B. "The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $9.3 million to remove a small amount of highly diluted PCBs and 'volatile organic compounds' (benzene and gasoline components) by incinerating the dirt."

Not a "last little bit" (VOCs 870 ppm, average 87 according to IMC; 3/5 samples were greater than 50 PCBs, 900 F.2d 441).

The PCB left was not a small amount and was not highly diluted.

The VOCs left consisted of more than benezene and gasoline: acetone, arsenic, chloroform, creosol, toluene, trichloroethylene (which was found to be 3,000 times higher than the acceptable concentration in some of the wells), to name a few (comprehensive list at 630 Fed Supp 1361, 1383–90 (D.N.H. 1985)).

C. "But there were no dirt-eating children playing in the area there, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely."

A description of the site is found at 630 Fed Supp 1366. "The site is zoned rural residential according to the Kingston Zoning Ordinance," meaning "you can build a single family or a two story dwelling." Fed Supp 1000. "But the undisputed fact is that the site is zoned residential, which means that it may be developed for virtually any purpose." RB at 6.

There is no building there, but not because it is a swamp. "* * * IMBC's real estate witness stated that the site could have developed residentially but for the contaminate remaining on site, and explained that his conclusion concerning current development of the site was based on a view of the property during which he saw 'horrible looking water' and on the statement by IMC's counsel, after IMC's cleanup attempt, that the site was 'severely contaminated.'" RB at 7.

D. "The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000."

An IMC expert testified to this theory, 900 F.2d 440, but the Government disputed it in detail, "Allowing mere diffusion of VOCs in the soil rather than remediation would result in effectively condemning the site for use the foreseeable future, a 'remedy' plainly not permissible under Section 121 of CERCLA." See 42 U.S.C. 9621(b)(1) (strong preference for remedial action which "permanently and significantly reduces the volume, toxicity or mobility of the hazardous substance)." RB p. 7.

CONCLUSION

For me, and for many others concerned about occupational and environmental health and food safety, it is extremely disappointing that President Clinton was unable or unwilling to nominate someone with a more enlightened attitude toward the solution of these serious problems. Although stating that economic considerations are not as decisive in health, safety and environmental regulation, Judge Breyer's views, as expressed in this book, amount to an unfair and unwarranted bashing of the very federal agencies who are trying, to prevent toxic chemical-induced deaths and illnesses. I can only hope that, good listener that he is, Judge Breyer will listen to these concerns ad, to use his terms, become more influenced by the humanity of John Donne than by the corporate hand of Adam Smith, as appears to be the case at this time.

The CHAIRMAN. Thank you, Dr. Wolfe.

Mr. Constantine.

STATEMENT OF LLOYD CONSTANTINE

Mr. CONSTANTINE. Thank you, Senator. It is a pleasure to be back here again.

I oppose the nomination of Judge Breyer principally on the basis of his antitrust jurisprudence. One might ask why Judge Breyer's record in this area should be of substantial concern for the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe an understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to under-

standing his overall approach to the role of the judiciary in our society.

Antitrust scholars and practitioners widely recognize Judge Breyer to be among the major jurists revising and reinterpreting the antitrust laws according to one narrow school of economic thought.

In July 1990, I testified before the Commerce Committee concerning the capacity of antitrust law to address the problem of international trade predation. At that time I told Senators Gorton and Bryan that the antitrust laws had little remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the committee at that time. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison* while he reversed a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, MA.

On Tuesday, Judge Breyer said that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a price squeeze, which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price at which it sells electricity at retail. The remedy for this predatory practice is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices.

On Tuesday, Judge Breyer stated that he decided cases "one at a time" and that he did not "like to be professorial." However, in this decision, Judge Breyer expounds on many issues in cases not before the court. Although *Town of Concord* involved a price squeeze in a fully regulated industry, Judge Breyer went to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the soundness of Judge Learned Hand's classic price-squeeze analysis in the *Alcoa* case.

