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Rules Versus Standards and the Antitrust Jurisprudence of Justice Breyer

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LEGAL REGIMES REGULARLY MUST balance the benefits of fixed, bright-line rules of conduct against the virtues of more flexible standards. For instance, a legislature might impose a rule that anyone driving more than 65 miles per hour is guilty of speeding. Alternatively, it might enact a standard making it illegal to drive at an "unsafe" speed.

Fixed rules can bring many benefits. They give actors clear notice of what is and isn't legal and allow them to tailor their conduct accordingly; they minimize the judicial and party resources needed to resolve a case; and they typically reduce the potential for error in the litigation process. On the other hand, fixed rules, by their very nature, may over-deter beneficial conduct or under-deter harmful conduct. More flexible standards allow judicial decision makers to sift more finely between desirable and undesirable conduct based on the particulars of the case—but at the cost of predictability and ease of application.

Antitrust courts have dealt with this tension since the early days of the Sherman Act. Some types of conduct (e.g., horizontal price fixing and market division) are so likely to harm competition that courts subject them to a rule of per se illegality, without inquiry into actual competitive effects.[1] On the other hand, when a category of conduct has a less predictable impact on competition, the benefits of more open-ended inquiry into the conduct's actual competitive effects may justify the costs.[2] In recent years, debate has often centered on whether antitrust should supply bright-line rules or safe harbors of per se (or near per se) *legality* to minimize the risks of chilling procompetitive behavior and reduce administrative costs, or whether more searching analysis is needed to capture conduct that is anticompetitive in the particular circumstances.[3]

Stephen Breyer's antitrust opinions have consistently focused on searching for the right balance between clear, predictable rules and detailed, fact-specific analysis under more open-ended standards.[4] Indeed, of all Justice Breyer's contributions to the development of modern antitrust law, both during his tenure on the First Circuit and on the Supreme Court, perhaps none has been more valuable. Breyer has emphasized that antitrust is a system of laws that must be administered by fallible judges and juries and followed by businesses in real time. He has favored bright-line rules and safe harbors when, in his view, the benefits of exhaustive analysis using all of the economic and other tools available in modern antitrust cases do not justify the costs. This focus has sometimes led to pro-defendant opinions shielding conduct from intensive antitrust inquiry; but, in other cases, to obtain the benefits of predictable rules, Breyer has been willing quickly to condemn conduct that could conceivably be procompetitive.

The principles Justice Breyer has articulated have served as a conceptual blueprint for several landmark Supreme Court antitrust decisions. And, as the sharp debate over the Department of Justice's now-withdrawn Section 2 Report well illustrates, these principles promise to remain central to the debate as the courts and agencies deal with some of the most controversial antitrust issues of our times.[5]

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Breyer's Opinions

***The Foundational Opinions:* Barry Wright *and* Town of Concord.** Breyer's opinion for the First Circuit in *Barry Wright Corp. v. ITT Grinnell Corp.*[6] may have done more to frame the rules versus standards question than any other modern antitrust case. In *Barry Wright*, the court affirmed dismissal of a challenge to the contracting policies of a dominant manufacturer of shock absorbers used in nuclear power plants. The plaintiff, a rival, alleged that the defendant violated Section 2 by, among other things, offering "unreasonably low" prices intended to drive competitors from the market. In the most widely cited portion of the opinion, Breyer rejected the "unreasonably low" pricing allegation, announcing a bright-line rule immunizing from antitrust scrutiny prices "that exceed both incremental and average costs."[7] He declined to adopt a Ninth Circuit test proscribing pricing above total cost if "'the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power.'"[8] But, critically, his rejection was not based on a determination that above total cost pricing could never harm consumers (indeed, he recognized that was at least a theoretical possibility), but on a conclusion that any rare instances of harm could not justify the cost of a full-blown analysis.[9]

