Neither Liberal Nor Laissez Faire: A Prediction of Justice Ginsburg's Approach to Business Law Issues

Edward A. Fallone
Marquette University Law School, edward.fallone@marquette.edu

Follow this and additional works at: http://scholarship.law.marquette.edu/facpub

Part of the Law Commons

Publication Information

Repository Citation
http://scholarship.law.marquette.edu/facpub/532

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
NEITHER LIBERAL NOR LAISSEZ FAIRE: A PREDICTION OF JUSTICE GINSBURG'S APPROACH TO BUSINESS LAW ISSUES

Edward A. Fallone

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 279

II. BASIC LEGAL PRINCIPLES .......................... 281
   A. Avoiding Expansive Applications of Regulatory
      Restrictions on Corporate Activity .................. 281
   B. Showing Respect Toward Activity That Is
      Designed to Increase Economic Efficiency ....... 288
   C. Deferring to Decisions of Administrative Agencies
      Acting Within Their Sphere of Authority .......... 295

III. CONCLUSION ............................................ 298

I. INTRODUCTION

On August 3, 1993, the United States Senate voted overwhelmingly to confirm President Clinton's nomination of Ruth Bader Ginsburg to the Supreme Court. In contrast to the confirmation hearings of some recent nominees to the Court, the Senate Judiciary Committee's questioning of Justice Ginsburg was marked by polite inquiry rather than by efforts to derail the nomination. Freed from the specter of an aggressive exam-
ination of her judicial philosophy, Justice Ginsburg answered the Committee's questions cautiously and, at times, evasively.\(^3\) One consequence of the Senate Judiciary Committee's restraint during the confirmation hearings is that Justice Ginsburg will join the Supreme Court without having given a clear indication of her legal views on a number of subject areas. In particular, Justice Ginsburg revealed little about her views on legal issues that concern the business community.

For suggestions as to how Justice Ginsburg might rule on business-related cases, one must turn to her prior judicial record. Indeed, during the hearings, Justice Ginsburg stated that her prior judicial opinions and academic writings were "the most tangible, reliable indicator of [her] attitude, outlook, approach and style."\(^4\) Admittedly, it is often perilous to speculate on the future voting patterns of Supreme Court Justices based on their previous legal opinions, experience, and party affiliation.\(^5\) However, an examination of Justice Ginsburg's record does provide some insights into her likely approach to business-law issues.

This article argues that Justice Ginsburg's rulings during her years on the D.C. Circuit suggest that while on the Supreme Court she will take a "moderate" to "conservative" approach to issues that concern corporate America, despite the fact that she may hold more liberal views on many social issues. Justice Ginsburg's opinions dealing with antitrust, securities, and regulatory issues during her tenure on the D.C. Circuit reveal that she has often adhered to certain basic "conservative" legal principles. However, as the following discussion illustrates,

---

\(^3\) See id.

\(^4\) Hearings on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Committee on the Judiciary, U.S. Senate (July 20, 1993) [hereinafter Hearings on the Ginsburg Nomination] (opening statement of Judge Ginsburg) available in LEXIS, Legis Library, Fednew file.

\(^5\) Chief Justice Earl Warren, for example, turned out to be far more liberal than his prior political record would have suggested or than the President who appointed him — Dwight Eisenhower — would have hoped; Justice David Souter, in his brief stint on the Court, also has been significantly more liberal than might have been expected. See generally Fox Butterfield, Growing as a Justice, Unchanged as a Man, CHICAGO DAILY LAW BULLETIN, July 6, 1992, at 2; Nancy E. Roman, Friendly Ideology Often Vanishes With High Court Seat, THE WASHINGTON TIMES, July 5, 1992, at A1.
Justice Ginsburg is not doctrinaire, nor is she a conservative ideologue on business matters. On the contrary, she has shown herself to be a pragmatic jurist who occasionally adopts more "liberal" legal principles in business cases if such a position is warranted by the particular facts.

II. BASIC LEGAL PRINCIPLES

Examination of Justice Ginsburg's opinions on business and regulatory issues indicates that three bedrock legal principles consistently inform her decisions of these issues. These principles are that: 1) expansive application of regulatory restrictions on corporate conduct should generally be avoided; 2) respect should be shown to business activity that is designed to increase economic efficiency; and 3) deference generally should be shown to the decisions of administrative agencies acting within their sphere of authority. All three of these principles are typically associated with a "conservative" judicial philosophy. However, Justice Ginsburg has not applied these principles in every case. She has been willing to make exceptions when applying these precepts would conflict with other fundamental (typically constitutional) principles of particular importance to her (protection of free speech and access to the federal courts for example). For this reason, it is appropriate to characterize Justice Ginsburg as "moderate to conservative" — rather than purely "conservative" — on business and regulatory issues.

