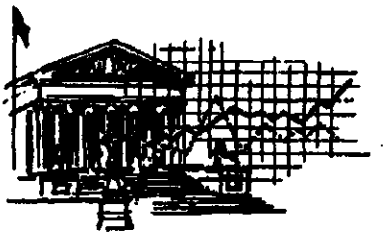

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WHY BREYER SHOULD NOT BE CONFIRMED TO THE U.S. SUPREME COURT

Statement of

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Washington, DC 20510

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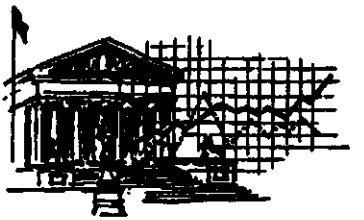

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Antitrust Cases of
Judge Stephen G. Breyer, 1st Circuit

I. Decisions 1981-6/8/93

1. *Cordova & Simonpietri Insurance Agency, Inc. et al. v. Chase Manhattan Bank N.A. et al.*, 649 F.2d 36 (1st Cir. 1981). AFFIRMING DISMISSAL of plaintiff's Sherman Act conspiracy complaint. Breyer. (Local insurance agency vs. a large bank, Chase Manhattan.)

2. *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981). AFFIRMING DIRECTED VERDICT for defendant. Price discrimination. Breyer. (Stationery wholesaler vs. a manufacturer of photo albums, scrap books, etc.)

3. *Auburn News Co. et al. v. Providence Journal Co. et al.*, 659 F.2d 273 (1st Cir. 1981). REVERSING INJUNCTION against defendant. Conspiracy, refusal to deal. Bownes. (Newspaper home-delivery distributors vs. newspaper.)

4. *Claire M. White et al. v. The Hearst Corp. et al.*, 669 F.2d 14 (1st Cir. 1982). AFFIRMING SUMMARY JUDGMENT for defendant. Resale price fixing, refusal to deal. Murray. (9 news dealers vs. newspaper publisher, Hearst.)

5. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1983). FINDING NO VIOLATION by defendant. Predatory pricing. Breyer. (New entrant vs. manufacturer with 94% of U.S. market for nuclear-plant shock absorbers.)

6. *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030 (1st Cir. 1984). AFFIRMING DIRECTED VERDICT for defendant. Tying arrangement. Bownes. (Dealer vs. manufacturer of photocopiers.)

7. *Kenworth of Boston, Inc. v. Paccar Financial Corp. et al.*, 735 F.2d 622 (1st Cir. 1984). REVERSING INJUNCTION against defendants. Tying, refusal to deal. Breyer. (Truck dealer vs. manufacturer with 18% of U.S. heavy-truck market.)

8. *Home Placement Service, Inc. et al. v. Providence Journal Co. et al.*, 739 F.2d 671 (1st Cir. 1984). DENYING PLAINTIFF new trial on damages ($1 trebled to $3) and denying most of its attorney's fees. Monopolisation, refusal to deal. Bownes. (Advertiser of rental real estate vs. newspaper.)

9. *James P. Kartell, M.D. et al. v. Blue Shield of Massachusetts et al.*, 749 F.2d 922 (1st Cir. 1984). REVERSING JUDGMENT for plaintiffs. Sherman Act conspiracy, monopolisation. Breyer. (Local doctors vs. large health insurer, Blue Shield.)

10. *Computer Identics v. Southern Pacific Co. et al.*, 756 F.2d 200 (1st Cir. 1985). Sherman Act conspiracy. AFFIRMING VERDICT for defendants. Torruella. (Seller of computer control systems with railroad, Southern Pacific.)

11. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1987). FINDING NO VIOLATION of Sherman Act. Exclusive dealing. Breyer. (Airline charter service with two planes vs. Massachusetts Port Authority.)

12. *Texaco Puerto Rico, Inc. v. Jose Medina et al.*, 884 F.2d 242 (1st Cir. 1987). AFFIRMING SUMMARY JUDGMENT for defendant. Monopolisation, refusal to deal. Timbers. (Puerto Rican service station dealer vs. large refiner, Texaco.)