Breyer emphasized a theme that runs throughout his antitrust opinions—although antitrust benefits from the insights and rigor that economic theory supplies, it is a *legal* regime that must account for the practicalities of administration. As Breyer wrote:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the econ-

> omists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[10]

Thus, he rejected the Ninth Circuit test because, among other things, it risked sacrificing the "bird[] in hand" of immediate above-cost price cuts benefiting consumers for the speculative "bird[] in the bush" of future lower prices; and it would be too difficult in practice for judges and juries to distinguish between "a firm that is cutting price to 'discipline' or to displace a rival and one cutting prices 'better to compete,'" with the consequences of mistakes too grave.[11] Breyer's concern about the "vagaries of administration" was not limited to the risks of incorrect litigation outcomes. He also stressed the importance of providing ex ante predictability to firms seeking to avoid litigation without pulling procompetitive punches: "[W]e ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a client firm considering procompetitive price-cutting tactics . . . . Would he not have to point out the risks of suit—whether ultimately successful or not—by an injured competitor?"[12]

Breyer's emphasis on balancing the benefits and costs of searching antitrust inquiry also colored another enduring First Circuit opinion, *Town of Concord v. Boston Edison Co.*, this time in a regulated industry setting.[13] *Town of Concord* involved a challenge by two municipal distributors of electricity to an alleged "price squeeze" by the vertically integrated defendant, Boston Edison, which both supplied electricity to the municipalities at wholesale and allegedly competed with the municipalities to supply retail customers. Boston Edison, whose rates were "completely regulated" at both the wholesale and retail levels, allegedly increased its wholesale prices to the municipalities without increasing its corresponding retail rates.[14] The First Circuit dismissed the claim, holding that "a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary conduct' under Sherman Act § 2."[15]

Breyer's opinion underscored points regarding administrability similar to those from *Barry Wright*:

> [A]ntitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. . . . They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.[16]

But he stressed that, in the context of a regulated industry, courts must pay particular attention to how "regulatory controls" bear on the determination whether the costs of intensive antitrust inquiry outweigh the potential benefits.[17]

Breyer discussed the many administrative difficulties in applying Learned Hand's *Alcoa* decision, which held that a monopolist could violate the antitrust laws by charging more than a fair price in a primary market while simultaneously charging so little in the secondary market that its rivals cannot make a "living profit."[18] He observed that to conclude a "price squeeze is exclusionary, one must believe that the anticompetitive risks associated with a price squeeze outweigh the possible benefits *and the adverse administrative considerations.*"[19] The court declined to follow *Alcoa* in the circumstances and announced a rule that "'normally' a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly."[20] For Breyer, the regulatory backdrop was crucial: although in an unregulated context, permitting price squeeze claims might bring "closely balanced" harms and benefits, "[f]ull price regulation dramatically alters the calculus of antitrust harms and benefits."[21]

In particular, Breyer found that "regulation significantly diminishes the likelihood of major antitrust harm" by making it harder for a monopolist to discourage entry or drive an equally efficient rival from the market.[22] Even absent an antitrust remedy, a distributor concerned about a possible price squeeze is not without recourse because it can challenge the utility's rates and practices before the regulator.[23] But just as important was the danger that making a price squeeze illegal would threaten consumers by creating incentives for monopolists to lessen their litigation exposure by "seek[ing] a retail price increase whenever they seek a wholesale rate increase."[24] Finally, Breyer feared that the inherent complexity of properly allocating costs and calculating reasonable rates created the likelihood of producing "arbitrary" results if a jury attempted to administer a proposed "anti-price-squeeze rule."[25]