A. Avoiding Expansive Application of Regulatory Restrictions on Corporate Activity

In several cases, Justice Ginsburg has declined to apply regulatory restrictions on business activity expansively. Instead, where she did not find clear indications that Congress intended a broad application of the statute at issue, Justice Ginsburg tended to adopt a relatively narrow interpretation. Under this approach, less corporate conduct falls under statutory or regulatory restrictions than critics of that conduct or than government regulatory agencies would generally prefer.
For example, in Roosevelt v. E.I. Du Pont de Nemours & Co., Justice (then D.C. Circuit Judge) Ginsburg interpreted the scope of the federal proxy rules in a manner that allows publicly held corporations to omit certain types of shareholder proposals from their proxy materials. The case was brought by a Du Pont shareholder who wished to have the company place two proposals — only one of which warrants discussion here — on the ballot at the next shareholder meeting. Although Du Pont had publicly announced its intention to stop manufacturing chlorofluorocarbons within a few years, the plaintiff had sought a shareholder vote on a proposal that would have required an earlier phase out than management preferred. The company, in response, refused to place the shareholder's proposal on the ballot, claiming it was entitled to rebuff the shareholder under a Securities and Exchange Commission ("SEC") proxy rule that allowed it to exclude proposals dealing with "the conduct of . . . ordinary business operations." Justice Ginsburg's opinion first held that the plaintiff had an implied private right of action to sue in federal court for a violation of this proxy rule; this right had been assumed for years but no court before had ever actually held it to exist. Justice Ginsburg then rejected the plaintiff's claims, affirming the district court. Justice Ginsburg did not address the broader question of whether the company's decision to produce or not to produce chlorofluorocarbons is one relating to the conduct of ordinary business operations. Had that been the issue, she may well have held that a shareholder proposal raising it went beyond ordinary business operations, and that management, therefore, could not exclude the proposal under Rule 14a-8. Instead, Justice Ginsburg held that the question of whether the company should cease chlorofluorocarbon production immediately, or in one year's time as management wanted — a mere timing question — is a matter of ordinary business operations that management need not submit to a shareholder vote.

---

7 Id. at 425.
8 Securities and Exchange Commission Rule 14a-8(c)(7), 17 C.F.R. § 240.14a-8(c)(7). See 958 F.2d at 417.
9 958 F.2d at 425.
10 See id.
11 Id. at 428.
Justice Ginsburg adopted this interpretation of the Rule 14a-8 exclusion even though the SEC, the agency that promulgated the federal proxy rules, had taken the position that the exclusion should be read narrowly and should require a corporation to include a proposal such as this one in its mailings to shareholders. The SEC argued that the timing of corporate conduct fell within the ordinary business operations exclusion under Rule 14a-8 only if the conduct itself fell within that exclusion. The SEC defines "ordinary business operations" restrictively to exclude actions that by their nature have significant policy or economic implications. Such an interpretation would have had the dual effect of promoting the micromanagement of publicly held corporations by their shareholders and expanding the number and type of shareholder proposals that fall within the regulatory authority of the SEC.

In rejecting the SEC approach, Justice Ginsburg expressed an appreciation of Du Pont management's role in making the day-to-day business and technical decisions necessary to implement a phase-out. Her opinion is a cautious one that attempts to strike a balance between allowing shareholders to place matters of great concern on the ballot at annual meetings and preventing excessive interference by shareholders in the corporation's day-to-day operations. The ruling preserves management's ability to exclude shareholder proposals that attempt to enable shareholders to micromanage the company's implementation of policy.

Justice Ginsburg also has been suspicious of expansive interpretations of regulatory restrictions in the antitrust area. Thus, in FTC v. Weyerhaeuser Co., she reviewed a challenge to a corporate merger leveled under Section 13(b) of the Federal Trade Commission Act. Section 13(b) provides that a preliminary injunction "may be granted" by a district court if the Federal Trade Commission ("FTC") is able to show a likelihood of

12 The position of the SEC as amicus curiae differed from the position of its staff, which had earlier issued two no-action letters stating that it would not recommend enforcement action against Du Pont if the latter excluded the proposal under Rule 14a-8. See id. at 426-427.