18. *Clamp-All Corp. v. Cast Iron Soil Pipe Institute et al.*, 851 F.2d 478 (1988). FINDING NO VIOLATION by defendant. Monopolization, predatory pricing. Breyer. (Maker of new pipe couplings and fittings vs. pipe manufacturers' association, 90% of U.S. market.)

14. *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1988). OVERTURNING JURY VERDICT for plaintiff. Tying. Breyer. (Local car dealer vs. auto manufacturer.)

15. *Monahan's Marine v. Boston Whaler, Inc., et al.*, 866 F.2d 525 (1989). AFFIRMING SUMMARY JUDGMENT for defendant. Tying. Breyer. (Local boat dealer vs. boat manufacturer.)

16. *Town of Concord et al. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990). OVERTURNING JURY VERDICT for plaintiff. "Price squeeze." Breyer. (Two local towns vs. large electric utility.)

II. Breyer Antitrust Cases, Post-6/8/93

17. *Tri-State Rubbish, Inc., et al. v. Waste Management, Inc., et al.*, 998 F.2d 1073 (1st Cir., 7/13/93). AFFIRMING DISMISSAL in part and remanding rest of plaintiff's "thin and doubtful" case. Exclusive dealing, predatory pricing. Boudin. (Trash hauler vs. 12-town waste-disposal monopoly.)

18. *R.W. Intl. Corp. et al. v. Welch Food, Inc. et al.*, 13 F.3rd 478 (1st Cir., 1/20/94). AFFIRMING SUMMARY JUDGMENT for defendants. Distributor termination, predatory pricing. Coffin. (Puerto Rican food distributor vs. large food manufacturer, Welch Food, Inc.)

19. *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft et al.*, 1994-1 CCH ¶70,548. REMANDING PLAINTIFF's "implausible" case. Resale price fixing, price discrimination. Breyer. (Puerto Rican auto dealer v. German auto manufacturer, BMW.)

Charles Mueller
July 13, 1994

* * *

WHY BREYER SHOULD NOT BE CONFIRMED TO THE SUPREME COURT

Charles E. Mueller

President Clinton has been misled, in my opinion, into making a grave mistake in nominating to the Supreme Court Judge Stephen Breyer of the U.S. Court of Appeals in Boston. On the basis of his antitrust record, he is an unjust man. He is also one who is intellectually and politically committed to a set of "economic" theories that are demonstrably false and that will callously reduce the standard of living of the average American family in the decades to come.

In response to a question from Senator Metzenbaum in these hearings on July 12, Breyer replied: "Sometimes plaintiffs did win in antitrust cases I've had and, as you point out, defendants have often won. The plaintiff sometimes is a big business and sometimes isn't. The defendant sometimes is and sometimes isn't."

Once more Breyer seems to have trouble with the facts. No plaintiff, so far as I can determine, has ever won an antitrust case in his court. In the attached table, I've listed the 19 such cases he's participated in since he joined the court (1980) and none was decided for the plaintiff. (Two were remanded--one as a "thin and doubtful" case, the other as an "implausible" one. See Tri-State and Caribe BMW, be-

low.) Do these qualify as plaintiff "wins" in Breyer's lexicon? If not, what cases is he talking about?

The rest of the Breyer answer quoted above was evidently intended to suggest that there was a "mix" of small and large firms on both sides in his 19 antitrust cases. This is patently not true. Historically, antitrust defendants have been, on average, some 30 times the size of antitrust plaintiffs and that tendency is clearly present in his cases as well.

In the table below, I've described (in a parenthetical sentence) the opposing parties in each of Breyer's 19 cases. His plaintiffs are largely local dealers or distributors, with a couple of new-entrant, new-technology producers--all obviously small by virtually any definition (e.g., the SBA's less-than-500 employees)--while his defendants are generally giant institutions (e.g., Chase Manhattan Bank, Blue Shield, Hearst newspapers, Southern Pacific Railroad, Massachusetts Port Authority, Boston Edison) or big manufacturers (e.g., BMW, Subaru, Welch Food, Paccar (heavy trucks), SCM (photocopiers), ITT Grinnell, and Texaco.)

Again, Breyer has misstated the facts. No antitrust plaintiff has ever won in his court. Similarly, the plaintiffs he's consistently ruled against have all been small and the defendants he's methodically favored--with his vote and his intellectual effort--have virtually all been very large.