Two of Justice Breyer's Supreme Court opinions echo *Town of Concord*'s intensive focus on whether supplementing regulatory schemes with antitrust law administered by non-specialized courts is likely to enhance or detract from market performance. In *Brown v. Pro Football*,[26] Breyer's opinion for the Court held that antitrust liability could not attach to collective action by employers following a breakdown in collective bargaining. Breyer was concerned that permitting antitrust liability to supplement labor laws administered by an expert National Labor Relations Board would "threaten[] to introduce instability and uncertainty into the collective-bargaining process," principally because inviting courts to evaluate the "reasonableness" of employers' collective action would bring about "a web of detailed rules spun by many different nonexpert antitrust judges and juries."[27] Similarly, Breyer's opinion for the Court in *Credit Suisse Securities v. Billing*[28] held that the securities laws preempted antitrust claims against syndicates of underwriting firms. Breyer observed that the need for antitrust remedies is small when a regulator actively polices the market in question.[29] But he was also concerned about the havoc that could result from antitrust plaintiffs bringing "lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different

nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results."[30]

***Bright-Line Rules and Truncated Analysis Not Favoring Defendants:* Caribe, Leegin, *and* California Dental.** Although *Town of Concord* and *Barry Wright* are well known for creating bright-line rules benefiting defendants, it is important to recognize that Breyer's approach has also sometimes led to rules favoring antitrust intervention. Breyer's opinion in *Caribe BMW, Inc. v. Bayerische Motoren Werke A.G.* is a case in point.[31] There, an automobile manufacturer sold cars both to its wholly owned distributor (which was separately incorporated), and also directly to the plaintiff retailer. The plaintiff complained that retailers purchasing from the distributor received better prices, in violation of the Robinson-Patman Act. The district court dismissed, holding that because the distributor sold to the plaintiff's competitors, while a separate entity sold to the plaintiff, there was no single "person" making discriminatory sales as the Act requires. Writing for the First Circuit, Breyer reversed, holding that the manufacturer and distributor must be treated as a single person.

Breyer again announced a bright-line rule—but this time one cutting in favor of intervention:

> Given the strength of that joint economic interest, we do not see how a case-specific judicial examination of "actual" parental control would help achieve any significant antitrust objective. Those instances in which a wholly owned subsidiary would intend to act contrary to the economic interests of its owner are likely few and far between, and, if they ever exist, would seem hard to prove.[32]

Justice Breyer's dissent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[33] which struck down the per se rule prohibiting resale price maintenance (RPM), has probably most often been viewed as a defense of stare decisis in the antitrust context. But it is also a powerful example of Breyer's focus on both the costs and benefits of searching antitrust inquiry. The *Leegin* majority argued that the rule of reason was appropriate because per se rules generally are reserved for restraints "'that would always or almost always tend to restrict competition and decrease output,'" and RPM could be procompetitive in some circumstances.[34] But while Breyer conceded that "as many economists suggest . . . sometimes [RPM] can bring benefits,"[35] he believed the more important question was: "[H]ow often are harms or benefits likely to occur?"[36] Moreover, as a matter of administration, he asked, "How easily can courts identify instances in which the benefits [of RPM] are likely to outweigh potential harms? My own answer is *not very easily*."[37] At bottom, Breyer was not convinced that the benefits provided by fact-specific inquiry under the rule of reason outweighed the substantial costs of abandoning the bright-line rule, including under-deterring "agreements that are, on balance, anticompetitive" and forcing "judges and juries . . . to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs."[38]

Anyone familiar with Breyer's *Barry Wright* opinion may not have been surprised by his willingness in *Leegin* to "apply[] rules of per se unlawfulness to business practices even when those practices sometimes produce benefits."[39] Both opinions reflect a unified view that antitrust courts must carefully weigh the costs of deterring procompetitive conduct against the costs of allowing a party to try to prove that, on the particular facts, the competitive effects of the challenged practice vary from the norm. Accordingly, Justice Breyer would have imposed per se illegality in *Leegin* for precisely the same reasons he created a rule of bright-line legality in *Barry Wright*: the antitrust laws cannot "precisely replicate economists' (sometimes conflicting) views"[40] because law must take into account the challenges of administration and must be applied by mortal, real-world actors.

