

Fall 1994

Clinton Court Is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer, The

Edward A. Fallon

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Edward A. Fallon, *Clinton Court Is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer, The*, 59 Mo. L. REV. (1994)

Available at: <https://scholarship.law.missouri.edu/mlr/vol59/iss4/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The Clinton Court is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer

*Edward A. Fallone**

In October 1994, Chief Judge Stephen Breyer of the U.S. Court of Appeals for the First Circuit became the 108th person to serve on the United States Supreme Court.¹ He joins a Supreme Court that has decided relatively few business law cases in recent years,² but which gave corporate america a few notable victories during the 1993-1994 Term.³ With the ascension of Justice Breyer to the Court, business persons and corporations might well expect that in future years the "Clinton Court" will become even more sympathetic to their legal concerns. Unlike President Clinton's first nominee for the Supreme Court, Justice Ruth Bader Ginsburg, who wrote relatively few business law opinions while an appellate judge and who often seemed to defer

* Assistant Professor of Law, Marquette University Law School; J.D. and B.A., Boston University. The author formerly served as a member of the Supreme Court Nomination Task Force advising Senator Herb Kohl (D-Wis.) on the Breyer nomination.

1. Linda Greenhouse, *Plaudits Drown Out Critics As Senate Confirms Breyer*, N.Y. TIMES, July 30, 1994, at A6. The full Senate voted 87-9 in favor of confirmation. *Id.*

2. See Kenneth W. Starr, *Rule of Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23 (blaming the low number of business law cases decided by the Supreme Court in recent years on disinterest on the part of law clerks and inordinate clerk influence over the "cert pool"); see also Kenneth W. Starr, *Rule of Trivial Pursuits at the Supreme Court*, WALL ST. J., Oct. 6, 1993, at A17.

3. See, e.g., *Central Bank v. First Interstate Bank*, 62 U.S.L.W. 4230 (U.S. 1994) (Rule 10b-5, the anti-fraud provision adopted pursuant to the Securities Exchange Act of 1934, does not authorize private actions imposing liability on those who aid and abet the primary violator—a holding which benefits the legal and accounting professions); *Honda Motor Co. v. Oberg*, 62 U.S.L.W. 4627 (U.S. 1994) (punitive damage awards that are not subject to judicial review and modification violate due process); *Dolan v. City of Tigard*, 62 U.S.L.W. 4576 (U.S. 1994) (state or local government may not condition the grant of permission for real estate development on the owner's dedication of some portion of the land for public use unless there is a rough proportionality between the dedication and the development's impact); *O'Melveny & Myers v. FDIC*, 62 U.S.L.W. 4487 (U.S. 1994) (tort liability of professionals who failed to uncover insider wrongdoing at savings and loans is a question of state, not federal, law); see generally Alan M. Slobodin, *Justices Weigh In On Business*, NAT'L. L. J., Aug. 15, 1994, at C6.

to the views of her more conservative colleagues on the D.C. Circuit in such cases,⁴ Justice Breyer has shown an active interest in economic regulation affecting industry, in antitrust law, and in securities law. This essay will explore Justice Breyer's overall judicial philosophy as it relates to business law issues, as well as his views on substantive law in this area. His numerous appellate opinions, as well as books and law review articles on related topics, provide an extensive "paper trail" and allow some preliminary conclusions to be drawn concerning Justice Breyer's business law jurisprudence.

I. INTRODUCTION

Beginning with the ill-fated nomination of Judge Robert Bork to be Associate Justice of the Supreme Court in 1987, and continuing throughout the Reagan and Bush presidencies, the selection of Supreme Court nominees and their subsequent confirmation hearings have been portrayed by some commentators and the popular media as a battle between the Left and Right wings of the political spectrum.⁵ Too often, observers of the confirmation process have eschewed an objective examination of the nominee's "theory of judging"—their judicial philosophy—in order to clothe the nominee with a particular political ideology.⁶ Prior opinions of the nominee have been scrutinized for liberal or conservative outcomes, rather than for an analysis of the reasoning behind those outcomes.⁷

4. See Edward A. Fallon, *Neither Liberal Nor Laissez Faire: A Prediction of Justice Ginsburg's Approach to Business Law Issues*, 1993 COLUM. BUS. L. REV. 279, 299.

5. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 6-11 (1994) (arguing that conservatives and liberals alike have focused on ideology to argue against a nominee, rather than allowing the nominee and her backers to make a positive case); DAVID O'BRIEN, *JUDICIAL ROULETTE* 99-106 (1988) (describing the battle over the Bork nomination).

6. See CARTER, *supra* note 5, at 16-20, 51-52 (describing a media culture incapable of transmitting complicated messages concerning the views of a Supreme Court nominee).

7. See CARTER, *supra* note 5 ("The public—including, perhaps, much of the bar—does not particularly care *how* the nominee will reach her results. The public cares only about what results the nominee will reach."). See, e.g., Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51 (1986) (classifying judicial appointees by ideology solely on the basis of outcome; conservative appointees are characterized as more likely to vote contrary to: 1) prisoner claims in prisoner's rights cases, 2) claims by women or minorities in discrimination cases, and 3) claims brought by unions in cases involving labor-management disputes).

The nomination process for the Supreme Court has taken a welcome turn towards civility under President Clinton. The Ginsburg and Breyer nominations have been notable for the lack of partisan attacks on either nominee. However, analysis of the nominees' prior judicial record by the media and some observers continues to be outcome oriented rather than theory based. This single-minded attention to the ultimate "winners" and "losers" in a case creates the illusion of a particular political ideology on the part of the judge, with little true predictive value.

For example, much of the reported criticism of Justice Breyer's nomination was outcome oriented. Critics of Justice Breyer's nomination often noted that a 1991 survey⁸ of the voting records of both Carter and Reagan appointees in antitrust cases found that Justice Breyer cast 16 out of 17 possible votes in favor of what could be deemed the "conservative" result; yet no attempt was made to analyze the reasoning behind those votes.⁹ Justice Breyer was also labeled "anti-consumer" largely because he wrote an antitrust opinion overturning a verdict won by a consumer group.¹⁰ Media characterizations of Justice Breyer labeled him as "unfeeling" and a perennial defender of corporate interests.¹¹

8. See William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49, 95-96 (1991).

9. See Holly Idelson, *Breyer's Liberal, Conservative Mix Seems to Assure Confirmation*, *CONG. Q.*, May 21, 1994, at 1305-07; see also Paul M. Barrett, *Supreme Court Nominee Wins Business' Approval*, *WALL ST. J.*, May 16, 1994, at B1.

10. See *Hearings on the Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States, Committee on the Judiciary, U.S. Senate* (July 12, 1994) [hereinafter *Hearings on the Breyer Nomination*] (questioning of Sen. Metzenbaum) available in LEXIS, Legis Library, Fednew File. Senator Metzenbaum, in a discussion of Justice Breyer's opinion in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991), characterized the ruling as being "more worried about ruffling the regulators [sic] feathers than protecting the consumers." *Hearings on the Breyer Nomination, supra*.

11. See Neil A. Lewis, *Friends and Foes Testify About Breyer*, *N. Y. TIMES*, July 16, 1994, at A10 (reporting on the testimony of Ralph Nader before the Senate Judiciary Committee). Justice Breyer's decisions have also been characterized as "devoid of emotional flair and polemics" and "uninspiring," see Eva Rodriguez, *Rulings Reveal Little of Judge Breyer's Heart*, *LEGAL TIMES*, May 23, 1994, at 1, while he has been accused of "reducing the law to cold economic principles" in his extra-judicial writings, see Marcia Coyle & Marianne Lavelle, *Risk Regulation Stance May Prove a 'Breyer Patch'*, *NAT'L L.J.*, May 30, 1994, at A12. It is not surprising that, in what might be viewed as an attempt to defuse such charges, Justice Breyer repeatedly stressed his desire to serve on the Supreme Court in order to "make the average person's ordinary life better." See Paul M. Barrett, *High Court Choice is Strong Thinker Who Offers Something for Everyone, No Distinct Agenda*, *WALL ST. J.*, May 16, 1994, at A22.

The purpose of this essay is not to speculate concerning Justice Breyer's personal political ideology. Nor is this essay intended to tabulate the interest groups that have emerged as "winners" and "losers" in Justice Breyer's past rulings. Instead, it is assumed that an examination of the basic principles employed by Justice Breyer in the formulation of legal rules will provide the most appropriate basis for an analysis of Justice Breyer's judicial philosophy. Therefore, this essay will attempt to identify the basic assumptions and modes of reasoning that underlie Justice Breyer's consideration of business law issues.

These basic assumptions and methods, employed on a fairly consistent basis by Justice Breyer, reveal a judicial philosophy in regards to business law questions that, while mixed, can generally be characterized as "conservative."¹² Elements of a "conservative" judicial philosophy in a business law context can be defined to include (1) a tendency to interpret federal statutes in a way that causes the *least* restriction on corporate activity in the marketplace;¹³ (2) a preference for simple and clearly articulated legal rules that are easy for the courts to administer and that allow individuals and businesses to anticipate the legal consequences of their conduct;¹⁴ (3) a faith

12. No normative connotation is intended by the use of the term "conservative;" it is used merely as a descriptive term. While much effort has been devoted to defining the contours of a "conservative" versus a "liberal" judicial philosophy in the context of constitutional interpretation, *see, e.g.*, DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT 182-91 (1993) (describing the application of economic analysis to constitutional principles); BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION 4-5 (1990) (arguing that conservatives and liberals alike have championed judicial activism in order to further their distinctly different goals); James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986) (analyzing the effect of conservative jurisprudence on liberal values), less time has been spent on an examination of how competing judicial philosophies may lead to contrary results in business law cases. *But see* Kovacic, *supra* note 8, at 53-54, 59-71. To a great extent, however, the insights gained from identifying differing theories of interpretation in the area of constitutional law can be applied to other areas of the law as well.

13. *See* Kovacic, *supra* note 8, at 53 (one aspect of conservative judicial approach is desire to limit government intervention in the economy); Carl W. Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U.L. REV. 1257, 1258 (conservatism is marked by a narrow interpretation of congressional statutes and the limited grant of access to federal courts to aggrieved individuals); *see also* William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeal*, 18 B.C. ENVTL. AFF. L. REV. 669, 686-96 (1991).

14. *See* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1240-41 (1989) (Chicago School economic analysis of the law includes a consideration

in the ability of individuals and entities to bargain in their self-interest and a corresponding reluctance to limit potential contractual arrangements;¹⁵ (4) a restrictive view of access to federal court in cases where the plaintiff possesses a claim in another forum;¹⁶ (5) respect toward corporate activity that is designed to increase economic efficiency;¹⁷ and (6) deference to the decisions of administrative agencies acting within their sphere of authority.¹⁸ The manner in which each of the above elements has informed Justice Breyer's business law jurisprudence will be discussed in turn.

II. BASIC PRINCIPLES

A. Regulatory Restrictions on Corporate Activity

Justice Breyer has faith in the self-regulating function of a competitive market. In his extra-judicial writings, he is generally skeptical of government intervention in the marketplace—particularly where the government intervenes in the form of direct agency regulation of industry.¹⁹ His judicial opinions

of the costs of administering a proposed legal rule).