Breyer is the candidate of big-business and monopoly in America. He has never met a monopoly or a restraint on competition that he didn't like, ruling for the big-business defendant, again, 19 times in 19 antitrust cases during his 14 years on the 1st Circuit Court of Appeals. He is credited with being "even more conservative than Robert Bork" by his conservative admirers, who gleefully note that he is the only Democratic appointee among 157 federal appeals judges who has voted 100% of the time for the big corporations charged with antitrust offenses--the other 6 who have such "100%" records being all Reagan appointees.

Breyer is disdainful of small business, believing that only the corporate giants can be "efficient." His unbroken line of 19 decisions for the same side (historically, each side in antitrust has won about half the time on appeal) shows a determined unwillingness to decide on the merits. No antitrust plaintiff will ever win a case in his court. In a word, he prejudges cases and nullifies laws he doesn't like.

What does this tell us about his judicial qualifications? About his impartiality, sense of justice, and judicial temperament? About his integrity and intellectual capacity? In his antitrust decisions, there is not a trace of fairness or even-handed application of the law. They reflect routine injustice, a consistent ruling in favor of the economic bullies rather than their victims--a result achieved by crabbed, mean-spirited interpretations of laws never intended as protectionism for inefficient corporate giants.

A host of business practices historically condemned as monopolistic and unfair--that destroy efficient small firms and lead to monopoly prices for the public--have in effect been legalized in his court. Price discrimination, predatory (below-cost) pricing, exclusive dealing, tying arrangements, resale price fixing, and the like have all been consistently approved by Breyer. There is one conspicuous principle in his antitrust

decisions: The corporate defendant always wins, no matter how egregious the challenged conduct.

To get this big-business-always-wins result, Breyer has routinely displayed his disrespect for Congress, rewriting the statutes as he went, in effect--to borrow the favorite phrase of Sen. Orrin Hatch (R-Utah)--"legislating from the bench." He has, for all practical purposes, repealed an entire body of law in his four-state (plus Puerto Rico) jurisdiction, including the venerable Sherman Antitrust Act (1890) and Clayton Act (1914).

Breyer's antitrust record displays a similar disdain for the Constitution. Antitrust cases are among those in which, under the 7th Amendment, "the right of trial by jury shall be preserved." Again to achieve his big-business-always-wins result in antitrust cases, Breyer has repeatedly overturned jury verdicts for the plaintiffs or ordered their cases dismissed before they reached the jury.

Intellect and integrity? Breyer rationalizes his siding with the economic bullies by claiming he's doing it all "for the consumer." In an Orwellian twist of the language, he theorizes that bigger must be more "efficient," so monopoly prices must be lower than competitive prices. His so-called "economics" is ideological fiction churned out by laissez-faire ideologues, with no credible empirical or real-world support. A "jury" of say 12 professional economists selected at random from the directory of the American Economic Association would find his economic theories hilarious.

. In one of his cases (Interface v. Massport, 1987), Breyer suggested that those harmed by the monopoly practices at Boston's Logan Airport could just go out and "build competing airports."

. In his most recent case (Caribe BMW v. Bayerische Motoren Werke, 1994), Breyer expressed perplexity as to how the plaintiff auto dealer could be simultaneously injured by a discriminatory price (charging him more for cars than his competitors paid) and a "maximum" resale price-fixing arrangement that prevented him from passing on that extra charge by raising his own resale prices to the public. The mystery is how Breyer could not understand the familiar "price squeeze" the plaintiff was obviously complaining about--an artificial jacking-up of the price he paid his supplier and an artificial holding-down of the price he was permitted to charge his own customers, thus artificially narrowing his own margin below the competitive level.

. In another case (Barry Wright Corp. v. ITT Grinnell, 1983), he wrote: "When prices exceed incremental [marginal or average variable] cost, one cannot argue that they must rise for the firm to stay in business." But in the airline industry, for example, marginal costs are estimated at less than 25% of full operating costs. A company can stay in business by covering only one-quarter of its operating expenses? This is economically silly.

