary.

So I want to personally express my great appreciation for your patience and for your willingness to be a part of this whole process.

We will start off with Ms. Robinson.

PANEL CONSISTING OF BARBARA PAUL ROBINSON, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NEW YORK, NY; PAULETTE BROWN, NATIONAL BAR ASSOCIATION, ON BEHALF OF THE COALITION OF THE BAR ASSOCIATIONS OF COLOR, WASHINGTON, DC; BRIAN SUN, PRESIDENT, NATIONAL ASIAN-PACIFIC AMERICAN BAR ASSOCIATION; RICHARD MONET, PRESIDENT, NATIVE AMERICAN BAR ASSOCIATION; AND WILFREDO CARABALLO, PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION

STATEMENT OF BARBARA PAUL ROBINSON

Ms. ROBINSON. Thank you, Senator. I was going to thank you for your patience in hearing us at this late hour and to tell you again thank you for the opportunity to testify before this distinguished Senate Committee on the Judiciary in the context of the nomination of Judge Breyer to the Supreme Court.

As you said, my name is Barbara Paul Robinson, and I am here as president of The Association of the Bar of the City of New York. We are one of the oldest bar associations in the country, and we are about to celebrate our 125th anniversary.

We now include over 20,000 members, and we were established to promote reform and approve the administration of justice, particularly in the courts. We try very hard to work in the public interest.

Our executive committee, through a subcommittee chaired by Stephen Rosenfeld, who is here with me today, has reviewed Judge Breyer's nomination, as it has reviewed earlier candidates for appointment to the Supreme Court. After an extensive review, the association has concluded that Judge Breyer is indeed qualified to be a Justice of the U.S. Supreme Court, because he possesses to a substantial degree all of the following qualifications that are set forth in our guidelines when we consider nominees to the U.S. Supreme Court.