15. See G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 498-502 (1993) (identifying two rationales for judicial adoption of a pro-market theory of contract law: the promotion of economic efficiency and the preservation of individual autonomy).

16. See Doug Bandow, *The Conservative Judicial Agenda: A Critique*, in ECONOMIC LIBERTIES AND THE JUDICIARY 265 (1987) (arguing that the imposition of restrictions on lawsuits in federal court is one part of the conservative judicial agenda); Tobias, *supra* note 13, at 1258; John C. Yang, *Standing . . . In The Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1356-57 (1992) (identifying a tendency among conservative jurists to closely scrutinize both the extent of the asserted injury and the causal link between the injury and the relevant government action).

17. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (1992) (economic efficiency is the principal criterion for judging the desirability of legal rules). Adherents of the so-called "Chicago School" of law and economics have been identified as espousing a conservative judicial philosophy focusing on the promotion of economic efficiency and wealth maximization. See ROBIN PAUL MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH* 60-66 (1990); see also HARRY FIRST ET AL., *Antitrust and a Dynamic Economy*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 91-93 (Harry First et al. eds. 1991) (placing the Chicago School in context with other economic approaches to antitrust law).

18. See Kovacic, *supra* note 13, at 694 ("[O]ne element of the conservatism attributed to Reagan appointees may be a prudent judicial unwillingness to engage in policymaking functions for which the courts are institutionally ill-suited.").

19. See STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 156-61 (1982); Stephen G. Breyer, *Regulation and Deregulation in the United States: Airlines*,

are generally similar, in the sense that they express a wariness of *indirect* government intervention in the marketplace. For example, he often seeks to avoid expansive interpretations of congressional statutes, such as the antitrust laws, where such an interpretation would unduly restrict free competition between firms. In addition, Justice Breyer's judicial opinions exhibit a sensitivity to the costs of regulation and to the effect that regulation has on business interests.

1. Economic Regulation

In his 1982 book, *Regulation and Its Reform*, Justice Breyer sets forth a critique of economic regulation. "Economic regulation" can be defined as government efforts to control price, production, and quality decisions made by private industry due to a belief that, left to its own devices, industry would make such decisions without adequate regard for the public interest.²⁰ In other words, there is a market failure leading to government intervention and the use of regulation as a corrective check on the market.

Justice Breyer's book is groundbreaking not so much in its approach to any one regulatory scheme, but rather in its insistence that economic regulation can be studied as a science and that certain general rules can be derived which are applicable to all regulatory schemes. In it, he sets forth his views of the agency decisionmaking process both as it affects regulated industries (such as telecommunications and transportation) and as it affects subject areas common to industry in general (such as environmental protection). In Justice Breyer's view, the decisionmaking process utilized by administrative agencies has inherent limitations which prevent the agency from successfully regulating the market.

The structure of the book is quite simple. First, Justice Breyer identifies those situations where the free market has failed and government regulation of the marketplace is justified.²¹ The main situations identified are: (1) where one firm enjoys a natural monopoly;²² (2) where "economic rents" are present;²³ (3) where "spillovers" are present;²⁴ (4) where buyers have

Telecommunications and Antitrust, in DEREGULATION OR RE-REGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES 20-21 (1990) [hereinafter Regulation and Deregulation in the United States].

20. See *Regulation and Deregulation in the United States, supra* note 19, at 7-8.

21. BREYER, *supra* note 19, at 15-35.

22. For example, where the industry cannot support more than one firm. See BREYER, *supra* note 19, at 15.

23. One example is where firms own stockpiles of a commodity, such as oil, that were purchased at prices far lower than the current market price. See BREYER, *supra* note 19, at 21.

inadequate information to evaluate competing products; and (5) where "excessive competition" is feared.²⁵ Next, Justice Breyer identifies six main variations of "classical regulation" that have been used by government agencies in the past to address these free market failures: (1) cost-of-service ratemaking;²⁶ (2) historically-based price regulation;²⁷ (3) allocation under a public interest standard;²⁸ (4) standard setting;²⁹ (5) historically-based allocation;³⁰ and (6) individualized screening.³¹

In Justice Breyer's opinion, each of these above-mentioned forms of classical regulation has varying degrees of success and failure in correcting the market failure at issue, and each has its own inherent inefficiencies as well. Therefore, Justice Breyer sets forth several "alternatives" which might be used to address a market failure instead of classical regulation.³² These alternatives include: (1) reliance on antitrust law to police an unregulated marketplace; (2) requiring firms to disclose more information about its products and production methods than it would freely choose to do;

24. A "spillover" occurs when the unregulated price of a good imposes costs on others who are not involved in its production, as when the environmental effects of a manufacturer's pollution are not reflected in the product's price. See BREYER, *supra* note 19, at 23.

25. "Excessive competition" is a condition that occurs when unregulated firms in a particular industry consistently price their product too low, thereby putting many firms out of business and reducing competition as a whole. BREYER, *supra* note 19, at 29. The likelihood that such a condition would ever occur in an unregulated marketplace is open to question. See Roger G. Noll, *Handbook for Reform: Breyer on Regulation*, 83 COLUM. L. REV. 1108, 1113 (1983) (characterizing Justice Breyer's treatment of excessive competition as a "straw man" argument).

26. In cost of service ratemaking, an agency uses estimates of a firm's cost to set authorized prices. See BREYER, *supra* note 19, at 36-37.

27. In historically based price regulation, an agency dictates future prices in the industry on the basis of historical price levels. See BREYER, *supra* note 19, at 60.

28. An agency engaged in public interest allocation strives to use criteria reflecting the public interest to choose which among competing claimants will be allowed to use a scarce resource. See BREYER, *supra* note 19, at 71.

29. Standard setting requires the agency to mandate certain technical details of a product or production process. See BREYER, *supra* note 19, at 96.

30. An agency engaged in historically-based allocation grants rights to users of a scarce resource on the basis of their historical use. See BREYER, *supra* note 19, at 120.

31. Individualized screening requires the agency to conduct a case by case review of producers or products to determine which will be permitted to enter the market or which will be precluded from entering. See BREYER, *supra* note 19, at 131.

32. BREYER, *supra* note 19, at 156-83.

(3) taxation designed to transfer income or deter socially undesirable conduct; and (4) the creation of marketable property rights.³³

Justice Breyer's main conclusion from his analysis is that economic regulation fails when it uses an improper form of classical regulation to address the particular market failure at hand.³⁴ He calls this situation a "mismatch." Rather than rely on old models of classical regulation that have been used repeatedly in the past, he argues that the government should use alternatives to regulation to craft responses more closely aligned to specific types of market failure. Thus, he argues that the cost-of-service ratemaking used to regulate prices in the transportation industry will inevitably prove inadequate to address the market failure perceived in that industry namely, a risk of excessive price competition between firms.³⁵ He suggests that deregulation, coupled with the enforcement of the antitrust laws where necessary, is a better method of addressing this problem. Justice Breyer holds up the deregulation of the airlines as a successful example of this approach.³⁶

Similarly, he argues that standard setting is an inadequate regulatory response to the economic rents caused by industrial pollution. Standard setting efforts in the pollution control context might entail an attempt to dictate the permissible levels of specific industrial waste products. However, Justice Breyer argues, it is too difficult to reach a scientific consensus on the safe levels of human exposure to each of the tens of thousands of pollutants that are currently present in our environment, both singly and in combination.³⁷ Instead of expending time and effort in a fruitless search for scientifically accepted standards which would limit each firm to an allowable amount of pollutants, Justice Breyer advocates the use of an incentive-based mechanism such as marketable rights to reduce the economic rents caused by industrial pollution.³⁸ As might be expected, this view leads him to be somewhat critical of the past efforts of the Environmental Protection Agency.

One of Justice Breyer's criticisms of classical regulation is that it typically raises costs in the industry and thus may create a barrier to entry for new firms.³⁹ Barriers to entry reduce competition and may ultimately raise prices to consumers. In certain instances, however, this may not be a bad

33. BREYER, *supra* note 19, at 156-183. A system of marketable property rights is created by first establishing a limited number of rights to engage in certain conduct (such as polluting). A market is then allowed to form where these rights are bought and sold by those who wish to engage in the conduct. BREYER, *supra* note 19, at 171.

34. BREYER, *supra* note 19, at 192-96.

35. BREYER, *supra* note 19, at 197.

36. BREYER, *supra* note 19, at 197, 220-21.

37. BREYER, *supra* note 19, at 261-66.

38. BREYER, *supra* note 19, at 271-84.

39. BREYER, *supra* note 19, at 194.

result. Classical regulation may be desirable if it operates to prevent firms from entering the market when they cannot meet the costs imposed by health, safety, or environmental standards. Justice Breyer himself has recognized this possible limitation on his theory of economic regulation. In another context, he has suggested that regulation should be judged differently when it is designed to address health and safety concerns as opposed to when it is intended solely to correct a market failure.⁴⁰

Justice Breyer's analysis of economic regulation is interesting, but ultimately his detailed exposition of the typical characteristics of classical regulation is more satisfying than his suggestions concerning the reform of the regulatory process.⁴¹ For instance, Justice Breyer convincingly points to the airline industry as an example of a regulatory mismatch cured by deregulation, and suggests that other mismatches might be similarly addressed. However, Justice Breyer leaves unexplored the possible limits of deregulation as a regulatory alternative. More recent experiences with deregulation, such as the deregulation of the Savings & Loan industry (and its subsequent bail-out), suggest that merely removing an existing regulatory scheme is no guarantee of a healthy and competitive industry.⁴² In other writings, Justice Breyer has indicated that newly deregulated industries may pose special risks to the public that call for special policies.⁴³ Yet, a close examination of these special risks and special policies is lacking in Justice Breyer's recommendations for the reform of the regulatory process.

Justice Breyer also places a great deal of faith in antitrust enforcement as a vehicle to police the unregulated marketplace. This faith might be misplaced in instances where the government lacks the will or the resources to pursue enforcement actions, or where the industry at issue lacks firms capable of shouldering the costs of private enforcement. In addition, when compared to classical regulation, private litigation under the antitrust laws contains its own inefficiencies. Overcrowded dockets lead to delays in final resolutions and an ensuing uncertainty concerning the rights of the parties. Litigation also leads to the development of the law through individual holdings as opposed to rules of general applicability. Finally, unlike the classical regulatory process, the use of antitrust litigation to police the market leaves open the possibility that

40. See Stephen G. Breyer, *The Economics of AIDS*, N.Y. TIMES, March 6, 1994, § 7, at 24 (reviewing TOMAS J. PHILIPSON AND RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1994)).

41. See generally Noll, *supra* note 25, at 1117-18.

42. See Lloyd N. Cutler, *Regulatory Mismatch and Its Cure*, 96 HARV. L. REV. 545 (1982).

43. See *Regulation and Deregulation in the United States*, *supra* note 19, at 19.

all persons affected by the dispute will not be parties to the action and, thus, will not be heard.