Judge Breyer then went on to unnecessarily expound to so-called single monopoly profit theory which, among neoclassical price theorists, is an article of faith. According to this theory, a monopolist will earn as much profit in a single market as it would if it extended its monopoly into a second market. Several conclusions flow from this theory. One is that in most cases the antitrust laws should not care if a monopolist extends his power from one market into another.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has set for cases which will come before him when he is on the Supreme Court. His opinion strongly predicts that Judge Breyer will vote to overturn the per se rule of illegality in trying cases. He will reject the rule against price squeezes in nonregulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market, are either competitively neutral or procompetitive. Finally, when the Supreme Court inevitably resolves the split in the circuits on whether monopoly leveraging constitutes a violation of section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's brooding concern for the rights and prerogatives of monopolists is a theme in many of his decisions.

For example, in the *Barry Wright* case, Judge Breyer found that a monopolist who made shock absorbers for the nuclear power plant construction industry did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 to 30 percent in response to the entry of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100-percent forfeiture of the contract price upon cancellation.

Taking the alleged exclusion acts one at a time, he ruled that none of them violated the antitrust laws. But this piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's brilliant analysis in *Alcoa.* An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe Machinery,* where, again, a series of separately lawful actions were held to collectively constitute illegal acts of monopolization.

Judge Wyzanski's famous statement still resonates today. He said:

> The dominance of any one enterprise inevitably * * * accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best.

In contrast, Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counterintuitive and contrary to the basic purpose of the antitrust laws.

In *Barry Wright,* the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which most antitrust judges consider lawful. But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers' incremental costs were also not predatory.

Again, in the *Kartell* case, Judge Breyer nullified a district court finding——

The CHAIRMAN. Excuse me, Mr. Constantine. You have gone way over, and I am in a bind. I have 2 minutes to get over there to vote. I am going to have to end your statement here. We will come back with Professor Estes. You can conclude when I come back, but I will be gone. There are going to be two votes back-to-back. I have 2 minutes to make this vote. I will vote and come back, and then we will go to Professor Estes and questions.

[Recess.]

Senator HATCH [presiding]. Mr. Constantine, why don't you conclude?

Mr. CONSTANTINE. OK. Well, thank you, Senator. I was just getting into finishing up.

As I was saying, in the *Kartell* case, Judge Breyer nullified a district court finding that Blue Shield, with a 74-percent share of the health insurance market, did not violate the antitrust laws by adopting a practice which fixed the prices received by virtually all

Massachusetts physicians. Judge Breyer honestly believes that, once again, a monopolist can be counted on to deliver lower prices.

What is totally missing from this decision—indeed, missing from all of Judge Breyer's decisions—is healthy skepticism about the long-term benefits of monopoly power, a skepticism which is the very core of the Sherman Act. Also missing is recognition of just how high and escalating were health care prices in an environment characterized by dominant rather than competing third-party payers.

To illustrate his method in *Kartell,* Judge Breyer compared buying health care to buying a fleet of taxicabs. Judge Breyer is undoubtedly a brilliant man, but much of the real world and the real marketplace is alien to him. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law when he is constrained only by his own sense of what is economically efficient.

In concluding, I would like to just briefly talk about the last antitrust decision by Judge Breyer in March of 1994, *Caribe BMW.* This was the first time in his career that he found for a plaintiff in an antitrust case. The decision is the most disturbing of all Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout was motivated by the widely known fact that he was under consideration for the next position on the Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act because BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to lower Caribe's retail prices by engaging in maximum vertical price fixing. It is true that maximum vertical price-fixing violates the law. However, Judge Breyer stretched as hard for the plaintiff, as he traditionally does for the defendant. It is also true that the rule against maximum vertical price fixing and the Robinson-Patman Act are the two most highly criticized antitrust rules. They are criticized because they usually prevent firms from lowering prices.

Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. So the result in this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMW's at lower prices to some of its customers and simultaneously being prevented from selling BMW's at a higher price to some of its customers. The context, timing, and result in this case exemplifies a degree of opportunism and cynicism which is disturbing.

I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way Judge Breyer approaches these vitally important cases in the future.

Thank you very much, Senator.

[The prepared statement of Mr. Constantine follows:]

PREPARED STATEMENT OF LLOYD CONSTANTINE

Chairman Biden and members of the Committee. Thank you for the opportunity to testify again, in this instance concerning the nomination of Judge Stephen Breyer to be an Associate Judge of the United States Supreme Court.

I am an antitrust litigator who represents plaintiffs and defendants including "Fortune 500" companies, small firms and groups of consumers.[1] I teach Antitrust Law at Fordham University School of Law. I have served as New York State's chief antitrust enforcer,[2] Chairman of the Task Force which coordinates antitrust enforcement for all 50 states,[3] Chairman of the New York State Bar Association's Antitrust Law Committee and as member of the Council of the American Bar Association Section of Antitrust Law.

I have devoted my professional career to antitrust law because I believe that along with civil rights and liberties, antitrust is at the center of our free and progressive society and has been central in making the United States the strongest and finest nation in the world.

I oppose the nomination of Judge Breyer. I do so principally on the basis of his antitrust jurisprudence. Given the fact that the Supreme Court typically renders only two to four antitrust opinions each year, among more than 150 full opinions, one might ask whether Judge Breyer's record in this area should be a substantial, let alone predominant, concern of the Senate. I think it should for several reasons.

Judge Breyer is a leading antitrust scholar and jurist who has written many important decisions interpreting our competition laws. I believe a sober and dispassionate understanding of the way Judge Breyer approaches his role as a judge in antitrust cases is crucial to understanding his overall approach to the role of the judiciary in our society.

Antitrust law still has the capacity to be what the Supreme Court said it was, that is, "the Magna Carta of free enterprise."[4] However, antitrust is *not* that cornerstone of economic freedom today, because recent administrations and the federal judiciary have openly disregarded the explicit purpose and meaning of the antitrust laws, and reinterpreted them in accordance with one extremely narrow view of neoclassical price theory. Antitrust has been trivialized in what the scholar Frederick Rowe has termed "The Faustian pact between law and economics,"[5] a pact which has spread beyond competition law into the interpretation of environmental law and even the law of civil rights and civil liberties.

Antitrust scholars and practitioners widely recognize Judge Breyer to be, along with Judges Bork, Posner and Easterbrook, the mayor jurists revising and reinterpreting the antitrust laws according to one school of economic thought. Please allow me to illustrate. In July 1990 I testified before the Commerce, Science and Transportation Committee concerning the capacity of antitrust law to address the problem of international trade predation. I told Senators Gorton and Bryan that the antitrust laws had little deterence or remedial value for this problem because they had been reduced to trivial laws primarily concerned with a trivial debate about a little triangle, which I offered to draw for the Committee. Two months later, Judge Breyer actually drew that triangle in his opinion in *Town of Concord* v. *Boston Edison*,[6] while reversing a $39 million verdict for Senator Kennedy's constituents in Concord and Wellesley, Massachusetts. In his colloquy with Senator Metzenbaum on Tuesday, Judge Breyer repeatedly stated that he nullified the jury verdict in order to lower electricity prices to all consumers in Massachusetts. This is clearly not the case. *Town of Concord* involved a "price squeeze" which occurs when a power company sells electricity at a wholesale price which is just below, at, or sometimes above the price of which it sells electricity at retail. The remedy for this predatory and exclusionary practice, first exhaustively analyzed by Judge Learned Hand in the landmark *Alcoa* decision,[7] is not, as Judge Breyer suggested, to raise retail prices but to lower wholesale prices. This would have the dual benefit of lowering all prices and increasing competition at the retail level.