In another notable dissent, *California Dental Association v. FTC*,[41] Breyer favored limiting inquiry into possible justifications for conduct striking him as almost invariably anticompetitive. The Supreme Court majority concluded that the FTC had impermissibly truncated its rule of reason analysis to condemn a dental association's restrictions on price and quality advertising. Breyer dissented, arguing that given "the serious anticompetitive tendencies of the [challenged] advertising restraints," the FTC's review had been sufficient.[42]

Justice Breyer would have allowed for some inquiry into the procompetitive benefits of the restriction, but because he believed the restrictions were so obviously likely to harm competition, he would not have required the FTC to disprove the existence of marginal procompetitive benefits or conduct a searching inquiry into actual anticompetitive effects.[43] He observed that the abridged rule of reason analysis he favored balanced the benefits of flexible inquiry with administrability:

> [I]ts allocation of the burdens of persuasion . . . represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity . . . a considerable advance . . . from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion . . . and the latter called forth the criticism that the "government always wins."[44]

Influence on Supreme Court Antitrust Jurisprudence

Themes from Breyer's First Circuit opinions—especially *Barry Wright* and *Town of Concord*—have profoundly influenced some of the most significant Supreme Court antitrust decisions over the last two decades. The Supreme Court in *Matsushita* liberally cited and quoted from *Barry Wright* when emphasizing the dangers of "mistaken inferences" in predatory pricing disputes: "'[W]e 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.'"[45] The Court reiterated this concern in *Cargill*,[46] and then again when it established an absolute safe harbor for pricing above cost in *Brooke Group*.[47] Ultimately,

Brooke Group's reasoning reflected the same administrability considerations Breyer articulated a decade earlier: to the extent aggressive, above-cost pricing might reflect anything other than laudable competition on the merits, "it is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."[48] The Court then extended the *Brooke Group* safe harbor to predatory bidding claims in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[49]

Breyer's influence is similarly evident in the Court's treatment of cases involving regulated industries, especially *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[50] (Indeed, one prominent commentator has suggested that "[t]he majority opinion bears the name of Justice Scalia, but the text unmistakably is the product of a Scalia-Breyer . . . collaboration."[51]) In *Trinko*, the court refused to extend Section 2 liability to an incumbent communications carrier's refusal to deal with an incipient rival, quoting *Town of Concord* for the proposition that "'[a]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.'"[52] The Court, again quoting *Town of Concord*, then observed that the "regulatory framework that exists in this case demonstrates how, in certain circumstances, 'regulation significantly diminishes the likelihood of major antitrust harm.'"[53] In a discussion reminiscent of Breyer's *Town of Concord* analysis, the Court went on to discuss various carrots and sticks that it believed made the regulatory regime "an effective steward of the antitrust function" and rendered "slight" the "benefits of antitrust intervention."[54] Finally, the Court discussed the costs of introducing Section 2 scrutiny in the circumstances, including the difficulties that courts would have in determining liability, the risks of false positives, the costs of introducing "a new layer of interminable litigation" to the mix, and courts' institutional unsuitability for supervising complex remedies on a day-to-day basis.[55] These costs of antitrust intervention are, yet again, similar to those Breyer analyzed in *Town of Concord*.[56]

Finally, just this year in *linkLine*, the Court drew heavily on *Town of Concord* in ending stand-alone price squeeze claims and holding that a plaintiff must prove either: (1) a violation of an antitrust duty to deal in the upstream, wholesale market; or (2) discounting that satisfies the *Brooke Group* test for price predation in the downstream, retail market.[57] The majority emphasized the practical difficulties of administering a rule that would require judges "to police" both retail and wholesale prices and quoted Breyer's concern that antitrust rules "must be clear enough for lawyers to explain them to their clients."[58]

The Future of the Rules Versus Standards Debate

The Supreme Court has ruled for antitrust defendants in an unbroken line of cases dating back to the early 1990s, and several of these decisions adopted a safe harbor protecting the defendant's conduct. This trend might lead some to posit that (apart from traditional per se illegal categories) the sort of rules-based antitrust jurisprudence prominent in Breyer's opinions is virtually synonymous with pro-defendant outcomes.