Another question unsatisfactorily answered is how Justice Breyer's reform is to be implemented. He suggests a congressional review of existing agencies.⁴⁴ Whether Congress is institutionally capable of performing the objective task of re-examining existing regulatory schemes, and then identifying and correcting regulatory mismatches, is suspect. Political forces and special interests, as well as an entrenched agency bureaucracy, may prevent Congress from successfully engaging in such reform efforts.⁴⁵

More importantly for purposes of this essay, Justice Breyer's analysis of economic regulation makes several basic assumptions that are relevant to his likely approach to business law issues. First, Justice Breyer approaches regulatory questions with a general bias towards the free market and against regulation.⁴⁶ He recognizes that regulation has certain inherent inefficiencies, such as the difficulties entailed in agency fact gathering, the resulting agency dependence on necessarily incomplete and biased information, and an institutional tendency by the agency to rely on regulatory schemes that imitate past regulatory models rather than to create innovative responses to new problems.⁴⁷ Justice Breyer also believes that the business decisionmaking process produces better decisions than the administrative decisionmaking process when it comes to the content of subjective standards (such as what constitutes "quality" television programming).⁴⁸ Given these weaknesses, attempts at economic regulation by the government may do more harm than good. Finally, he believes that classical regulation can *never* be an adequate response to the problems of excessive competition, control of economic rents or spillovers.⁴⁹ As a result, he believes that regulation of an industry is only justifiable as a last resort and only if the overall public interest is served.⁵⁰

44. BREYER, *supra* note 19, at 357-58.

45. *See* Cutler, *supra* note 42, at 552.

46. *See Regulation and Deregulation in the United States, supra* note 19, at 20 ("Decentralized individual decisions made in a workably competitive marketplace or [sic] more likely to prove economically efficient, to bring about efficient production processes, and to encourage desirable innovation than are the centralized, bureaucratic decisions of the economic regulator.").

47. *See also* Noll, *supra* note 25, at 1118.

48. *See* BREYER, *supra* note 19, at 81.

49. BREYER, *supra* note 19, at 195.

50. *See* BREYER, *supra* note 19, at 195; *Regulation and Deregulation in the United States, supra* note 19, at 21 (regulation is "to be used only as a weapon of last resort—as a heroic cure reserved for a serious disease.").

2. Antitrust Doctrine

Justice Breyer's interpretation of substantive antitrust law also reflects his faith in the self-regulating function of a competitive market. He typically favors interpretations of the Sherman Act that give its prohibitions a limited scope of applicability.⁵¹ The result of such an interpretation is a philosophy of antitrust which maximizes the scope of permitted competitive activity.

One such case is *Town of Concord v. Boston Edison Co.*⁵² Critics have called the decision "anti-consumer."⁵³ In that case, Justice Breyer rejected a claim under section 2 of the Sherman Act that an electric utility had used a price squeeze to monopolize the local distribution of electricity. A price squeeze can occur when a company operates at two levels of an industry—it produces a product which it supplies to customers at a wholesale price, and at the same time it also sells the product at retail prices to the public in competition with its own customers.⁵⁴ Thus, the company might charge its customers a higher than fair price at the wholesale level and also undercut its customers by selling the product to the public at a lower price than its customers can afford to match at the retail level.

In *Town of Concord*, Justice Breyer held that no illegal price squeeze was possible by Boston Edison since the prices at which the utility sold its electricity were subject to regulatory approval at both levels of the market.⁵⁵ He emphasized that regulators can control the prices set by Boston Edison and, therefore, the harms that the antitrust laws are designed to prevent—in this case, a price squeeze that drives competitors from the market and deters new competitors from entering—are not likely to occur.⁵⁶ Since no anticompetitive harm is likely, the risks that the utility's pricing practices will help it maintain a monopoly are outweighed by the tendency of the prices to

51. See, e.g., *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988).

52. 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).

53. See *Hearings on the Breyer Nomination* (July 12, 1994) (questioning of Sen. Metzenbaum). For a generally supportive analysis of Justice Breyer's reasoning, see Keith A. Rowley, Note, *Immunity From Regulatory Price Squeeze Claims: From Keogh, Parker, and Noerr to Town of Concord and Beyond*, 70 TEX. L. REV. 399, 409-10, 416 (1991) (arguing that aggressive enforcement of the antitrust laws to control price squeezes may "discourage efficient operations and deprive customers of prices that reflect lower costs . . .").

54. *Town of Concord*, 915 F.2d at 18.

55. *Id.* at 19, 25-28.

56. *Id.* at 25.

reflect efficient operations and by the salutary effect of the utility's low retail rates on consumers.⁵⁷

Justice Breyer's narrow interpretation of section 2 in this case appears to be influenced by his belief that antitrust law serves as an alternative to classical regulation.⁵⁸ Either antitrust law or classical regulation is a possible response to a perceived market failure, and either one provides an adequate remedy. So long as one system is in place, the harm has been addressed and the other system is unnecessary.⁵⁹

Justice Breyer has also used a narrow interpretation of antitrust injury to limit the interference of the antitrust laws with the operation of the competitive marketplace. Under established doctrine, an antitrust plaintiff may only recover for harm that flows from anticompetitive conduct.⁶⁰ Critics have charged Justice Breyer with using economic theory as a vehicle to cleanse defendants of liability for injurious acts, in that the economic model under which he operates recognizes only a limited range of conduct that is truly anticompetitive.⁶¹ In particular, Justice Breyer equates anticompetitive conduct with conduct which ultimately leads to higher prices for consumers.⁶² Where this harm is unlikely to occur, Justice Breyer finds that dismissal of the plaintiff's claim is required due to the lack of a cognizable antitrust injury.

An example of this approach may be seen in *Interface Group, Inc. v. Massachusetts Port Authority*.⁶³ Interface purchased two aircraft from TWA for use in a charter service. Part of the deal was TWA's agreement to allow Interface to use TWA ground services at Logan Airport's Terminal C.

57. *Id.* at 26-27.

58. *See supra* notes 34-36 and accompanying text.

59. Other courts considering the same issue have been more accommodating to antitrust claims against utilities under dual regulation. *See, e.g.,* *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1378 (9th Cir. 1992); *see also* *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982) (suggesting that a price squeeze may be possible in a regulated industry), *cert. denied*, 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light and Power Co.*, 662 F.2d 921, 934-35 (2d Cir. 1981) (same); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 983-85 (7th Cir. 1980) (same), *cert. denied*, 449 U.S. 1096 (1981); *see generally* John E. Lopatka, *The Electric Utility Price Squeeze As An Antitrust Cause of Action*, 31 UCLA L. REV. 563, 622-30 (1984) (arguing that, in the absence of regulatory reform, the enforcement of the antitrust laws is an acceptable remedy for harmful price squeezes).

60. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

61. *See* Page, *supra* note 14, at 1278-90.

62. *See Regulation and Deregulation in the United States, supra* note 19, at 28; *Grappone*, 858 F.2d at 794 (Breyer, C.J.).

63. 816 F.2d 9 (1st Cir. 1987).

Massport, which operates Logan Airport, had a policy requiring all charter services to utilize Terminal E where they were required to purchase ground services from Massport's own authorized seller of such services (called fixed base operators or "FBOs"). Interface sued, claiming that Massport's policy constituted an unlawful restraint of trade in violation of section 1 of the Sherman Act.⁶⁴

Analyzing the purported agreement in restraint of trade under the rule of reason,⁶⁵ Justice Breyer found no antitrust violation. In particular, he rejected claims that Massport's policy requiring charter services like Interface to utilize the services of the FBOs at Terminal E constituted an exclusive dealing arrangement between Massport and the FBOs.⁶⁶ He noted that Interface could not show the arrangement between Massport and the FBOs made it "easier for Massport to abuse its market power or more difficult for new firms to build competing airports."⁶⁷ Therefore, Justice Breyer found that the arrangement between Massport and the FBOs did not cause the type of harm that is the subject of section 1's prohibition.⁶⁸

Critics of the decision have made much of Justice Breyer's supposed reasoning that Massport's policy did not lead to antitrust harm because other potential market entrants remained free to build "competing airports"—an obvious absurdity given the fact that airport authorities like Massport are

64. *Id.* at 10.

65. The literal language of § 1, declaring every conspiracy in restraint of trade to be illegal, would criminalize every agreement concerning trade. *See Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). Recognizing this fact, the Supreme Court has long held that the statute only prohibits "unreasonable" restraints of trade. *See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98 (1984); *Standard Oil Co. v. United States*, 221 U.S. 1, 63-64 (1911). A "rule of reason" analysis has developed to allow the court to determine which practices impose an unreasonable restraint on competition. The classic articulation of the rule of reason was set forth by the Supreme Court in *Chicago Board of Trade*:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

246 U.S. at 238 (Brandeis, J.).

66. *Interface Group*, 816 F.2d at 11.

67. *Id.* at 12.

68. *Id.*

quasi-public bodies created by the legislature.⁶⁹ However, Justice Breyer's point appears to be that Massport (and its delegate FBOs) were not in economic competition with the charter business. Therefore, Massport's policy requiring all charters to purchase ground services through the FBOs was not designed to keep the charter from competing with Massport. The policy did not limit competition with Massport, nor did it assist Massport in creating or maintaining a monopoly.⁷⁰ This led Justice Breyer to conclude that the Massport policy may have caused harm to Interstate, but it was not a harm prohibited by the antitrust laws. By recognizing the harmfulness of the Massport policy as applied to Interstate, but refusing to find the antitrust laws applicable because Massport and Interstate were not in direct economic competition, Justice Breyer adopted a narrow reading of the scope of section 1.

Other antitrust opinions by Justice Breyer are similar. In *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*,⁷¹ he rejected a claim that the defendant's high prices on some products constituted evidence of unlawfully low prices on others. Justice Breyer stated that the manner in which the defendant financed a low price was irrelevant unless the plaintiff could first show that the low price was predatory.⁷² In *Monahan's Marine, Inc. v. Boston Whaler, Inc.*,⁷³ Justice Breyer found that evidence of "sweetheart deals" between a boat builder and some of its dealers was insufficient to support an antitrust claim by a dealer who failed to receive similar terms. He reasoned that, if antitrust laws forced suppliers to cut prices to all competing dealers or to none at all, suppliers in the builder's position might choose not to cut prices and consumers would ultimately pay higher prices.⁷⁴ In both of these cases, Justice Breyer considered evidence of conduct that was injurious to the complaining firm. However, because Justice Breyer found that the injury was not of the type prohibited by the antitrust laws, he rejected the significance of the evidence.⁷⁵ Once again, his narrow view of what

69. See Charles Mueller, *An Antitrust Stumble On the Road to the Supreme Court: The Breyer Case*, 24 ANTITRUST L. & ECON. REV. 1, 11 (1992-1993) (stating that Justice Breyer's use of theory without a coherent statement of facts results in an opinion that "fail[s] to make any sense").

70. See PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 736.2e at 874 (Supp. 1993) (stating that the denial of an essential facility to a consumer who is not an actual or potential competitor does not prevent or otherwise limit competition with the owner of the essential facility).

71. 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

72. *Id.* at 485-86.

73. 866 F.2d 525 (1st Cir. 1989).

74. *Id.* at 527-28.