More disturbing than the narrow result reached in *Town of Concord*, and the disingenuous manner in which Judge Breyer responded to Senator Metzenbaum's questions about his decision, is Judge Breyer's mode of analysis in this lengthy opinion. On Tuesday Judge Breyer stated that he decided cases "one at a time" and that he didn't "like to be professorial." Please Senators, read *Town of Concord* and judge for yourselves. In this decision Judge Breyer expounds on many issues and cases *not* before the court. Although *Town of Concord* involved what Judge Breyer considers the distinct case of a price squeeze in a fully regulated industry, Judge Breyer went

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[2] Assistant Attorney General In Charge of Antitrust, Office of the Attorney General, New York State, 1980–1991.

[3] Chairman Antitrust Task Force National Association of Attorneys General, 1985–1988.

[4] *United States* v. *Topco Associates*, 405 U.S. 596 (1972).

[5] Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics," 72 Geo. L.J. 1511 (1984).

[6] 915 F.2d 17 (1st Cir. 1990).

[7] *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).

to great lengths to call into question the settled law involving price squeezes in unregulated industries and to criticize the economic soundness and judicial administrability of Judge Hand's price squeeze analysis in *Alcoa*. Judge Breyer then went on to unnecessarily expound the so-called "single monopoly profit" theory which among neo-classical price theorists is an article of faith. According to this theory a monopolist will earn as much profit in a single market as it would if it extended its monopoly through leverage, or predation into a second market. The conclusions which flow from this theory are several. One is that in most cases the antitrust law should not care if a monopolist to do this in certain circumstances. Third, since the monopolist won't make any greater profit by doing this, evidence that it has done so is really just a mirage, for a rational monopolist would not try to extend its power if it would not be profitable.

Town of Concord sets forth a significant part of the agenda which Judge Breyer has for cases which will come before him on the Supreme Court. His exposition of the single monopoly profit theory strongly predicts that Judge Breyer will vote to overrule established antitrust law in several cases. He will vote to overturn the *per se* rule of illegality in tying cases, involving firms with market power in the typing product. He will probably reject the rule against price squeezes in on-regulated industries. He will find that vertical mergers, which extend a dominant position from one market to an upstream or downstream market is either competitively neutral or pro-competitive. Finally, when the Supreme Court inevitably resolves the current split in the circuits on whether monopoly leveraging constitutes a violation of Section 2 of the Sherman Act, Judge Breyer will find that there is no violation.

Judge Breyer's concern for the rights and prerogatives of lawful monopolists is a constant theme in several of his antitrust decisions.

For example, in *Barry Wright Corp.*, v. *ITT Grinnell Corp.*,[8] Judge Breyer found that a monopolist who made shock absorbers for nuclear power plant construction did not violate the antitrust laws. Judge Breyer found that the defendant had 94 percent of the market; it had introduced selective discounts of 25 percent to 30 percent in response to the entry into the market of a new competitor; and it employed contracts which required customers to buy their total estimated needs and further required 100 percent forfeiture of the contract price upon cancellation. Taking the alleged exclusionary acts one at a time, he ruled that none of them violated the antitrust laws. This piecemeal method of analysis avoided the logical conclusion that acts which viewed separately as benign may collectively be extremely anticompetitive. This is the lesson of Judge Hand's classic analysis of Alcoa's dominance of the aluminum industry, which resulted from a series of practices which did not separately violate the law, but which used together maintained a monopoly. An example closer to Judge Breyer's home was Judge Wyzanski's classic decision in *United Shoe*,[9] where again a series of separately lawful actions were held to collectively constitute acts of monopolization in violation of Section 2 of the Sherman Act. Judge Wyzanski's famous statement in that case still resonates today: "the dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideas of an open society founded on the faith that tomorrow will produce a better than the best." This completely alien to Judge Breyer's antitrust jurisprudence, which he articulates as a concern about lower prices. However, over and over again Judge Breyer looks to monopolists or dominant firms to produce lower prices, a notion which is both economically counter intuitive, and more important, contrary to the basic purpose of the antitrust laws.