Indeed, concerns that antitrust safe harbors may reflect undue reluctance to intervene have been at the heart of criticism regarding the DOJ's now-withdrawn Section 2 Report. The Report echoed many of the themes found in Breyer's jurisprudence—it cited *Barry Wright* more than ten times, three times quoting Breyer's statement that legal tests should be directed to producing an administrable system, rather than seeking to "embody every economic complexity and qualification."[59] The Report proposed short-cutting exhaustive analysis in several contexts, by establishing safe harbors for a variety of conduct, including predatory pricing (safe harbor for prices above "average avoidable costs");[60] bundled discounts (safe harbor for passing "discount attribution test");[61] exclusive dealing (safe harbor if less than 30 percent of existing customers or effective distribution is foreclosed);[62] and unilateral refusals to deal (if unconditional, these "should not play a meaningful part in section 2 enforcement").[63]

When the DOJ issued the Report during the Bush Administration, the FTC refused to join, and three Commissioners took sharp issue with the DOJ's findings.[64] Those Commissioners wrote that "the benefits of clarity must be balanced against the benefits of effective and reasonable law enforcement, lest the interests of consumers be compromised";[65] and, in many instances, "antitrust counseling and enforcement decisions require an in-depth, context-specific assessment of the facts."[66] The new Assistant Attorney General for Antitrust, Christine Varney, expressed similar concerns when she announced that the Justice Department was withdrawing the Report. She criticized the Report for reflecting too much concern about "'over-deterrence,'" and stated that the Report's safe harbors and "extreme caution in enforcing Section 2" reflected undue "skepticism regarding the ability of antitrust enforcers—as well as antitrust courts—to distinguish between anticompetitive acts and lawful conduct."[67]

The determination whether to invoke a bright-line rule, safe harbor, or truncated, "quick look" analysis in a particular case will often turn on fundamental assumptions about whether over-deterrence of procompetitive conduct is a graver risk than under-deterrence of anticompetitive conduct, the institutional capabilities of the judicial system, or other issues. But, as Breyer's opinion for the First Circuit in *Caribe* and his Supreme Court dissents in *Leegin* and *California Dental* show, applying definite rules or truncated analysis in appropriate circumstances need not lead to outcomes that are systematically pro-defendant (or pro-enforcement).

It would be unfortunate to discount the benefits of fixed rules because of a mistaken belief that such rules are useful only to restrict antitrust intervention. The choice between a bright-line rule or more open-ended inquiry turns on considerations that differ in important respects from those bearing on whether conduct should be deemed anticompetitive. There will plainly be cases where full-blown rule of reason

analysis is necessary to—in the words of Justice Breyer—separate the anticompetitive "goats" from the procompetitive "sheep."[68] But it is important that those who believe antitrust doctrine has become unduly permissive do not dismiss bright-line rules and safe harbors as inherently under-inclusive, and engage fully in the debate over when definite rules make sense and what form such rules should take. ■

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[1] *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing per se illegal); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (market allocation per se illegal).

[2] E.g., State Oil Co. v. Khan, 522 U.S. 3 (1997) (rule of reason treatment for maximum resale price maintenance); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (rule of reason treatment for minimum resale price maintenance).

[3] For a detailed discussion of the interplay between rules and standards in antitrust analysis see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007).

[4] Breyer's opinions often reflect the influence of fellow Harvard scholars, whose works he has cited. *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983) (citing Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698–99 (1975) (proposing bright-line test for predatory pricing)); id. at 234 (citing Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960) (evaluating costs and benefits of intensive economic analysis and advocating simplified approach to merger analysis)). For an analysis of various contributions members of the "Harvard School," including Breyer, have made to modern antitrust jurisprudence, see William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2007 COLUM. BUS. LAW REV. 1.