75. See Page, *supra* note 14, at 1290.

constitutes an antitrust injury led Justice Breyer to adopt a permissive attitude towards the allegedly anticompetitive conduct.

B. Rules of Easy Administration

Justice Breyer's approach to business law issues is also conservative in the sense that he prefers to adopt legal rules of decision that are simple for the courts to apply.⁷⁶ He is conscious of the need for courts to adopt standards of liability that can be effectively administered by the judiciary, which is more limited in its fact finding ability than a regulatory agency, and which has less resources available to it. Such rules have the added benefit of predictability, which allows lawyers to advise their clients as to the likely consequence of specific conduct.

Therefore, where an expansive standard of liability is proposed that would involve a court in determining difficult questions of fact, or would lead to unpredictable results, Justice Breyer is likely to reject such a standard. Instead, Justice Breyer prefers to adopt a simpler rule that can be easily administered even if the simpler rule results in practices that Congress intended to condemn going unpunished.⁷⁷ By eschewing complicated factual inquires, courts can apply the relevant legal standards quickly and consistently to determine what conduct violates the congressional statute. However, leaving the full promise of the congressional legislation unfulfilled is the price of easy administration.

76. See *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 751 (1st Cir. 1994) (Breyer, C.J.) ("Perhaps one could somehow avoid this anomaly in other ways, but it seems undesirable to invent epicycles in an already too complex area of the law. It is simpler to hold in parallel fashion that ownership alone makes a 'single seller' of a firm and its wholly owned distributor . . ."); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (antitrust rules "must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification"), *cert. denied*, 499 U.S. 931 (1991); *Barry Wright Corp. v. IIT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, C.J.) ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve.").

77. *Barry Wright*, 724 F.2d at 234 ("[D]espite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional 'economic' loss. . . . Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.") (citations omitted).

In *Barry Wright Corp. v. ITT Grinnell Corp.*,⁷⁸ one of his most influential⁷⁹ antitrust opinions, Justice Breyer considered whether a firm with a monopoly on the production of mechanical snubbers violated the antitrust laws by *reducing* the price that it charged to its primary purchaser. The plaintiff, a competing snubber manufacturer, claimed that the price cut was an action by a monopolist designed to win sales away from a newly emerging competitor. The key fact was that, even with the price cut, the price charged by the defendant was still greater than the cost of producing the snubbers. If the defendant monopolist had lowered its prices *below* its "incremental cost"⁸⁰ in order to drive out a competitor, so that it could subsequently raise prices without fear of competition, then its conduct would have constituted predatory pricing and it almost certainly would have been held to be a violation of Section 2 of the Sherman Act.⁸¹

The precise question was whether a price cut above incremental cost—one that still allowed the monopolist to cover the costs of production—should be deemed unlawful. Justice Breyer held that it should not. He stated that lower prices benefit consumers and that one of the Sherman Act's goals is to provide consumers with the low price levels that are typically present in a competitive market.⁸² He declined to interpret the Sherman Act as prohibiting a price cut unless it could be shown that the lower price would hurt consumers. This requirement is arguably met in cases involving prices below incremental cost, but the plaintiff could not show any such harm flowing from a price cut that remained above cost. The consequence of Justice Breyer's reasoning is that a price cut above the firm's incremental cost can rarely form the basis of a section 2 violation.⁸³

78. 724 F.2d 227 (1st Cir. 1983).

79. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (Powell, J.) (citing *Barry Wright* favorably); *A.A. Poultry Farms, Inc. v. Rose Acre Farms*, 881 F.2d 1396, 1401-1402 (7th Cir. 1989) (Easterbrook, C.J.) (following *Barry Wright*), *cert. denied*, 494 U.S. 1019 (1990); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344-46 (8th Cir. 1987) (same); see also *AREEDA ET AL.*, *supra* note 70, ¶ 714.6c, at 715 (favorably describing Justice Breyer's "perceptive" opinion).

80. Incremental costs are usually defined as "the costs that the firm would save by not producing that additional product it can sell at that price." *Barry Wright*, 724 F.2d at 232.

81. 15 U.S.C. § 2 (1988). This section prohibits the maintenance of monopoly power through means beyond the needs of ordinary business dealings.

82. *Barry Wright*, 724 F.2d at 231 ("[A] legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risk [sic] interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets.").

83. Justice Breyer left open the possibility that § 2 of the Sherman Act might be violated by a price cut above incremental cost but below average total cost, "a

The plaintiff responded by arguing that a strict rule allowing all price cuts above cost was inappropriate and that the plaintiff should be allowed to recover if it could show a price cut above cost coupled with an intent to harm a competitor. While recognizing the possibility that a price cut above cost might sometimes be made with an exclusionary motivation, and that such conduct is undeserving of protection, Justice Breyer worried that a rule premising liability on the motives behind the price cut would lead to problems of proof and might possibly deter other firms from making legitimate price cuts.⁸⁴ Therefore, Justice Breyer rejected the plaintiff's argument and held that the better rule is to severely limit the instances in which a price cut above incremental cost can serve as the basis of a Section 2 violation.⁸⁵

Justice Breyer's reasoning recognized that the judicial objective in interpreting the antitrust laws should be to arrive at an interpretation that prohibits all of the conduct that Congress intended to prohibit in passing the statutes. However, strict compliance with this objective may lead judges to adopt rules that are deficient in three ways: (1) they are incapable of easy application; (2) they lead to unpredictable results; and (3) they discourage desirable conduct. Faced with this predicament, Justice Breyer chose to err on the side of allowing some odious conduct to escape liability, so that the maximum amount of lawful competition might be preserved in the marketplace.⁸⁶ Accordingly, he chose a legal rule that premised liability on

circumstance that can arise either when production is at a level below full capacity and the firm lowers prices to levels that do not cover a 'fair share' of fixed costs or when a plant is pushed beyond its 'full' capacity at prices that do not cover the specially high costs of the extraordinary production levels." *Id.* at 233. See generally Jessica L. Goldstein, Note, *Single Firm Predatory Pricing in Antitrust Law: The Rose Acre Recoupment Test and the Search for an Appropriate Judicial Standard*, 91 COLUM. L. REV. 1757, 1764 (1991) (noting that prices above average total cost enjoy a "strong or conclusive presumption of legality").

84. *Barry Wright*, 724 F.2d at 235-36.

85. *Id.* An alternative would be to adopt a rule placing greater emphasis on the intent of the firm as a determinant of antitrust liability when it engages in price cuts above incremental cost. See *E.W. French & Sons v. General Portland, Inc.*, 885 F.2d 1392, 1403-04 (9th Cir. 1989) (Farris, C.J., concurring); Steven Beck, Note, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242, 1259-60 (1991) (noting that Justice Breyer adopts a rule of per se lawfulness where price exceeds total cost without regard for the intent behind the pricing decision); see generally Phillip E. Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 963 (1987) (arguing that questions of intent can be misused in monopolization cases in order to mislead courts and juries).

86. A jurist who, unlike Justice Breyer, does not place as much value upon these particular elements of a legal rule, might well adopt a different approach to statutory

the issue of whether the price cut was above incremental cost as opposed to choosing a rule that premised liability on the defendant's subjective intentions in instituting the price cut.⁸⁷

Justice Breyer's approach is consistent with one identified tendency of the Chicago school of antitrust jurisprudence: an overriding preference to avoid the costs of overinclusiveness that flow from the imposition of liability under per se rules such as those that prohibit tying or predatory pricing.⁸⁸ If some marginal portion of desirable competitive conduct will be deterred by an overinclusive per se rule, then Justice Breyer will probably examine alternative legal standards for imposing liability. One alternative in such situations would be to adopt a fact dependant test of liability. Such tests avoid the risk of deterring desirable conduct that is inherent in per se rules. However, Justice Breyer is likely to conclude that fact-based tests are not worth the effort needed to apply them, given the limited circumstances in which harm to consumers is likely to occur under his economic models. The only other alternative available to Justice Breyer is to presume the lawfulness of most conduct, and to use clear rules of easy applicability to dictate the limited circumstances in which liability will be imposed.⁸⁹ This appears to be Justice Breyer's favored approach.

C. Freedom of Contract

It is difficult to construct an overarching philosophical approach from an examination of Justice Breyer's opinions dealing with business contracts given the highly fact-specific nature of contractual disputes. Nonetheless, it appears that Justice Breyer is most often inclined to hold reasonably sophisticated parties to the terms of the bargain expressed in their contract.⁹⁰ Justice

interpretation. For example, compare the language of the Supreme Court in *Basic, Inc. v. Levinson*, 485 U.S. 224, 236 (1988) (Blackmun, J.) ("[E]ase of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions.").

87. See also Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L. J. 271, 275 (1987) (discussing use of administrability filters to "screen out" problematic antitrust cases); cf. *E.W. French & Sons*, 885 F.2d at 1403-04.

88. See Page, *supra* note 14, at 1265.

89. See Page, *supra* note 14, at 1266-67 (discussing Justice Breyer's opinion in *Grappone, Inc. v. Subaru of New England*, 858 F.2d 792 (1st Cir. 1988)).

90. See, e.g., *Northeast Data Systems, Inc. v. McDonnell Douglas Computer Sys. Co.*, 986 F.2d 607 (1st Cir. 1993) (holding that choice of law provision in contract extended to unfair trade practices claim); *Hill Constr. Corp. v. American Airlines, Inc.*, 996 F.2d 1315 (1st Cir. 1993) (upholding contractual limitation on liability); *Allied Communications Corp. v. Continental Cellular Corp.*, 821 F.2d 69 (1st Cir. 1987) (upholding what the court believed to be the allocation of risk accepted by the parties

Breyer's approach to business law questions exhibits a healthy respect for the ability of individuals to contract freely amongst each other in their economic dealings. Such an approach avoids the paternalism that often results from judicial efforts to reformulate the terms of a commercial contract. Justice Breyer appears unlikely to allow a party to avoid its freely made contractual obligations based on a court's determination that the party consented to an unfair bargain.

Therefore, Justice Breyer's approach to the enforcement of business contracts is consistent with his previously discussed reluctance to interfere with the workings of the competitive marketplace. Justice Breyer apparently adheres to the view that parties should be free to bargain over allocation of risk in a commercial contract however they wish, with the knowledge that courts will strictly enforce such a contractual allocation when disputes arise.⁹¹ In this way, it is hoped that the law will create predictability and certainty in business dealings and thereby foster commercial transactions.⁹²

An example of this approach can be seen in *V.S.H. Realty, Inc. v. Texaco, Inc.*,⁹³ in which Justice Breyer filed a separate opinion. The case involved an interpretation of Massachusetts' unfair trade practices law.⁹⁴ The majority interpreted the law to provide a cause of action for a seller's failure to disclose known and constructively known defects in a product sold under an "as is" contract.⁹⁵ Justice Breyer dissented from this portion of the majority opinion.

In his dissent, Justice Breyer criticized the majority for effectively eliminating the utility of the "as is" contract in a commercial transaction.⁹⁶ He pointed out that the majority's interpretation forces sellers to search the product for defects and to disclose every defect that is found.⁹⁷ Such an interpretation ignores the fact that some consumers might actually prefer to accept an "as is" sale, particularly in circumstances where the seller lowers the price in exchange for the consumer taking on the risk of a hidden defect.⁹⁸ If that is a bargain that knowledgeable business consumers wish to make, then, in Justice Breyer's view, the courts should not interpret the unfair trade

in the contract).