Before leaving *Barry Wright*, I would point out that in that decision, once again, Judge Breyer reached out to decide cases not yet before his Court. In *Barry Wright*, the plaintiff challenged as predatory, prices which were above the defendants' average total costs, a situation which almost all antitrust scholars, judges and practitioners, I among them, would consider lawful and non-predatory. (Leaving aside the issue of the syncrgistic effect that this pricing had when used in combination with the other exclusionary practices in that case.) But for no reason other than serving a separate agenda, Judge Breyer went on to decide that prices that were below average total cost but above the producers incremental costs were also not predatory. Recall what Judge Breyer told you Tuesday about the judge's duty to only decide actual cases and controversies.

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[8] 724 F.2d 227 (1st Cir. 1983).

[9] *U.S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Again in the *Kartell*[10] case which Judge Breyer advanced as exemplifying his goal of lowering prices, Judge Breyer nullified a district court finding that Blue Shield, with a 74 percent share of the relevant health insurance market, did not violate the antitrust laws by adopting a ban on "balance billing," which effectively fixed the prices received by virtually all Massachusetts physicians accepting Blue Shield patients. I believe that Judge Breyer honestly believes that he did the right thing in that case, and he believes once again a monpolist can be counted on to deliver lower prices. What is totally missing from this decision, and indeed missing from all of Judge Breyer's decisions, is healthy skepticism about the long-term benefits of monopoly power, a skepticism which *is* the very core of the Sherman Act. Also missing is any recognition of just how high and out of control were healthcare prices in an environment characterized by dominant rather than competing third party payers. Also missing from the decision is any concern for the quality of healthcare which may be a paramount concern in this area. Antitrust not only demands low prices but high quality. Indeed, to illustrate his method in *Kartell*, Judge Breyer resorts to an analogy about the buyer of a fleet of taxicabs[11] and observes that if Blue Shield's practices were truly anticompetitive, there would not be a steadily increasing supply of doctors in Massachusetts.[12] If you don't understand the logic of this supply and demand argument, equating the purchase of healthcare with purchase of a fleet of cabs, please refer to Judge Breyer's diagram at Appendix B of his opinion in *Town of Concord*. Judge Breyer is undoubtedly a brilliant, good and honest man, but much of the real world and real marketplace is alien to him. One of the reasons many people voted for President Clinton was his pledge to appoint to the Supreme Court, people with a broader background. Broader than people like Judge Breyer who have gone from law school to clerkship, to law faculty to the Court, with a segue to position with this Committee. I fear that the narrow ideological focus that Judge Breyer has demonstrated consistently in his antitrust opinions will typify his approach to other areas of the law, when as a Supreme Court Justice he is constrained only by his own sense of what is logical and economically efficient.

The last case I will address is Judge Breyer's March 1994 decision in *Caribe BMW*,[13] when for the first time in his career he found for a plaintiff in an antitrust case. This decision in my opinion is the most disturbing of all of Judge Breyer's rulings. Only Judge Breyer knows whether this dramatic turnabout in antitrust ideology and mode of analysis was motivated by the wisely known fact that he was under consideration for the next seat on the High Court.

Caribe BMW involved a car dealer in Puerto Rico which complained that it was victimized by two violations of the antitrust laws. First, it said it was the victim of price discrimination violative of the Robinson-Patman Act. Caribe said that BMW sold cars to other dealers at a lower price than it received. Caribe also claimed that BMW was trying to *lower* Caribe's retail prices by engaging in *maximum* vertical price fixing. It is true that maximum vertical price fixing violates the law. However, Judge Bryer stretched as hard for the plaintiff, as he traditionally does for the defendant, to find a plausible violation of the law here. It is also true that the rule against maximum vertical price fixing is one of the two most highly criticized antitrust rules. It is criticized because it often prevents firms from lowering prices, which Judge Breyer articulates as the antitrust laws' appropriate core concern. Senator Metzenbaum will not that his bill to codify the *per se* rule against vertical price fixing has never included the maximum vertical price fixing offense.