. The next year (in his Kartell v. Blue Shield, 1984), he declared unambiguously that "to succeed, [a predatory-pricing case] requires a showing that the price was below 'incremental cost' (or the equivalent)," citing as his sole authority his own decision of the preceding year (Barry Wright, above). The U.S. Supreme Court, nearly a decade later (Brooke/Liggett v. B&W Tobacco, 1993), is itself still undecided as to the "appropriate measure of cost" in such cases.

. In a price-discrimination case (Allen Pen Co. v. Springfield Photo, 1981), Breyer relied on the fact that the goods on which the victim was overcharged (more than its competitors) accounted for only 2% of that disadvantaged firm's total business. He made no mention of the Supreme Court's holding (FTC v. Morton Salt, 1948) that the price-discrimination law must, of necessity, apply to each and every individual item in a merchant's inventory if it is to have any real meaning, including, in that case, table salt sold in a supermarket (accounting for a fraction of 1% of its overall sales).

. Breyer rejects the traditional notion that one of antitrust's main purposes is the prevention of "unfair" competitive practices, referring to such attacks on small enterprises as mere "torts" which "lie beyond the purview of the antitrust laws" (Kartell v. Blue Shield, 1984) and disparagingly characterizing a Massachusetts statute prohibiting them as a "fair trade" law (Kenworth v. Paccar, 1984). The difficulty with this Breyer "tort" theory is first that torts were illegal at common law and were thus already illegal in 1890 when Congress passed the Sherman Act, doing so precisely because it found the existing tort law inadequate to deal with the trusts of the day, e.g., Standard Oil, American Tobacco, and the like. A second problem is that this Breyer notion is wildly at odds with a mountain of legislative history and Supreme Court rulings since 1890.

. Rejecting "fairness" as even a part of the standard in antitrust, Breyer embraces a single criterion, what he calls "consumer welfare." The problem, though, is that he defines this term to include not just consumers as members of households (the conventional economic definition) but business firms as well. In mainstream economics, the interests of commercial organizations are designated by the term "producer welfare" but Breyer never mentions this. By lumping both consumers and entrepreneurs under the same label, "consumer welfare," he's able to claim that he's serving "consumers" even when families are being looted by anticompetitive practices. If both the individual citizen and the corporate monopoly are "consumers," then the overcharging of the former by the latter merely "transfers" money from the pockets of one "consumer" to another. Under this definition, the behavior of Willie Sutton--the gentleman who robbed banks "because that's where the money is"--caused no loss of "consumer welfare." He simply "transferred" money from one "consumer" pocket to another, with no reduction in the total amount of money held by him and the bank together.

. While the Supreme Court has repeatedly held that the (federal) Sherman Act does not preempt the antitrust field and that the 50 states are accordingly free to enact and enforce substantively stronger antitrust laws if they like, Breyer holds (Cardova & Simonpietri Ins. v. Chase Manhattan, 1981) that the states--while allowed to "occasionally" vary the "details" of their antitrust statutes from the federal model--must keep them "broadly consistent with general federal policy." Since state antitrust law long preceded the federal, this is an especially outrageous suggestion by Breyer.

. Breyer defines "entry barriers" as costs facing new entrants that incumbents were spared. This is a word game that drains the term of all serious meaning. For example, under this definition, there would be no "barriers" confronting those denied fair access to Boston's Logan Airport (Massport, above), since they could presumably build a new one for the same number of (inflation-adjusted) dollars as were spent by the original Logan builders. In mainstream economics, entry barriers

have an entirely different definition, namely, as costs facing new entrants that allow incumbent firms to maintain higher-than-competitive prices (without inducing new entry that would force their prices back down). This traditional definition protects the public from monopoly pricing; Breyer's does not.

In other cases, Breyer ordered summary dismissal because he wasn't persuaded that the defendants had "market power"--the power to charge a price above the competitive level. But in a case where he assumed such market power (Kartell v. Blue Shield, 1984), he ruled that monopolists have a right to "exploit" their market power and, besides, that it's judicially difficult to determine "what is a 'competitive' price." The rules bend to get a fixed result: The corporate defendant always wins. A court he sits on has no rightful claim to the public's trust and confidence.