13 Id. at 426.

14 Id. at 427-28.


ultimate success in an action that alleges that the conduct at issue violates the antitrust laws.\textsuperscript{17}

In \textit{Weyerhaeuser}, the FTC brought a Section 13(b) action alleging that the planned merger of two corrugated-container manufacturers on the West Coast would increase concentration in the relevant market and thereby decrease competition.\textsuperscript{18} The district court found that the FTC had met its burden of demonstrating a likelihood of success on the merits but declined to issue an injunction enjoining the challenged merger. Instead, the district court imposed a “hold separate order,” allowing the merger to go forward under certain specified conditions.\textsuperscript{19} Specifically, the hold separate order allowed one manufacturer to acquire the other’s assets but required that one of the acquired company’s production mills be preserved as a separate entity. The district court determined that, should the FTC succeed at full trial on the merits, the forced divestiture of this particular mill would be an adequate remedy.\textsuperscript{20}

On appeal before the D.C. Circuit, the FTC argued that, once the district court had concluded that the FTC was likely to succeed in showing the merger’s anti-competitive effect at trial, the district court was precluded from allowing the merger to proceed.\textsuperscript{21} Justice Ginsburg, however, affirmed the district court’s order. She rejected the FTC’s argument that hold separate orders are not authorized by Section 13(b), finding nothing in the statute’s language or legislative history to prohibit such an order.\textsuperscript{22} Rather, Justice Ginsburg held that a district court possesses an equitable power to issue a hold separate order in a Section 13(b) proceeding when such an order is merited by the particular facts of the case and the hold separate order can realistically be expected to safeguard adequate relief.\textsuperscript{23}

Justice Ginsburg’s ruling preserves a defense in a Section 13(b) proceeding for the parties to a challenged merger. Even

\textsuperscript{17} Id.
\textsuperscript{18} Id., 665 F.2d at 1074.
\textsuperscript{19} Id. at 1075.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 1083.
\textsuperscript{22} Id. at 1084.
\textsuperscript{23} Id. at 1085. \textit{But cf:} FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1346 (4th Cir. 1976) (private equities are not to be considered in granting or withholding injunctive relief under Section 13(b)).
where the FTC can show a likelihood of success on the merits, the parties can now avoid an injunction against the merger by arguing that the equities support allowing the merger to proceed subject to a hold separate order. In essence, she would allow a merger that may substantially lessen competition in the industry to proceed — despite Section 13(b) — subject only to the possibility that the district court would later order the merged entity to divest itself of some portion of its business. The FTC interpretation, by contrast, would have prohibited the merger’s consummation in the first place. Justice Ginsburg’s interpretation of Section 13(b) is less expansive than the interpretation urged by the FTC and, therefore, allows corporations a greater degree of flexibility in pursuing mergers and acquisitions.

That Justice Ginsburg utilizes an interpretive approach that keeps regulations from being applied expansively is further suggested by U.S. v. Baker Hughes Inc.\textsuperscript{24} Although Justice Ginsburg did not write the opinion for the three judge panel of the D.C. Circuit that heard the case, she joined Justice (then-Judge) Clarence Thomas’ opinion harshly criticizing\textsuperscript{25} the Justice Department’s proposed legal standard for establishing that a merger or proposed merger violated Section 7 of the Clayton Act.\textsuperscript{26} As described below, the standard adopted by Justice Thomas makes it significantly more difficult for the Justice Department to obtain a permanent injunction halting a corporate merger.

In Baker Hughes, a Finnish manufacturer of hardrock hydraulic underground drilling rigs (“HHUDRs”) proposed to acquire the French subsidiary of an American company.\textsuperscript{27} The subsidiary also manufactured HHUDRs. The Justice Department sought a permanent injunction to prevent the merger on the ground that it would substantially lessen competition in the United States HHUDR market in violation of Section 7.\textsuperscript{28}