In *Caribe*, Judge Breyer also reversed the district court's dismissal of the Robinson-Patman Act claim. Robinson-Patman is the other of the two most highly criticized provisions of antitrust, again because it allegedly raises prices. To sustain the Robinson-Patman claim, Judge Breyer had to break new ground, applying, I believe correctly, the rule of the *Copperweld*[14] case to the Robinson-Patman Act. The result tin this case was that Judge Breyer has allowed Caribe to complain that it is being prevented from selling BMWs at a low price to some of its customers because of price discrimination and simultaneously being prevented from selling BMWs at a higher price to some of its customers because of maximum vertical price fixing. The context, timing and result in this case exemplifies a degree of cynicism which is disturbing.

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[10] *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 749 F. 2d 922 (1st Cir. 1984).
[11] 749 F. 2d at 929.
[12] 749 F. 2d at 927.
[13] *Caribe BMW, Inc.* v. *Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745 (1st Cir. 1994).
[14] *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (19845).

Judge Breyer will be confirmed. I hope that the concerns raised by Senator Metzenbaum and the concerns voiced here may have some small effect on the way he approaches these vitally important cases in the future.

Senator HATCH. Mr. Estes.

STATEMENT OF RALPH ESTES

Mr. ESTES. Senator Hatch, Senator DeConcini, Senator Specter, I know there is important business occupying the Senate today, but I do wish that more members of the committee had the opportunity to hear the testimony of this panel, because coming late though it does in the hearings, it is very important testimony for the future of this country. And I do appreciate the opportunity to testify.

My testimony is based entirely on my reading of Judge Breyer's writings. I do not know the gentleman. I do not even know if I have seen him. His writings on the surface present an appearance of objectivity. They conceal much, but as you read them in the aggregate, they reveal much.

Throughout his writings, you can see in Judge Breyer an allegiance to business and corporations that could, through his opinions as a Supreme Court Justice, do great harm to our citizens and to our Nation. He asserts he does not favor complete deregulation, but he does want to free corporations from regulatory constraints, and he believes that in many more cases the market will appropriately constrain corporate behavior, if, indeed, as he seems to doubt, it needs much constraining.

Judge Breyer's ideas on corporate regulation are grounded in an erroneous free-market view of social costs. In this marketplace of Judge Breyer's, there is no distinction between corporations and people. To the judge, the Disney Corp. and the homeowner in Manassas, VA, are equal players in the economic arena, as are a woman who may have needed silicone breast implants and the Dow Corning Co.

In his economic calculus, the following are mathematically equal: On the one hand, a healthy, undamaged, whole child; on the other hand, a brain-damaged child, brain-damaged for life from a hot dose of DPT vaccine who has been awarded $25 million or whose family has been awarded $25 million to pay for round-the-clock care for the rest of that child's life. Those are economically equivalent in Judge Breyer's economic calculus.

Judge Breyer would prefer not to direct corporations to behave responsibly. Instead, he favors tax breaks and marketable, special rights, such as pollution rights, to try to get them to behave responsibly. Put in more down-to-earth terms, what he is talking about is bribing corporations to keep them from doing harm.

In this kind of approach, Judge Breyer, I am afraid, fails to show a real understanding of the historical basis in this country for chartering corporations. A good study of history would show him that corporations were created in the first place as servants of the people and of the society, and that a corporate charter is a grant of special privilege, conveyed by the people through their State, in expectation of benefits to society.

If Judge Breyer knew this history, I think he would support a public policy that demands that corporations behave responsibly in the first place, instead of one that tries to get them to do good—