[5] The Department of Justice's 2008 Report on enforcement priorities for single-firm conduct under Section 2 was withdrawn by the DOJ in May 2009. *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter DOJ Section 2 Report], *available at* http://www.usdoj.gov/atr/public/reports/236681.htm; Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

[6] 724 F.2d 227 (1st Cir. 1983).

[7] *Id.* at 236.

[8] *Id.* at 233–34 (quoting William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981)).

[9] *Id.*

[10] *Id.* at 234.

[11] *Id.*

[12] *Id.* at 235.

[13] 915 F.2d 17 (1st Cir. 1990).

[14] *Id.* at 20–21.

[15] *Id.* at 28.

[16] *Id.* at 22.

[17] *Id.* at 22–23.

[18] *Id.* at 25 (citing United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)).

[19] *Id.* (emphasis added).

[20] *Id.* at 29.

[21] *Id.* at 25.

[22] *Id.* at 25–26.

[23] *Id.* at 28.

[24] *Id.* at 27.

[25] *Id.* at 27–28.

[26] 518 U.S. 231 (1996).

[27] *Id.* at 242.

[28] 127 S. Ct. 2383 (2007).

[29] *Id.* at 2396.

[30] *Id.* at 2395.

[31] 19 F.3d 745 (1st Cir. 1994).

[32] *Id.* at 750. Breyer also observed that the reasoning of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Court held that a wholly owned subsidiary could not "conspire" with its parent for Section 1 purposes, applied to the circumstances in *Caribe*. *Id.* at 750–51.

[33] 127 S. Ct. 2705 (2007).

[34] *Id.* at 2713 (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).

[35] *Id.* at 2729 (Breyer, J., dissenting).

[36] *Id.* at 2730.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2729.

[40] *Id.*; *see also Barry Wright*, 724 F.2d at 234.

[41] 526 U.S. 756 (1999).

[42] *Id.* at 785 (Breyer, J., dissenting).

[43] *Id.* at 791–93.

[44] *Id.* at 793–94.

[45] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (quoting *Barry Wright*, 724 F.2d at 234).

[46] *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 116 (1986).

[47] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993) (citing, inter alia, *Cargill*, 479 U.S. 104, and *Matsushita*, 475 U.S. 574).

[48] *Id.* at 223.

[49] 127 S. Ct. 1069 (2007).

[50] 540 U.S. 398 (2004).

[51] Kovacic, *supra* note 4, at 68.

[52] *Trinko*, 540 U.S. at 411–12 (quoting *Town of Concord*, 915 F.2d at 22).

[53] *Id.* at 412.

[54] *Id.* at 412–14.

[55] *Id.* at 414–15.

[56] *See Town of Concord*, 915 F.2d at 27–28.

[57] Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109, 1119–20 (2009).

[58] *Id.* at 1121 (quoting *Town of Concord*, 915 F.2d at 22). Justice Breyer wrote a concurring opinion arguing that the Supreme Court should not have reached the merits of the price squeeze claim because the plaintiffs had made clear they sought only to prove a traditional predatory pricing claim.

[59] DOJ Section 2 Report, *supra* note 5, at 15, 37, 108 (quoting *Barry Wright*, 724 F.2d at 234). In discussing refusals to deal, the DOJ had liberally quoted from *Town of Concord*. *Id.* at 126 (citing *Town of Concord*, 915 F.2d at 25).

[60] *Id.* at 65–67.

[61] *Id.* at 101.

[62] *Id.* at 141.

[63] *Id.* at 127.

[64] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice [hereinafter FTC Commissioners' Statement], *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

[65] *Id.*

[66] *Id.* at 3.

[67] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era 6–7 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245777.pdf.

[68] *Leegin*, 127 S. Ct. at 2729.