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:]