91. Some have argued that a single-minded judicial protectiveness of the freedom to contract is a throwback to the *Lochner* era. See Schwartz, *supra* note 12, at 73-88 (arguing that Chicago School jurists are attempting to "resuscitate *Lochner*").

92. See Shell, *supra* note 15, at 505-09.

93. 757 F.2d 411 (1st Cir. 1985).

94. MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1984).

95. *V.H.S. Realty*, 757 F.2d at 418-19.

96. *Id.* at 420-21 (Breyer, C.J., concurring in part and dissenting in part).

97. *Id.*

98. *Id.* at 421.

practices statute in a way that forces the seller to bear the risk of hidden defects.⁹⁹ Instead, he would have interpreted the statute in a manner that preserved the ability of the buyer and the seller to contract freely with each other as they saw fit.

D. Access To Federal Forum

In *Howe v. Goldcorp Investments, Ltd.*,¹⁰⁰ Justice Breyer upheld the dismissal of the plaintiff's federal securities law claim on forum non conveniens grounds, despite a statutory provision¹⁰¹ placing exclusive venue for violations of the federal securities laws in federal court. Justice Breyer's reasoning in this case is illustrative of a restrictive view of the circumstances under which plaintiffs should have access to a federal forum in the business law context. He adopts a conservative approach in that he gives greater weight to other values—namely the need to promote harmony among the legal systems of the world—than he gives to a plaintiff's right to have his claims heard in federal court.

In *Howe*, an American shareholder brought his securities lawsuit against a Canadian company in the United States District Court for the District of Massachusetts, which dismissed the plaintiff's claims on forum non conveniens grounds.¹⁰² The Securities and Exchange Commission ("SEC"), in an amicus brief, argued that the special venue statute applicable to securities actions gave the plaintiff the right to have his case heard in the United States.¹⁰³ Justice Breyer rejected this argument on several grounds.

First, he found no evidence in the legislative history that Congress intended the venue provision to deprive district courts of their power to transfer cases to more convenient forums.¹⁰⁴ Second, recent case law construing special venue statutes in the context of RICO and Jones Act cases had found no effect on the district court's ability to dismiss the complaint on forum non conveniens grounds.¹⁰⁵ Finally, Justice Breyer found that the

99. See also G. Richard Shell, *Substituting Ethical Standards for Common Law Rules In Commercial Cases: An Emerging Statutory Trend*, 82 Nw. U. L. REV. 1198, 1232-34 (1988) (discussing the majority opinion as an example of liability being imposed under a state fair trade practices statute where the omission at issue would not have led to common law liability).

100. 946 F.2d 944 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992).

101. 15 U.S.C. § 77v (1988).

102. *Howe*, 946 F.2d at 947.

103. *Id.* at 948.

104. *Id.* at 949.

105. *Id.* at 949-50 (citing *Transunion Corp. v. Pepsico, Inc.* 811 F.2d 127, 130 (2d Cir. 1987)). However, Justice Breyer also recognized contrary precedent holding

increase in international commerce and the prospect of international forum shopping provided strong policy grounds for rejecting the SEC interpretation.¹⁰⁶ Applying the doctrine of forum non conveniens to the case, Justice Breyer held that, given the superior access to sources of proof in Canada and the "somewhat similar protections" available under Canadian law, the district court did not err in dismissing the claim and requiring the plaintiff to seek relief in the Canadian courts.¹⁰⁷

Justice Breyer recognized that the Canadian company had upwards of 2,500 American shareholders.¹⁰⁸ Given this fact, and given the broad protections that Congress intended to grant American investors under the securities laws, it would not have been particularly surprising had Justice Breyer adopted the SEC argument and held dismissal improper. Certainly, the prior precedent concerning the availability of forum non conveniens in both the securities context and the context of similar federal statutes was mixed.¹⁰⁹

Justice Breyer's failure to adopt the SEC position ultimately rests on policy grounds. Much of his reasoning is based on the supposed disharmony among nations that would be engendered by a rule prohibiting dismissal.¹¹⁰ Yet, Justice Breyer's opinion is notable in that its discussion of forum non conveniens does not address the related issue of the extraterritorial application of the U.S. securities laws. Some commentators discussing the extraterritorial application of the U.S. securities laws have suggested that past efforts to apply the law to activities outside of our borders have actually provoked little outcry from other nations. Such foreign acquiescence may be due to the general acceptance among nations of the idea that deceit in securities transactions is offensive conduct that requires regulation.¹¹¹ Given this prior experience with the extraterritorial application of the securities laws, one has to wonder

similar special venue statutes, such as the antitrust special venue provision, to be a bar to dismissal on forum non conveniens grounds. *Id.* at 950 (citing *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983)); *cf.* *Dailey v. NHL*, 780 F. Supp. 262, 271-73 (D.N.J. 1991) (declining to dismiss ERISA claim on forum non conveniens grounds due to exclusive jurisdiction for such claims in federal court), *rev'd*, 987 F.2d 172 (3d Cir.), *cert. denied*, 114 S. Ct. 67 (1993).

106. *Howe*, 946 F.2d at 950.

107. *Id.* at 951-52.

108. *Id.*

109. *Id.* at 949-50.

110. *Id.* at 953 ("[W]e believe that a holding barring transfer would increase the risk that national legal systems will work to frustrate one another and would hinder efforts to promote greater coordination and harmony among them.")

111. *See* JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 1336 (1991).

whether the feared disharmony underlying Justice Breyer's opinion is truly likely to occur. His opinion places greater weight on speculative conflicts between nations than on the ability of an aggrieved plaintiff to be heard in federal court.¹¹²

112. See also *Allens Mfg. Co. v. Napco, Inc.*, 3 F.3d 502 (1st Cir. 1993) (breach of contract claim dismissed for failure to satisfy jurisdictional amount).

Justice Breyer's prior interpretation of the scope of private rights of action under the securities laws has been mixed. In *Jackvony v. RIHT Fin. Corp.*, 873 F.2d 411 (1st Cir. 1989), Justice Breyer affirmed the dismissal of the plaintiff's claim of security fraud under § 10(b) of the 1934 Securities Exchange Act and Rule 10b-5. *Jackvony*, 873 F.2d at 413. The plaintiff alleged that he had been defrauded by a bank's failure to disclose the possibility of its acquisition by another corporation during the time period when it was offering its securities for sale to the plaintiff. *Id.* at 413-14. Justice Breyer concluded that the nondisclosed information concerning the possible acquisition of the defendant was not material. *Id.* at 415.

First, the "probability versus magnitude" test set forth by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), was not satisfied. *Jackvony*, 873 F.2d at 415. The lack of any concrete offers to acquire or specific discussions with possible acquirors during this period evidenced a very low probability that the possible acquisition would occur. *Id.* Justice Breyer's conclusion on this point appears to be a sound one. While *Basic* has been described as favoring the disclosure of borderline cases of preliminary negotiation, see THOMAS L. HAZEN, *THE LAW OF SECURITIES REGULATION* § 13.5 at 693 (2d ed. 1990), exploratory contacts that occur prior to the beginning of negotiations may not make an eventual acquisition probable enough to merit disclosure, see *id.* at n.28. In addition, Justice Breyer's opinion concluded that the possibility of banks such as the defendant corporation being acquired was "general knowledge" given the expansion of banking that was underway in the early 1980's. *Jackvony*, 873 F.2d at 415. Therefore, the disclosure of the specific information at issue here—the defendant bank's knowledge that it was a potential acquisition target—would have added nothing significant to the total mix of information already available to the plaintiff. *Id.* This reasoning appears to be an application of a form of the "truth on the market" doctrine. Cf. *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989).

Justice Breyer ruled in a way favorable to a plaintiff's ability to bring a private lawsuit under the securities laws in *In re Atlantic Fin. Management, Inc.*, 784 F.2d 29 (1st Cir. 1986), *cert. denied*, 481 U.S. 1072 (1987). In that case, Justice Breyer considered whether § 20(a) of the Securities Exchange Act of 1934, which creates vicarious liability for a securities violation for persons or entities that "control" the actual offender, was the exclusive theory under which an employer could be found vicariously liable for the actions of their employee. *In re Atlantic*, 784 F.2d at 30. Justice Breyer began by noting that, in the absence of § 20(a), there would be "little doubt that . . . we should read the Securities Act of 1934 as imposing vicarious liability . . ." *Id.* at 32. Then Justice Breyer turned to the effect, if any, that § 20(a) had on that conclusion. Acknowledging a split in the circuits on the issue, Justice Breyer sided with the majority view and held that, despite the existence of § 20(a), that

<https://scholarship.law.missouri.edu/mlr/vol59/iss4/2>

E. Use of Economic Theory

Jurists who adhere to the Chicago school of law and economics are often identified as proponents of a conservative judicial philosophy. Among the ideas advanced by the Chicago school is the idea that economic efficiency, often defined in terms of wealth maximization, should be the principal criterion for judging the desirability of legal rules.¹¹³ In this view, legal rules that promote economic efficiency are preferable to rules that do not

section was not exclusive and a plaintiff could still bring a claim against the employer under traditional common law theories of vicarious liability. *Id.* at 34-35.

Interestingly, the Supreme Court recently decided *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994). In the *Central Bank* case, the Supreme Court held that plaintiffs bringing a private action under Rule 10b-5 may not recover under a common law theory of aiding and abetting liability. *Id.* at 1455. This holding was contrary to every circuit court opinion to consider the issue of whether aiding and abetting liability was available under Rule 10b-5. *See, e.g., Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 652 (9th Cir. 1988) ("Aiding and abetting is itself a violation of Section 10(b) and Rule 10b-5."), *cert. denied*, 493 U.S. 1002 (1989); *Congregation of the Passion v. Kidder Peabody & Co.*, 800 F.2d 177, 183 (7th Cir. 1986). The Supreme Court, in an opinion by Justice Kennedy, reasoned that the text of § 10(b) limited the scope of conduct under which liability could be imposed by the judiciary in an implied private right of action. *Central Bank*, 114 S.Ct. at 1446-48. Since the language of § 10(b) does not mention aiding and abetting liability, courts may not extend liability under that section to reach those who aid and abet a primary wrongdoer. *Id.* at 1440.

The Supreme Court's reasoning in *Central Bank* appears to signal the future demise of vicarious liability in private actions brought under Rule 10b-5. As is the case with aiding and abetting conduct, conduct which gives rise to liability under various common law doctrines of vicarious liability is nowhere mentioned in the text of § 10(b). Thus, courts may not extend the reach of Rule 10b-5 to impose liability for such conduct. The existence of an express provision for control person liability, under § 20(a) of the statute, adds weight to this argument.

Thus, Justice Breyer may have an opportunity to revisit the issue in *In Re Atlantic Fin. Management* if, as is likely, the Supreme Court is asked to determine the implications of its *Central Bank* holding for the doctrine of vicarious liability under the securities laws. It will be interesting to observe whether, in such a situation, Justice Breyer stands by the reasoning in his prior opinion. Justice Breyer's view is unlikely to be determinative, however. The jurist he replaces on the Supreme Court, Justice Blackmun, dissented from the holding in *Central Bank*.

113. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (1992); *see* ROBIN MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH THEORY AND PRACTICE* 60-66 (1990) (describing the relatively conservative approach taken by the Chicago School as opposed to other law and economics theorists); George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 *YALE L.J.* 1284, 1287-88 (1981) (discussing the concept of economic efficiency as a "scientific proposition").

produce such a result.¹¹⁴ Justice Breyer might be characterized as a conservative jurist because he is a student of economics and often uses economic analogies in his opinions.

In his writings, Justice Breyer has stressed the usefulness of both economic theory and analogies based on economic principles as tools to help judges and regulators.¹¹⁵ In his view, these tools provide a framework which places legal arguments in perspective and which helps decisionmakers to focus on the known or unknown facts most relevant to the decision at hand.¹¹⁶ Justice Breyer's judicial opinions reflect this philosophy. For example, in *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*,¹¹⁷ Justice Breyer addressed the issue of whether a firm and its subsidiary should be treated as a single seller under the Robinson-Patman Act¹¹⁸ by using an economic diagram to represent the distribution arrangement between a hypothetical manufacturer, its wholly owned distributor, and various types of retailers.¹¹⁹ Similarly, a lengthy appendix to Justice Breyer's opinion in the *Town of Concord* case included graphic and numerical examples which Justice Breyer used to "help provide an intuitive understanding of the possible price effect of having two separate monopolists at two different industry levels."¹²⁰ In addition to charts and diagrams, Justice Breyer's opinions, most notably in the area of antitrust, often contain extended explanations of the economic principles that he believes underlie the legal rules relevant to the case.¹²¹

However, while Justice Breyer unabashedly uses economic theory to inform his view of the law, he does not reduce all legal controversies to the

114. POSNER, *supra* note 113, at 23. Professor Minda has argued that Judge Posner, in his most recent writings, has moderated his prior assertion that the economically efficient rule is *necessarily* the correct rule, in favor of a more pragmatic approach. See Gary Minda, *Jurisprudence at Century's End*, 43 J. OF LEGAL EDUC. 27, 37-38 (1993) (discussing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

115. See Stephen G. Breyer, *Economists and Economic Regulation*, 47 U. PITT. L. REV. 205, 217-18 (1985).

116. See Breyer, *supra* note 115.

117. 19 F.3d 745 (1st Cir. 1994).

118. 15 U.S.C. § 13 (1973).

119. *Caribe*, 19 F.3d at 749.

120. 915 F.2d at 32-33. See also *Hearings on the Breyer Nomination* (July 12, 1994) (questioning by Sen. Metzenbaum) ("[M]y question is, in view of the jury verdict, the court's verdict, the position that the city of Concord and the people of that community were in, why did you disregard all of those facts and replace them with a graph and a chart that are completely hypothetical?").

121. See, e.g., *Town of Concord*, 915 F.2d at 23-25; *Grappone, Inc.*, 858 F.2d at 794-97.

question of which proposed legal rule produces the efficient result. In other words, he is willing to use economic theory to help explain why the law should adopt a particular result as opposed to other alternatives, but he differs from the Chicago school of jurists in that he does not proclaim that economic theory is the law.¹²²

Justice Breyer freely admits the limitations of economic theory as an aid to legal decisionmaking. He recognizes that economists often disagree on specific points and that economic theory cannot anticipate and encompass every complex fact pattern that might end up in court.¹²³ He does, however, find economics to be a useful tool in an area of the law like antitrust, where the congressional statute uses vague language and where economic theory provides clear and workable standards that judges can apply in a way consistent with legislative purposes.¹²⁴

His fondness for economic analogies and his faith in the unbridled workings of the competitive marketplace can lead Justice Breyer to adopt positions that might be criticized as insufficiently cognizant of their human impact.¹²⁵ For example, Justice Breyer has argued that we should rethink the manner in which we assess and regulate health risks given the large cost involved in eliminating risk completely and the small incremental benefit in reducing risk beyond a certain point.¹²⁶ As an academic exercise, this is certainly a question that every society should consider. However, some people feel strongly that even minimal amounts of certain health risks—say cancer risks from pollution—are unacceptable. These people will undoubtedly be concerned that a Justice of the Supreme Court, with the great power that that institution possesses, is even willing to pose such a question. Nonetheless, Justice Breyer is not insensitive to such concerns. He has written that "economics alone cannot prescribe how much society should spend on health and safety."¹²⁷

122. See *Judicial Precedent and the New Economics*, in *ANTITRUST FORUM 1983—ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS* 9, 16 (Eleanor M. Fox & James T. Halverson eds. 1983) [hereinafter *Judicial Precedent and the New Economics*].

123. *Id.* at 17, 19-20; see Breyer, *supra* note 115, at 207-11.

124. *Judicial Precedent and the New Economics*, *supra* note 122, at 9-11.

125. See *Hearings on the Breyer Nomination* (July 12, 1994) (questioning of Sen. Metzenbaum) (suggesting that theories of economic efficiency replace individual justice in Justice Breyer's antitrust opinions).

126. See STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 150 (1982).

127. See Stephen G. Breyer, *The Economics of AIDS*, *N.Y. TIMES*, March 6, 1994, § 7, at 24.

F. Deference to Agency Decisionmaking

Federal agencies regulate business through direct economic regulation of a particular industry or through health, safety, and environmental regulations applicable to all businesses. As a member of the Supreme Court, Justice Breyer will be called upon to review agency decisions—especially decisions involving an agency interpretation of the congressional statute which dictates the bounds of agency authority. Justice Breyer's opinions in this area while a member of the U.S. Court of Appeals for the First Circuit represent a bit of a departure from the other opinions discussed in this essay. In fact, it is in this area of his judicial philosophy in which Justice Breyer comes closest to adopting the position most often associated with a more liberal judicial philosophy. A liberal approach toward the question of judicial review of agency decisionmaking is most evident in Justice Breyer's immigration law opinions.

In contrast to his sometimes impersonal reasoning in the areas of economic regulation and antitrust, Justice Breyer's immigration opinions demonstrate a real concern for the human consequences of his rulings. For example, in *Thomas v. INS*,¹²⁸ Justice Breyer dissented from a majority opinion upholding a deportation order issued in absentia when the alien was 30 minutes late for a hearing. Justice Breyer's dissent noted that deportation is a "very severe, very stringent consequence."¹²⁹ He would have held that the Board of Immigration Appeals acted arbitrarily in refusing to reopen the alien's case under these facts.¹³⁰ Similarly, in *Garavito v. INS*,¹³¹ Justice Breyer held that the Immigration and Naturalization Service ("INS") abused its discretion in refusing to approve the alien's request for a visa reclassification. Under the circumstances presented, Justice Breyer felt that approval of the alien's request was the more "humane" course of action available to the INS.¹³²

128. 976 F.2d 786 (1st Cir. 1992).

129. *Id.* at 791.

130. *Id.*

131. 901 F.2d 173 (1st Cir. 1990).

132. *Id.* at 177. *See also* *Luna v. INS*, 709 F.2d 126 (1st Cir. 1983) (Board of Immigration Appeals abused its discretion in refusing alien's request to reopen his deportation proceedings; alien was entitled to a hearing on his claim that deportation would result in extreme hardship to his wife and family, who were lawful U.S. residents). Justice Breyer's appreciation for the human effect of INS decisionmaking may be due to the fact that his wife is an immigrant, as were his maternal grandparents. *See Hearings on the Breyer Nomination* (July 12, 1994) (opening statement of Justice Breyer).

In addition to stressing the human side of agency action in immigration cases, Justice Breyer has also adopted the liberal position on the proper scope of judicial deference to Executive Branch decisions in the area of immigration law. In immigration cases, the federal government often argues for, and conservative jurists often accord, a greater than usual amount of deference to the decisions of the INS.¹³³ The asserted justification for this extraordinary deference is the political and national security implications of decisions affecting immigration. In its most extreme form, the argument that the Executive Branch possesses "plenary power" over immigration matters would only allow a reviewing court to set aside an immigration decision that Congress delegated to the discretionary power of the Attorney General (or to her delegate within the INS) in very unusual circumstances.¹³⁴

Justice Breyer, however, does not accord the government's immigration decisions any special status. Instead, he treats these decisions as he would treat any other determination that Congress has placed within an agency's discretion: he applies ordinary principles of administrative law.¹³⁵ As a result, Justice Breyer reverses the decisions of the INS and the Board of Immigration Appeals more often than is the norm in this area¹³⁶ (or, at least,

133. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987) (considering argument by the Board of Immigration Appeals that its construction of the 1980 Refugee Act was entitled to "substantial deference"); Kevin R. Johnson, *Responding to the 'Litigation Explosion: The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 443-44, 460 n.219 (1993) (discussing judicial deference to executive branch immigration decisions both prior to and after *Chevron*).

134. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 623-24 (1st Cir. 1985) (Breyer, C.J.) ("The INS points to a number of cases suggesting that the scope of the government's discretionary power in this area [immigration] is unusually broad—to the point where a reviewing court would set aside a decision of the sort here at issue only in very unusual circumstances."); see generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 550-60, 580-83 (1990) (explaining the historical role that the "plenary power doctrine" has played in constitutional immigration law).

135. See *Ananeh-Firempong*, 766 F.2d at 624 ("[I]f the INS means that the cases it cites reach beyond ordinary principles of administrative law to require a special judicial mood of extraordinary caution in all immigration cases, we do not agree.").

136. See *Goncalves v. INS*, 6 F.3d 830 (1st Cir. 1993); *Da Conceicao Rodrigues v. INS*, 994 F.2d 32 (1st Cir. 1993); *Thomas v. INS*, 976 F.2d 786 (1st Cir. 1992) (Breyer, C.J., dissenting); *Garavito v. INS*, 901 F.2d 173 (1st Cir. 1990); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Luna v. INS*, 709 F.2d 126 (1st Cir. 1983); see also *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994) (Justice Breyer participating in oral argument and the drafting of the opinion but not in the issuance of the panel's decision); but see *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992); *Novoa-Umania v. INS*, 896 F.2d 1 (1st Cir. 1989); *Holley v. INS*, 727 F.2d 189 (1st Cir. 1984).

more often than is the norm outside of the 9th Circuit, which has a reputation for being pro-alien in immigration cases).

Justice Breyer's reading of the general administrative law principles applicable to federal court review of agency decisionmaking might also be viewed as somewhat liberal. Under the Supreme Court precedent of *Chevron U.S.A. v. NRDC*,¹³⁷ a federal court called upon to review an agency's interpretation of the terms of its governing statute should give that interpretation considerable deference so long as the statute is not clearly to the contrary.¹³⁸ Some conservative jurists have interpreted the *Chevron* decision as a command to the lower courts not to second guess agency interpretations.¹³⁹ Unlike these jurists, in the immigration area at least, Justice Breyer has not hesitated to reject the INS' interpretation of its governing statute by finding the interpretation "arbitrary, capricious or an abuse of discretion."¹⁴⁰

137. 467 U.S. 837 (1984).