\begin{enumerate}
\item \textsuperscript{24} 908 F.2d 981 (D.C. Cir. 1990).
\item \textsuperscript{25} Justice Thomas wrote: “We find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case law, and in the government’s own Merger Guidelines.” 908 F.2d at 983.
\item \textsuperscript{26} 15 U.S.C. § 18 (1988).
\item \textsuperscript{27} 908 F.2d at 982.
\item \textsuperscript{28} Id.
\end{enumerate}
At a bench trial, the Justice Department introduced market-share statistics sufficient to establish a presumption that the merger would lead to undue concentration in both the relevant product market (defined as three types of HHUDRs and their associated spare parts and components) and the relevant geographic market (defined as the geographic United States).\textsuperscript{29} The burden of rebutting this presumption then shifted to the defendant corporations. The district judge found that the defendants had successfully rebutted the presumption that competition may be substantially lessened by showing three things: (1) there was an absence of significant barriers to entry into the relevant market; (2) the statistics underlying the government's prima facie case were misleading; and (3) HHUDR consumers were relatively sophisticated.\textsuperscript{30} The district judge, therefore, denied the government's request for a permanent injunction.\textsuperscript{31}

On appeal, the Justice Department argued that, once a presumption is established that competition may be substantially lessened, the defendant in a Section 7 proceeding can rebut that presumption only by introducing evidence of an absence of significant barriers to entry into the market and that the entry by competitors would be "quick and effective."\textsuperscript{32} In addition, the Justice Department argued that a defendant can rebut the government's prima facie case only if the defendant's evidence is sufficient to constitute a clear showing that after the merger a competitor could make a quick and effective entry into the market.\textsuperscript{33} Justice Thomas dismissed these contentions.

First, Justice Thomas held that nothing in either Section 7 or prior caselaw restricts a defendant to one type of evidence in rebutting a prima facie case;\textsuperscript{34} instead, no one type of evidence is dispositive, and a variety of factors, constituting the totality of the circumstances, are relevant in determining whether the defendant's evidence successfully rebuts the presumption that competition may be substantially lessened.\textsuperscript{35} Second, Justice Thomas held that where the defendant does introduce evidence

\textsuperscript{29} Id. at 983.
\textsuperscript{30} Id. at 984.
\textsuperscript{31} Id. at 982.
\textsuperscript{32} Id. at 983.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 984-86.
\textsuperscript{35} Id. at 985.
that entry into the relevant market is relatively easy, that evidence will rebut the presumption if it shows that future entry into the market by a competitor is likely.\textsuperscript{36} According to Justice Thomas, there was nothing in prior judicial interpretations of Section 7 that required the defendant to establish that the future entry would be "quick and effective" and not just likely. Finally, Justice Thomas reviewed relevant Supreme Court decisions and concluded that, despite the onerous evidentiary burdens that the Court had imposed on defendants in the early Section 7 cases, the Court's more recent practice had been to require the defendant show only that the government's prima facie case did not accurately predict the merger's effect on future competition.\textsuperscript{37} This is a significantly easier burden for the defendant to meet than the Justice Department's proposed alternative (which required the defendant to affirmatively show that the merger will not substantially lessen competition in the relevant market).

Justice Thomas' opinion enhances an antitrust defendant's ability to rebut statistical evidence that a proposed merger may reduce competition. Prior to the \textit{Baker Hughes} decision, it was at least arguable that the government could obtain an injunction halting a merger where the government's sole type of evidence was a statistical analysis suggesting that the merged-entity would possess a greater market share than was possessed in sum by the two individual companies prior to the merger.\textsuperscript{38} Since \textit{Baker Hughes} was decided, such evidence will rarely suffice without more,\textsuperscript{39} defendants may now overcome a prima facie case built on market share statistics in a variety of ways, from merely poking holes in the statistics themselves to

\textsuperscript{36} Id. at 987-89.

\textsuperscript{37} Id. at 99-91 (citing U.S. v. General Dynamics, 415 U.S. 486 (1974)).


producing evidence that new competitors may enter the relevant market.

By requiring the government to produce more decisive evidence than market share statistics in order to prevail, the Baker Hughes decision effectively prevents the government from using these statistics as its sole criterion in making Section 7 enforcement decisions. Under the Baker Hughes court's interpretation, Section 7's prohibition of anti-competitive mergers does not block a merger simply because the merger results in a company that has significantly increased market share. Like the Roosevelt and Weyerhaeuser opinions authored by Justice Ginsburg, the Baker Hughes opinion, in which she joined, rejects proffered statutory interpretations that would result in the expansive application of regulatory restrictions to corporate activity.

B. Showing Respect Toward Activity That is Designed to Increase Economic Efficiency

Jurists who adhere to the "Chicago School" of law and economics use economic efficiency, often defined in terms of wealth maximization, as the principal criterion for judging the desirability of legal rules. In this view, legal rules that promote economic efficiency are preferable to rules that do not have

40 Justice Thomas wrote: "The government does not maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery." 908 F.2d at 992 n.13.