In overturning the historic competitive-price standard, Breyer sets aside all enforcement of, for example, the country's merger law: In the Justice Department's 1992 Merger Guidelines, unlawful mergers are defined as those that create or enhance the "ability profitably to maintain prices above competitive levels." And of course public agencies whose job is to prevent utilities from gouging the public routinely set prices intended to approximate those that would prevail under competitive conditions. In holding that the competitive price level can't be judicially determined, and that monopolists have a right to "exploit" their monopoly power, Breyer rejects any form of protection for the public from private economic power, whether antitrust (to maintain competitive markets) or public regulation (to restrain incurable monopoly pricing power).

The underlying assumption in all Breyer's antitrust rulings is that big is more efficient than small. It is a thoroughly false--indeed, a perverse--premise. It is almost universally the case that the largest firm in a given industry is among its most inefficient, e.g., GM in autos, IBM in computers, and so on. In the airline industry, for example, the Big 5 carriers have unit (per-passenger-mile) costs that exceed those of mid-size Southwest Airlines--and even the smallest of the new startup lines--by 23% (American) to 48.6% (USAir). Salamon Bros., NY Times, 4/25/93.

Only when the new administration intervened in early 1993 to stop the incessant predatory attacks by the Big 5 were those efficient small airlines permitted to expand across the country and thus trigger an overall decline in prices to the consumer. It is a fairness or level-playing-field standard in antitrust--the one Congress laid down when it passed these laws over 100 years ago--that deconcentrates markets and systematically lowers consumer prices. It is Breyer's unwillingness or inability to grasp this central empirical fact of the real economic world that makes him the national liability that he is.

Sophistry is the hallmark of Breyer's antitrust decisions. One can search in vain through them for even the slightest trace of the "brilliant jurist" portrayed by his supporters. His opinions are rambling, factually-incoherent lectures (purporting to be "economic" theory) so poorly written--as can be verified by a visit to any county law library--that the reader often has to go to the decision of the court below to find out what had actually happened in the cases. Here all that's evident is either intellectual incompetence--captivity to the crude 19th century dogma that "big is efficient"--or equally crude cheerleading for corporate giantism to gain "conservative" political support for an ambitious judicial career.

A judge's stand on antitrust is a revealing window into his broader view of the general economic issues and his overall judicial philosophy. Antitrust has two vital functions in America. First, it lays down the rules of the entrepreneurial game for the nation's 20 million businesses, providing them and their families with a "bill of rights," a shield against unjust treatment by economic predators.

No less importantly, antitrust is the nation's central price-control mechanism. Without it, mergers and economic thuggery quickly transform competitive industries into sclerotic monopolies and prices start to climb. With Breyer on the Supreme Court, its pro-monopoly majority will be so solid that corporate lawyers will dutifully start telling their clients the rules are now off, that the long-sought grail of laissez-faire has at last arrived. With antitrust effectively repealed by unelected judges, consolidation will accelerate even faster and prices in health care, for example, will be rocketing even further out of control as the voters go to the polls in '96. When President Clinton named Breyer to the high court, he almost certainly killed any serious chance of controlling health-care costs during his presidency and, indeed, cut the strongest cable that restrains prices at large.

Stephen Breyer's 19 pro-monopoly votes spell out an ultra-conservative economic agenda that he shares with Robert Bork and Antonin Scalia. It is one that systematically transfers very large amounts of money from consumers and efficient small enterprises to corporate dinosaurs that are too inefficient to compete on the merits and thus have to resort to economic violence against their smaller, more efficient competitors to survive. Even if Congress should rewrite the country's antitrust laws in a plainly-expressed effort to prevent this result, his record makes it plain that he would find a way to evade it. His is a result-oriented antitrust jurisprudence and no private antitrust plaintiff can ever expect to win his vote. His confirmation by the Senate will itself be read by his 1,000 colleagues on the nation's courts as an endorsement of his antitrust views by Congress or of its indifference to that vital body of law and the economic havoc that its neglect inevitably yields. On the Court, his votes and his pro-monopoly advocacy will cost the nation--and the president--dearly indeed.

"Every great mistake has a halfway moment," Pearl Buck once wrote, "a split second when it can be recalled and perhaps remedied." The U.S. Senate now has such a "halfway moment," a final chance to spare the U.S. and its president the appalling costs of his greatest mistake, Stephen Breyer. It is the one he will most regret in the years to come.