138. The *Chevron* court adopted a two part test for federal court review of agency decisionmaking. First, the reviewing court must ask whether Congress directly addressed the precise question at issue. If the answer is "yes," then the plain meaning of the statutory language must be enforced. If the answer is "no," then the reviewing court must accept the agency's interpretation of the statute it is charged with enforcing—so long as that interpretation is reasonable and a permissible construction. *Id.* at 842-43.

139. See Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L. J. 511, 512, 516-18 (stating belief that *Chevron* applies with full force when controversy involves a pure question of statutory interpretation).

Some commentators have suggested that, under the current political climate, a conservative jurist might be tempted to second guess an activist agency wielding a heavy regulatory hand, thereby striking down agency action that the judge finds politically offensive. See Slobodin, *supra* note 3, at C6. Similarly, BERNARD H. SIEGAN, in *ECONOMIC LIBERTIES AND THE CONSTITUTION* 284 (1980), takes the position that liberal judges critical of *laissez faire* economic theory are *more likely* to defer to agency regulatory action than conservative judges. This essay, however, adopts the view that judicial deference to agency decisionmaking is more properly classified as a conservative attribute, consistent with other conservative principles such as judicial restraint and a protective attitude towards the authority of the Executive Branch.

140. See *Goncalves*, 6 F.3d at 833 ("[T]he Board, while claiming that its exception is a reasonable 'interpretation' of its regulation, reached that interpretation by following a complicated logical syllogism that, in our view, is either irrelevant or erroneous."); *Da Conceicao Rodrigues*, 994 F.2d at 33-34 (rejecting the Board of Immigration Appeals' interpretation of the phrase "sentences to confinement actually imposed" from 8 U.S.C. § 1182(a)(2)(B) (1988)); *Thomas*, 976 F.2d at 791 (Breyer, C.J., dissenting) (finding action by Board of Immigration Appeals to be arbitrary); *Garavito* 901 F.2d at 174 ("While we recognize that the INS has broad discretionary

The proper degree of judicial deference required by *Chevron*, especially in the immigration context, remains the subject of much debate. At least two of the appellate panels on which Justice Breyer reviewed challenges to INS decisions have split on the issue.¹⁴¹ While it may be overstating matters to label Justice Breyer a "critic" of the *Chevron* rule,¹⁴² his past opinions have taken a liberal view of a federal court's role in overseeing the decisions of the INS, with the result that he has not hesitated to second guess that agency.

G. Justice Breyer's Place on the Conservative Spectrum

On questions of business law, Justice Breyer has typically taken a conservative approach towards judging. He has interpreted the law in a manner that is skeptical of regulatory restrictions on corporate activity and which allows firms a great degree of freedom in their competitive conduct. He values legal rules which are capable of easy judicial administration, even where adoption of those rules may sometimes allow conduct targeted by the legislature for sanction to go unpunished. His decisions are supportive of the ability of individuals to contract freely with each other and to allocate the risks of a transaction in the manner in which they see fit, with little second guessing by the judiciary. His approach to the question of access to a federal forum has at times included reasoning that takes a restrictive view towards the ability of aggrieved parties to have their claim heard in federal court. Justice Breyer has used economic theory to shield efficient corporate activity from the reach of legal rules, although he often does so with a recognition of the limitations of economic theory as a judicial tool. The one area where Justice Breyer might be expected to part from the conservative approach concerns the question of deference to agency decisionmaking. Here, Justice Breyer's past opinions suggest that he will be less inclined to defer to the decisions of an administrative agency than his conservative colleagues.

authority to decide when, or whether, a change in visa classification is proper . . . we believe that, in this instance, its determination is indeed an 'abuse of discretion.');" *Ananeh-Firempong* 766 F.2d at 626-29; *Luna*, 709 F.2d at 127-29.

141. See *Ananeh-Firempong*, 766 F.2d at 629 (Campbell, C.J., dissenting); *Thomas*, 976 F.2d at 790-91 (Breyer, C.J., dissenting).

142. See Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373-81 (1986) (arguing against "strict interpretation" of *Chevron*); cf. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 144-47 (1990) (arguing that courts should engage in a more rigorous review of agency decisionmaking); see also Ernest Gellhorn, *A Justice Breyer May Tip the Court's Balance*, NAT'L. L. J., July 4, 1994, at A20 (describing Justice Breyer's "distinctive" position on the question of deference to agency interpretations).

While Justice Breyer has adopted a conservative judicial philosophy in the above areas, one should not conclude that he will invariably find himself in agreement with the rest of the conservative wing of the Supreme Court on business law issues. There are degrees of conservatism, just as there are degrees of liberalism. The distinctions that exist within the spectrum of a conservative judicial philosophy are illustrated by the public debates that have taken place between Justice Breyer and both Justice Antonin Scalia and Judge Robert Bork—two of the most forceful conservative personalities to have served on the bench in recent years.¹⁴³ These debates do not negate the existence of a large degree of common ground between Justice Breyer and his conservative brethren. Rather, in each case the source of the disagreement between Justice Breyer and his fellow jurist was Justice Breyer's reluctance to accept some of the more extreme manifestations of the conservative approach.

For example, in the antitrust area, Justice Breyer and Judge Bork have both been identified with the conservative trend in antitrust law that developed during the 1980s.¹⁴⁴ Both jurists are in accord as to the general purposes of the antitrust laws. They both are proponents of the view that the antitrust

143. In 1991, Justice Breyer participated in a well known debate with Justice Scalia on the proper judicial use of legislative history. *See Verbatim: Judge Stephen G. Breyer, In His Own Words*, LEGAL TIMES, May 16, 1994 at 12-13; *see also* Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 851-53 (1992); *Hearings on the Breyer Nomination* (July 12, 1994) (questioning of Sen. Grassley). Justice Breyer has also taken issue with some of Judge Bork's views concerning the uses of economic theory in determining substantive antitrust law. *See Judicial Precedent and the New Economics*, *supra* note 122, at 5-21.

144. Justice Breyer's conservatism in the area of substantive antitrust doctrine is documented in Kovacic, *supra* note 8, at 95-96; *see also supra*, notes 52-76 and accompanying text.

Justice Breyer's tenure on the First Circuit largely coincided with a series of antitrust decisions by the Supreme Court that many view as embodying a shift to a more conservative antitrust jurisprudence. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993); *Spectrum Sports v. McQuillan*, 113 S.Ct. 884 (1993); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *Cargill, Inc. v. Montfort of Colorado*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977). It would not be surprising if the decisions of an appellate judge reflected the growing influence of this trend. However, in the case of Justice Breyer, the opposite occurred. Many of his appellate decisions influenced the Supreme Court in ways that actually encouraged that Court's shift towards more conservative antitrust principles. *See, e.g., Matsushita Elec.*, 475 U.S. at 594.

laws are designed to benefit consumers through the lower prices engendered through competition, and not to protect individual firms from business risks.¹⁴⁵ In the words of Justice Breyer, "Antitrust law aims through the competitive process at bringing about low prices for consumers, better products, and more efficient methods of production. Those three things, in my mind, are the key to antitrust law and really a strong justification for an economy in which there are winners and losers, and some people get rich and others don't."¹⁴⁶

The proposition that the effect of challenged conduct on injured firms is secondary to the possible benefits that such conduct may hold for consumers underlies many antitrust decisions of the last fifteen years which have increasingly limited the scope of antitrust liability. Such decisions are permissive of corporate activity that might have been condemned in prior years. The criticism of this conservative view of the purpose of antitrust law is that it ignores the interests of entrepreneurs and engenders a permissive climate where large, established firms feel free to take harsh actions against emerging competitors.¹⁴⁷ Advocates of a more expansive view of antitrust liability argue that the conservative approach ignores the need to preserve fairness in business tactics and the need to ensure that emerging companies are given an equal opportunity to succeed.¹⁴⁸ They charge that the conservative view can be reduced to four words: big business always wins.¹⁴⁹

The antitrust debate between Justice Breyer and Judge Bork did not center around Justice Breyer's rejection of consumer welfare as the primary object of the antitrust laws, in favor of an approach that is more protective of emerging competitors. Instead, Justice Breyer rejected certain extreme aspects of the conservative approach to antitrust law, as articulated by Judge Bork and others, that conflicted with two additional principles that inform Justice Breyer's judicial philosophy. These principles are a respect for legislative intent and a due regard for precedent.

145. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 84 (1978); *Regulation and Deregulation in the United States*, *supra* note 19, at 28. This view is sometimes expressed in the shorthand phrase that the antitrust laws are designed to protect competition and not competitors.

146. *Hearings on the Breyer Nomination* (July 12, 1994) (questioning by Sen. Thurmond).

147. See *Hearings on the Breyer Nomination* (July 12, 1994) (questioning by Sen. Metzenbaum).

148. See Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why it Matters*, 77 MARQ. L. REV. 265, 283 (1994) (arguing that a purely economic approach to antitrust law discourages entrepreneurial activity by failing to preserve fairness and by increasing risk in business endeavors).

149. See Mueller, *supra* note 69, at 7.

Justice Breyer possesses an obvious respect for Congress and he has expressed a desire to reach decisions that are compatible with, and in furtherance of, legislative intentions.¹⁵⁰ Whenever possible, he prefers to adopt an interpretation of the statute in question that can be reconciled with evidence of the intent of Congress, even if the competitive marketplace suffers as a result.¹⁵¹ In this way, his approach differs from that of Judge Bork, who sometimes suggested that courts should decline to enforce congressional legislation that is unsound as a matter of economic theory.¹⁵²

During his confirmation hearings, Justice Breyer was asked whether he would interpret the antitrust laws in a manner consistent with the intent of Congress. Senator Kohl, in the course of questioning the nominee, read a quote attributed to Judge Posner: "If the legislature enacts into statutory law a common law concept as Congress did in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle, in which event the values of the framers

150. See *Hearings on the Breyer Nomination* (July 12, 1994) (questioning by Sen. Biden). Justice Breyer testified that his approach to the interpretation of environmental regulations "reflects the need for courts to go back to the underlying intent of Congress." *Id.* (questioning by Sen. Kennedy). He was also asked by Senator Thurmond to give his view on congressional attempts to overturn a Supreme Court decision rejecting the use of statistics to establish racial discrimination in the imposition of the death penalty. Justice Breyer indicated his willingness to defer to Congress' decision in the matter, saying "as Congress decides it, so should the courts enforce it." *Id.* (questioning by Sen. Thurmond). Most likely Justice Breyer's favorable view of legislators and the legislative process comes from his experience as a member of Senator Kennedy's staff. Senator Kennedy has characterized Justice Breyer as "one of the leading exponents of the view that laws should be construed in the manner that Congress intended." See *id.* (opening statement of Sen. Kennedy).

151. See *Judicial Precedent and the New Economics*, *supra* note 122, at 13-14 ("There is an important difference between working with ambiguities in a statute and in the case law toward a result that makes good sense in terms of sensible human purposes—that is what judges do every day—and interpreting a statute completely contrary to what—on the basis of evidence—Congress meant."). Of course, critics of Justice Breyer's antitrust opinions would counter that he misreads the intent of Congress in that area to the extent that he places primacy on the preservation of low prices for consumers.