41 See also Fedway Associates, Inc. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms, 976 F.2d 1416, 1420-24 (D.C. Cir. 1992) (Ginsburg, J.) (declining to adopt Bureau of Alcohol, Tobacco and Firearms' interpretation of the Federal Alcohol Administration Act that would have prohibited certain wholesale sales promotions).

such a result. Although Justice Ginsburg has not declared allegiance to a legal method that relies principally on economic analysis, she has written or joined opinions that exhibit respect toward conduct that is designed to increase efficiency.

For example, in *One-O-One Enterprises, Inc. v. Caruso,* Justice Ginsburg held that an integration clause in a stock option contract barred securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934. The securities fraud claims at issue were based on the defendants' allegedly fraudulent representations and omissions during negotiations. These representations were alleged to be material because they concerned contemplated future conduct on the defendants' part that would help determine the option contract's value. The integration clause at issue provided that the contract "superseded any and all previous understandings and agreements" among the parties. In denying the plaintiffs' securities fraud claims, Justice Ginsburg reasoned that the integration clause made "any reliance by plaintiffs on prior representations . . . unreasonable and any failure by defendants to disclose [their contemplated future conduct] immaterial." She also commented that, if the plaintiffs were allowed to recover under such circumstances, "contracts would not be worth the paper on which they were written." Her opinion, therefore, does not allow one party to resort to non-contractual remedies for misrepresentation, such as those contained in the rules promulgated under Section 10(b), when the parties' written agreement disavows the misrepresentation.

Although Justice Ginsburg did not explicitly invoke economic efficiency in *Caruso,* her reasoning is consistent with a view

---

44 848 F.2d 1283 (D.C. Cir. 1988).
46 *Id.* at 1286.
47 *Id.*
48 *Id.*
49 *Id.* (quoting Tonn v. Philco Corp., 241 A.2d 442, 445 (D.C. 1968)).
that enforcing contracts according to their terms is, at least generally, a more efficient means of policing commercial dealings than is allowing a party resort to the federal securities laws. The legal rule adopted by Justice Ginsburg, giving the written agreement priority over duties imposed on the seller by Section 10(b), is efficient because it allows individuals to make decisions in accordance with their perception of their own self-interest. Many law and economics theorists would applaud the result in Caruso on the theory that the legal system functions more efficiently when it enforces such freely-made decisions than it does when it ignores them and attempts to reconstruct a more “equitable” bargain between the parties.50

Similarly, in Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,61 Justice Ginsburg joined in an opinion by Judge Robert Bork holding that a van line’s refusal to deal with certain local agents was not a violation of the antitrust laws. Judge Bork’s opinion reasoned that the refusal to deal was intended to enhance the van line’s efficiency.” The resulting efficiency, combined with the negligible anti-competitive effects of the refusal, led Judge Bork to conclude that the refusal survived a “Rule of

50 A comparison may be illustrative of Justice Ginsburg’s approach. In Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), Judge J. Skelly Wright wrote a landmark decision allowing a party to a furniture rental contract to disavow the contract on the grounds that the bargain entered into was unconscionable. Judge Wright’s opinion can be criticized from a law and economics perspective for focusing primarily on the status of the parties and their perceived inability to bargain equally, rather than focusing on whether the contract was entered into freely in a competitive market for rental furniture. See ROBIN MALLOY, supra note 43, at 107-11. In contrast to Judge Wright’s approach, Justice Ginsburg’s opinion in One-O-One Enterprises avoids an examination of the parties’ status. Rather, she assumes that the purchaser of the security made an informed choice in a competitive market for securities, and holds the purchaser to that choice.


62 Id. at 221.
Reason" analysis and, therefore, did not violate Section 1 of the Sherman Act.

Central to Judge Bork's reasoning in *Rothery* is the assumption that the goal of the antitrust laws is to promote economic efficiency to the possible exclusion of other values. Judge Bork and other conservative antitrust theorists of the Chicago School have postulated that allowing companies to behave efficiently will eventually lead to greater consumer welfare, and that this furthers Congress' purposes in passing the Sherman Act. Judge Patricia Wald, in a concurrence, questioned Judge Bork's assumption that the only goal of the antitrust laws is to increase economic efficiency and pointed out other objectives Congress may have had in mind. In particular, Judge Wald cited commentators who have theorized that Congress sought to serve not efficiency but political or social goals such as avoiding excessive concentrations of economic (and concomitant political)

---

63 The literal language of Section 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. National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 98 (1984); Standard Oil Co. of N.J. 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, all are relevant facts.

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


power in the hands of a few corporations, thereby enhancing the economic and political freedom of individuals.\(^5\)

By joining in Judge Bork's opinion rather than Judge Wald's concurrence, Justice Ginsburg may be understood to have chosen Judge Bork's side of the debate.\(^6\) In her confirmation hearings, however, Justice Ginsburg attempted to distance herself from the Rothery opinion, stating that she disagreed with some of Judge Bork's reasoning but agreed with the result.\(^7\) Nevertheless, one must wonder why Justice Ginsburg did not then join Judge Wald's concurrence or write separately herself.

Justice Ginsburg pointed during her confirmation hearings to her dissenting opinion in *Michigan Citizens For An Independent*}
Press v. Thornburgh as an example of her antitrust philosophy. In *Michigan Citizens For An Independent Press*, the D.C. Circuit was called upon to decide whether the Attorney General was authorized under the antitrust laws to permit two Detroit newspapers to operate jointly. The majority allowed the merger, but Justice Ginsburg dissented. Justice Ginsburg's opinion in *Michigan Citizens*, however, actually turned on the interpretive question of whether a specific statutory exception to the antitrust laws should be read narrowly, not on questions of economic efficiency's role in applying the Sherman Act. The majority read The Newspaper Preservation Act broadly and, therefore, allowed the merger. Justice Ginsburg did not believe that the Act authorized the specific actions taken by the Attorney General. In reality, therefore, Justice Ginsburg's dissent in this case sheds little light on her antitrust philosophy.

When given another opportunity during the hearings to elaborate on her views about the role of economic efficiency in ap-
plying the antitrust laws, Justice Ginsburg sidestepped the question. She was asked what weight, if any, she would give economic efficiency arguments that are advanced to justify anti-competitive conduct. Her response was equivocal, stating that the antitrust laws are "focused on the interests of the consumer," but that they also recognize an interest in "preserving the independence of entrepreneurs."

Those who advocate economic efficiency as the primary or exclusive goal of the antitrust laws argue that such a view best serves the interests of the consumer. Judge Bork and others have used the term "consumer welfare" to refer to the increased aggregate wealth (consumer and producer surplus) that they argue results from allowing efficient business behavior. It is possible, therefore, to interpret Justice Ginsburg's reference to consumer interests as an endorsement of Judge Bork's economic efficiency views in Rothery. Such a reading would be in apparent conflict with the view that the antitrust laws are primarily designed to protect new entrants in the market, such as entrepreneurs.

Justice Ginsburg did state in her response, however, that the antitrust laws recognize the interests of entrepreneurs who wish to enter the market and compete with established companies. But promoting entrepreneurial activity as a value in itself may often conflict with promoting economic efficiency. Justice Ginsburg may not have appreciated the potential for conflict between these values in many cases, or she may simply have wished to evade the question. Admittedly, Justice Ginsburg did not indicate that she used the term "consumer welfare" in the same sense that it is used by conservative antitrust theorists. Although this seems unlikely, perhaps she is simply not familiar with the term's connotations — a possibility raised by her

---


68 Id.

69 See Bork, supra note 57, at 84; see also Eleanor M. Fox & Lawrence A. Sullivan, Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY 18 (Harry First et al., eds. 1991).

70 See id.; See also First, supra note 43, at 91.
disarming admission during the confirmation hearings that "antitrust . . . is not my strong suit."\textsuperscript{71}

Although Justice Ginsburg's views about the proper weight economic efficiency arguments should be accorded in antitrust cases are not clear, it is possible to draw some more general conclusions concerning her receptivity to efficiency arguments. Thus, Justice Ginsburg has not indicated that she believes economic analysis provides a unifying theory of law that should be applied to promote efficiency in a myriad of factual situations. Yet, as the analysis above indicates, her voting patterns are consistent with a view that, at least in business contexts, economic efficiency is an important value.\textsuperscript{72}

C. Deferring to Decisions of Administrative Agencies

Acting Within Their Sphere of Authority

As a member of the U.S. Court of Appeals for the D.C. Circuit, Justice Ginsburg was often called upon to review the administrative decisions of independent and executive branch federal agencies.\textsuperscript{73} In this context, she typically deferred to the agency's decision, provided that Congress had delegated authority to make the decision at issue to the agency, and that the agency's decision was the result of a full and reasoned consideration of the facts.\textsuperscript{74} Justice Ginsburg usually did not defer to

---


\textsuperscript{72} See also Fedway Associates, Inc. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms, 976 F.2d 1416, 1422 (D.C. Cir. 1992) (Ginsburg, J.) (Federal Alcohol Administration Act should not be interpreted to allow the Bureau of Alcohol, Tobacco and Firearms to inhibit the "free and rational economic choice" of retailers).