152. See *Judicial Precedent and the New Economics*, *supra* note 122, at 13. During the confirmation battle over the nomination of Judge Bork to serve on the Supreme Court, the greatest concern expressed by members of the Senate regarding Judge Bork's antitrust views was that he seemed to have little respect for congressional legislation in the area and that his lack of respect raised doubts as to whether he would faithfully enforce antitrust legislation as a Supreme Court Justice. See 133 CONG. REC. S14,767 (daily ed. Oct. 22, 1987) (statement of Sen. Biden).

may not be controlling at all."¹⁵³ Senator Kohl contrasted Judge Posner's position with a quote from Justice Souter, made during Justice Souter's own confirmation hearings: "When we are dealing with the antitrust laws, we are dealing with one of the most spectacular delegations to the judiciary that our legal system knows. Certainly a respect for legislative intent has got to be our anchor for interpretation."¹⁵⁴ Asked by Senator Kohl to adopt one of the two positions expressed by these jurists, Justice Breyer expressed his agreement with Justice Souter on the need to conform antitrust interpretations with legislative intent.¹⁵⁵

Justice Breyer's overall tendency to interpret the Sherman Act so as to give it a limited scope of applicability¹⁵⁶ is also tempered by a respect for precedent and an attempt to limit his holdings to the specific facts involved whenever possible.¹⁵⁷ In this regard as well, it can be argued that he differs from those who advocate the conservative approach to antitrust in its most extreme form. For example, Judge Bork has stated that "precedent is less important in Sherman Act jurisprudence than elsewhere; and this is just as well. There is no particular reason why courts have to keep doing harm, rather than good, once they understand economic reality."¹⁵⁸ In contrast,

153. *Hearings on the Breyer Nomination* (July 13, 1994) (questioning by Sen. Kohl).

154. *Id.*

155. *Id.*; see also *Judicial Precedent and the New Economics*, *supra* note 122, at 12-13 (disagreeing with Judge Robert Bork, who had taken a position similar to that expressed in the quotation by Judge Posner, *supra* note 153).

156. See *supra* notes 52-76 and accompanying text.

157. See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (limiting holding somewhat); see also *Hearings on the Breyer Nomination* (July 12, 1994) (questioning by Sen. Hatch) (Justice Breyer expressing an intention to be bound by precedent while serving on the Court and to avoid deciding cases in a way that expresses a subjective belief or preference).

158. *Judicial Precedent and the New Economics*, *supra* note 122, at 8. Judge Bork's rather cavalier approach to precedent in the antitrust area was used by critics of his nomination to the Supreme Court to characterize Judge Bork as an "activist" judge who exhibited a willingness to declare the law in accordance with his own ideological views despite legal precedent to the contrary. See SEN. COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REP. NO. 7, 100th Cong., 1st Sess. (Oct. 13, 1987) *reprinted in* 14E HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987, at 6693, 6771-6776 (1990). Although Justice Breyer is generally regarded to hold conservative views on the scope of antitrust law, no similar charges of activism emerged during his confirmation hearings. An example of the type of reasoning characterized as "activist" by critics of Judge Bork may be

Justice Breyer has noted that economic arguments concerning the content of the antitrust laws should exhibit "sensitivity" towards legal precedent.¹⁵⁹

Another way in which Justice Breyer differs from some of his conservative colleagues is his reluctance to apply economic principles to

illustrative.

One case where critics charged Judge Bork with reaching out to declare principles of antitrust law beyond the extent warranted by the facts, and with a disregard for relevant precedent, was *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). In *Rothery*, a group of local moving companies that were also agents affiliated with the national firm Atlas Van Lines sued Atlas over its policy of dropping any agent that directly competed with Atlas. The agents claimed that the Atlas policy constituted a "boycott" and was therefore a per se violation of § 1 of the Sherman Act. *Id.* at 211. Judge Bork dismissed the claims.

First, he held that not all refusals to deal constitute a "boycott," and that therefore the Atlas policy should be judged under a balancing test to determine whether it violated the rule of reason rather than treated as a per se violation of § 1. *Id.* at 215-16. Second, he suggested that the failure of the defendant Atlas to possess significant market power was, in and of itself, sufficient to lead to the conclusion that the policy satisfied the rule of reason. Therefore, no other factors needed to be considered in performing the balancing test. *Id.* at 217-21. As pointed out by Judge Wald in a separate concurrence, the facts of the case would have supported dismissal on the basis that the weighing of pro-competitive and anti-competitive effects of the policy led to the conclusion that the policy did not unreasonably restrict competition. There was therefore no need for Judge Bork to hold that a defendant's lack of market power was *the* determinative factor in the analysis. *Id.* at 230-32 (Wald, C.J., concurring); see also Curtis J. Polk, *Should Market Power Be A Surrogate for Balancing in Applying the Rule of Reason?*, 55 GEO. WASH. L. REV. 764 (1987).

Finally, Judge Bork's opinion went on to hold that Atlas' policy was intended to eliminate the problem of "free riders"—agents who received the benefits of their association with Atlas while also acting as competitors. Therefore, the policy was designed to make Atlas more efficient and any anticompetitive effect ancillary to this proper purpose could not form the basis of an antitrust violation. *Atlas Van Lines*, 792 F.2d at 224. Judge Bork's authority for this last proposition was a Sixth Circuit opinion written in the 19th century by Judge William Howard Taft. *Id.* (citing *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899)). A more contemporary Supreme Court opinion appeared to the contrary, see *United States v. Topco Associates*, 405 U.S. 596 (1972), however Judge Bork interpreted another line of Supreme Court precedent and concluded that *Topco* had been "effectively overruled." *Atlas Van Lines*, 792 F.2d at 226. It can be argued that Judge Bork's interpretation of this precedent was self-servingly designed to avoid the dictates of *Topco*. Subsequent to Judge Bork's opinion, the Supreme Court reaffirmed its *Topco* holding in *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990).

159. *Judicial Precedent and the New Economics*, *supra* note 122, at 16.

determine legal rules regulating health and safety.¹⁶⁰ His skepticism towards government intervention in the marketplace appears greatest in the context of the regulation of economic activity. Despite some critical remarks concerning the role of the Environmental Protection Agency, Justice Breyer appears more willing to accept a degree of government interference with the marketplace if the regulation can be justified on non-economic grounds. He has expressed the view that regulation of industry may be justified on moral and emotional grounds, even when economic justifications are lacking. In such instances any criticism of regulation on purely economic grounds may be misguided.¹⁶¹ Justice Breyer has described the distinctive nature of regulation seeking to promote health and safety:

There is no economics that tells you the right result in that kind of area. There is no economics that tells you or me or all of us how much we're prepared to spend or shouldn't spend on the life of another person. There is nothing that tells us the answer to that in some kind of economics book that I am aware of. And also, that's so much a decision that people will make through their elected representatives—its a democratically made decision.¹⁶²

Justice Breyer's debate with Justice Scalia is somewhat different from his disagreements with other conservative jurists. This debate concerns the proper role that legislative history should play in the interpretation of statutory language.¹⁶³ Legislative history might be employed during the first step of the *Chevron* analysis, to determine whether or not the statutory language addresses the precise question at issue.¹⁶⁴ In particular, legislative history can be used to give meaning to the plain language of the statute where the language itself is ambiguous. Thus, a reviewing court can use legislative

160. Judge Posner, for example, is well known for his application of economic theory to legal rules governing social conduct. See TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993).

161. See Stephen G. Breyer, *The Economics of AIDS*, N.Y. TIMES, March 6, 1994, § 7, at 24.

162. *Hearings on the Breyer Nomination* (July 13, 1994) (questioning by Sen. Biden). See also *id.* (July 12, 1994) (questioning by Sen. Kennedy) (Justice Breyer stating that "[w]hen you start talking about health, safety and the environment, the role [of economics] is much more limited, because there no one would think that economics is going to tell you how much you want to spend helping the life of another person. If in fact people want to spend a lot of money to help save earthquake victims in California, who could say that was wrong?").

163. Cf. Scalia, *supra* note 139, at 521 with Breyer, *supra* note 143, at 848-61.

164. See *supra* notes 137-42 and accompanying text.

history to avoid the second step of the *Chevron* analysis, which would require deference to the agency interpretation of the language in cases where the statutory language is unclear.

Justice Scalia has taken the position that judges engaged in the first step of the *Chevron* analysis should limit their inquiry to the plain meaning of the statutory language, with little or no concern for the legislative history surrounding the statute.¹⁶⁵ Justice Breyer, in contrast, has defended the traditional use of legislative history as an interpretive tool, albeit a tool with recognized limitations.¹⁶⁶

Yet, despite his disagreement with Justice Scalia on this point, Justice Breyer's position does not present a wholesale challenge to the principles that Justice Scalia espouses. The crux of the debate appears to be that Justice Breyer would prefer to employ the recognized tools of statutory construction depending on the facts of the particular case. The circumstances would dictate whether more or less weight was given to the legislative history in the context of the particular dispute. Justice Scalia would prefer a more uniform and mechanical application of the *Chevron* decision, and would happily abandon the use of legislative history in order to achieve this goal.¹⁶⁷

III. CONCLUSION

The addition of Justice Breyer to the Supreme Court will add another sympathetic ear towards the legal concerns of business persons and corporations. The basic legal principles that often underlie Justice Breyer's reasoning in business law cases will lead him to interpret the law so as to minimize the degree to which it interferes with business conduct in the marketplace. From a business law context, his nomination is one that might

165. See Gellhorn, *supra* note 142, at A19.

166. See Breyer, *supra* note 143, at 861-69; *cf. In re Evangelist*, 760 F.2d 27 (1st Cir. 1985). In this case, Justice Breyer considered whether a provision of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b) (1981), authorizing a shareholder to sue an investment company and its investment advisor for breach of fiduciary duty, should be tried in front of a judge or a jury. The plaintiff argued that the use of the word "damages" in the statute indicated that the plaintiff was entitled to "legal" remedies and thus had a constitutional right to a jury trial on his claim. *Evangelist*, 760 F.2d at 30. Justice Breyer held that the historical treatment of breaches of fiduciary duty as equitable claims, the legislative history of the statute indicating an intent to create an equitable remedy, and a persuasive Second Circuit opinion on the same issue all led to the conclusion that the plaintiff's claim was an equitable one and that there was no right to a jury trial. *Id.* at 29-31. In particular, Justice Breyer placed greater weight on the legislative history of the statute than he did on the plain statutory language.

167. See Gellhorn, *supra* note 142, at A20.

well have been acceptable to a Republican administration. One can presume that it is the moderating effect of Justice Breyer's respect for legislative intent and prior precedent, as well as his views on legal questions outside of the business area, that made him an attractive Supreme Court candidate to the Clinton Administration. In this regard, he is following in the footsteps of his immediate predecessor to the Court, Justice Ruth Bader Ginsburg. With these two additions to the Supreme Court, the model for a nominee to the "Clinton Court" has become apparent: a conservative to moderate approach to business law issues, coupled with a more liberal approach to social concerns.