\textsuperscript{73} The issue of judicial review of agency decisions differs from the question of whether a court should defer to the agency's asserted interpretation of law. In the former case, the court is acting as a reviewing court of the administrative body. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984) (describing limited role of federal court review in such cases). In the latter case, there is often no administrative "decision" to review and an appellate court instead is called upon to review the legal findings of a federal district court. See *Roosevelt*, 958 F.2d at 427 n.19. When there is no administrative decision to review, Justice Ginsburg has often declined to adopt an agency's asserted interpretation of law when the result is to expand regulatory restrictions on corporate conduct. See *supra* notes 7-42 and accompanying text.

\textsuperscript{74} See, e.g., *Household Goods Forwarders Tariff Bureau v. ICC*, 968 F.2d 81
agency decisions, however, where she found those decisions to be inconsistent with, or contrary to, the agency’s prior decisions. For example, in *Sang Seup Shin v. INS*, Justice Ginsburg chose not to defer to a decision of the Board of Immigration Appeals (“BIA”), even though the decision was discretionary in nature, because the decision ignored factors to which the BIA had given great weight in prior cases.

Applying these principles, Justice Ginsburg has upheld regulatory decisions even when they have produced controversial results. In *Consumer Federation of America v. Consumer Product Safety Commission*, for example, she deferred to a Consumer Product Safety Commission decision to terminate rulemaking that would have imposed safety restrictions on the sale of all-terrain vehicles (“ATVs”). Similarly, in *Wint v. Yeutter*, her opinion deferred to a Department of Agriculture rule that effectively eliminated thousands of sugar cane workers from eligibility for legalization under the Immigration Reform and Control Act.

Her treatment of the agency review issue reveals an appreciation of the manner in which the federal government’s authority is allocated among various entities, and a desire to avoid encroachment by the judiciary on the agencies’ “turf.” She appears to have resisted the temptation to overturn an agency determination simply because she disagreed with the result of the agency’s actions.

In her confirmation hearings, Justice Ginsburg revealed that her deferential treatment of agency determinations has been influenced by the Supreme Court’s reversal of her circuit court opinion in *Chevron U.S.A., Inc. v. NRDC*. In that case, the

(D.C. Cir. 1992) (upholding ICC action where the agency acted pursuant to statutory authority and adequately articulated its reasoning).

67 750 F.2d 122 (D.C. Cir. 1984).

68 Id. at 127.

69 990 F.2d 1298 (D.C. Cir. 1993).

70 Id. at 1306 (finding that the Commission’s decision to monitor industry compliance by using an outstanding consent decree rather than by imposing a ban on sales of ATVs to minors was a rational one).

71 902 F.2d 76 (D.C. Cir. 1990).

72 Id. at 82-84 (holding that the Department of Agriculture’s decision to define “fruits and vegetables of every kind and other perishable commodities” to exclude sugar cane is a rational decision that is consistent with congressional intent).

Supreme Court held that where Congress' intent in passing a statute or one of its provisions is not clear, a federal court should defer to the actions taken by the agency charged with enforcing the given statute so long as those actions were taken pursuant to a reasonable interpretation of the statute.\textsuperscript{2}

Justice Ginsburg stressed during the hearings, however, that "deference does not mean abdication" of a judge's duty to review the actions of the federal bureaucracy.\textsuperscript{3} In the past, Justice Ginsburg has not deferred to agency determinations where doing so threatened certain fundamental principles. For example, she has not deferred to agency action where the result would be to deny a party access to the federal courts. Thus, in \textit{Office and Professional Employees Int'l Union, Local 2 v. FDIC},\textsuperscript{4} she rejected the Federal Deposit Insurance Corporation's ("FDIC") interpretation of the word "creditor" under FIRREA,\textsuperscript{5} where the result of the agency's interpretation was to deny unions access to federal court.\textsuperscript{6} By contrast, in \textit{Randall v. Meese},\textsuperscript{7} Justice Ginsburg deferred to a discretionary decision by the Immigration and Naturalization Service, partly because federal court review of the challenged decision would remain available to the plaintiff at a future time.\textsuperscript{8}

\textsuperscript{2} 467 U.S. at 842-43.


\textsuperscript{4} 962 F.2d 63 (D.C. Cir. 1992).


\textsuperscript{6} 962 F.2d at 67. It was also significant to Justice Ginsburg that FIRREA provided for de novo review of the FDIC determination in federal court. Id. at 65. Thus, she stated that under these circumstances the \textit{Chevron} principle of deference to agency decisionmaking did not apply. Id.

In the past, Justice Ginsburg has often striven to ensure that a federal court remains available to aggrieved parties. See \textit{Beckett v. Airline Pilots Assoc.}, 995 F.2d 280 (D.C. Cir. 1993). In \textit{Beckett}, Justice Ginsburg joined an opinion by Judge Edwards that took pains to construct a theory of plaintiffs' case that provided a federal forum for the plaintiffs. See id. (holding that former Pan Am pilots had standing to file a suit in federal court seeking to enforce a consent decree between their union and Pan Am).

\textsuperscript{7} 954 F.2d 472 (D.C. Cir. 1988), \textit{cert. denied.}, 491 U.S. 904 (1989).

\textsuperscript{8} Id. at 481-82.
Similarly, Justice Ginsburg has not deferred to an agency’s decision when she believed that it would threaten constitutional principles such as freedom of speech or due process. For example, in *Abourezk v. Reagan,* she refused to defer to a State Department interpretation of an exclusion provision under the Immigration and Nationality Act that would have jeopardized free speech values. The State Department had interpreted the statute in a manner that resulted in the denial of visas to members of communist organizations who had been invited to speak in the United States. Judge Bork, in dissent, argued that *Chevron* principles required the court to defer to the State Department’s interpretation. Justice Ginsburg, by contrast, concurred in the majority opinion that remanded the case to the district court for reconsideration of whether the State Department’s construction of the Act’s exclusion provisions was inconsistent with its prior administrative practice.

### III. CONCLUSION

Justice Ginsburg’s prior judicial record suggests that she will be a moderate to conservative jurist on matters of business and regulatory law. She has shown a preference for narrow applications of government regulations to business interests and a healthy respect for the reasoned determinations of regulatory agencies. Unlike members of the “Chicago School,” Justice Ginsburg does not appear to adhere to the philosophy that economic efficiency should be pursued to the exclusion of other values. However, her voting patterns are consistent with a philosophy that it is important to promote efficiency in business-law cases. Moderating her decisions on business and regulatory matters is her sensitivity to government action that may infringe upon the fundamental rights of citizens.

---

*83* 785 F.2d 1043 (D.C. Cir. 1986), *aff’d by an equally divided Court,* 484 U.S. 1 (1987).


*91* 785 F.2d at 1054-56.

*92* Id. at 1048-49.

*93* 785 F.2d at 1066.

*94* Id. at 1056. *See also Rafeeidie v. INS,* 880 F.2d 506, 525-26 (D.C. Cir. 1989) (Ginsburg, J., concurring) (remanding for a determination of whether a permanent resident alien’s due process rights were violated by the summary exclusion proceedings used to deny re-entry after a trip abroad).
Only time will tell to what extent Justice Ginsburg's voting patterns in business law cases have been influenced by a desire to avoid writing separate opinions because they might lead to confusion in the law — a desire that she has articulated on previous occasions. A preference for certainty and predictability in the law, thus, may have led her to overlook relatively minor differences with her more conservative colleagues in the past. Now that Justice Ginsburg has joined the Supreme Court, her future opinions may exhibit a greater willingness to adopt a moderate approach, even where the result is a separate concurrence. Ironically, if Justice Ginsburg chooses to write separately from a conservative majority in order to embrace a middle ground, one consequence may be more fractured opinions from the Supreme Court and less guidance on business law issues.


96 This preference for certainty in the law does not explain why she joined Judge Bork's majority opinion in Rothery rather than Judge Wald's concurrence. See supra notes 52-59 and accompanying text.

97 See, e.g., TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993) (three separate opinions and one dissent issued, without any one clear rule of decision, in connection with contention that punitive damages award violated the Due Process Clause of the Fourteenth Amendment).