

linkLine's Institutional Suspicions

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Antitrust scholars are having fun again. Not so long ago, they were the poor, redheaded stepchildren of the legal academy, either pining for the older days of rigorous antitrust enforcement or trying to kill off what was left of the enterprise.¹ Other law professors felt sorry for them, ignored them, or both.

But now antitrust is making a comeback of sorts.² In one heady week in May of 2009, a front-page story in the *New York Times*³ reported the dramatic decision of Christine Varney—the Obama Administration's new Antitrust Division head at the Department of Justice—to jettison the entire report on monopolization offenses released by the Bush DOJ just eight months earlier.⁴ In a speech before the Center for American Progress, Varney announced that the Justice Department is “committed to aggressively pursuing enforcement of Section 2 of the Sherman Act.”⁵ As if to prove that “shock and awe” enforcement against monopolists is still possible, two days later the European Commission released its decision fining Intel nearly \$1.5 billion for beating up on AMD in the microprocessor

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¹ This is merely a figure of speech and is not intended to disparage the poor, redheads (which I used to be when I had hair), or stepchildren.

² For an insightful description of antitrust's comeback in the legal academy, see Joshua Wright, Don't Call It a Comeback, Truth on the Market Blog, available at <http://www.truthonthemarket.com/2009/04/11/dont-call-it-a-comeback/> (April 11, 2009).

³ Stephen Labatan, Administration Plans to Strengthen Antitrust Rules, N.Y. Times May 11, 2009.

⁴ Press Release, USDOJ, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

⁵ Christine A. Varney, Vigorous Antitrust Enforcement in This Challenging Era (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.htm>.

market.⁶ Suddenly, the antitrust community felt an electric current that it hadn't felt for many years.⁷

A point of note for those who checked out of antitrust law when Ronald Reagan was president: What is significant about this recent surge is not so much that the prospect of public antitrust enforcement has reemerged. Some areas of public antitrust enforcement have endured despite ideological shifts between administrations.⁸ For example, the Reagan, Bush I, and Bush II administrations were very active in anti-cartel enforcement and even brought some merger challenges.⁹ What is notable is the prospect that monopolization law—the branch of antitrust dealing with unilateral exclusionary conduct by dominant firms—may enjoy a revival.

Monopolization law was always the Chicago School's *bête noire*.¹⁰ Certainly, Chicago Schoolers critiqued the Warren Court-era precedents in other areas such as vertical or conglomerate mergers or horizontal mergers in unconcentrated markets, but they saved their strongest fire for interventionist antitrust norms on unilateral exclusionary conduct such as tying, predatory pricing, and related practices. When Aaron Levi and Aaron Director wrote their influential "Law and the Future" article in 1956, their primary target was "monopoly leveraging" theory—the argument that monopolists frequently seek to spread their monopoly power to adjacent markets.¹¹

⁶ Press Release, European Commission, Commission Imposes Fine of €1.06 Bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices, (May 13, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁷ Of course, the jettisoning of the monopolization report and Intel decisions were highly controversial in the antitrust community. Nonetheless, as Herbert Hovenkamp has noted, members of the antitrust community generally gain from enhanced enforcement. See Labatan, *supra* n. 3 (quoting Professor Herbert Hovenkamp: "People aligned with plaintiffs will rejoice. Those aligned with defendants will wring their hands. A lot of law firms will be indifferent because they take money from both sides.").

⁸ See Daniel A. Crane, *Technocracy and Antitrust*, 86 *Tex. L. Rev.* 1159, 1175–80 (2008).

⁹ *Id.*

¹⁰ For a brief sketch of the Chicago School of antitrust—not to be confused with the Chicago School of economics—as opposed to the Harvard School, see Part II.A *infra*.

¹¹ Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 *Nw. U. L. Rev.* 281 (1956).

Now the antitrust enforcement agencies in Europe and the United States—buttressed by a new wave of post-Chicago economic scholarship¹²—are rallying against the monopolists. In the United States, they face but one major obstacle: the courts. The Supreme Court in particular has become very conservative on antitrust cases in general and monopolization cases in particular.¹³ Since 1993, defendants are 15-0 in antitrust cases in the Supreme Court.¹⁴ Six of those cases involved claims of monopolization or exclusionary conduct.¹⁵ Defendants have won the last nine exclusionary conduct cases in the Supreme Court since 1992.¹⁶ The writing on the wall suggests that we are about to witness a clash between the new wave of anti-monopolization sentiment in the federal antitrust enforcement agencies and the Chicago School-dominated federal courts.

Yet to understand the coming clash simply as a courts versus agencies showdown would be to miss a much richer tapestry of institutional interactions. The evolving story of monopolization law involves a complex set of relationships among a number of different institutional actors (broadly speaking) including judges, juries, the Department of Justice, the Federal Trade Commission, industry regulators, the private plaintiffs' bar, dominant firms, and markets. The interaction of these institutions—and their mutual trust and, more to the point, mistrust—molds modern monopolization law.

¹² See Daniel A. Crane, Chicago, Post-Chicago, and Neo-Chicago, 76 U. Chi. L. Rev. ____ (forthcoming 2009).

¹³ The Court has not heard a substantive merger case since 1974. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

¹⁴ Plaintiffs last prevailed in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

¹⁵ *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009) (price squeeze); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (predatory overbidding); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (tying); *Volvo Trucks of North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (price discrimination); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004) (refusal to deal); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (boycott).

¹⁶ In addition to the six cases listed in the previous footnote, defendants won in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing), *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (retailer termination), and *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (anticompetitive litigation). The last plaintiff win was *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) (tying).

In this essay, I review the Supreme Court's most recent monopolization decision—*Pacific Bell v. linkLine*¹⁷—with a focus on the suspicions between the various institutions that had a hand in the case. In Part I, I review *linkLine*'s facts and locate it within the sweep of recent monopolization decisions. I then compare *linkLine* to another recent monopolization case—the D.C. Circuit's decision in *Rambus v. FTC*¹⁸—that involved a different set of institutional actors. Taken together, *linkLine* and *Rambus* provide a comprehensive introduction to the cast of instructional players who shape monopolization law and to their nexus of mutual suspicions. In Part II, I show the mutual suspicions of the various institutional actors shape monopolization law. Finally, in Part III, I offer some observations on the implications of these institutional suspicions for the Obama administration's ambitions to reinvigorate antitrust enforcement.

I. *linkLine* and *Rambus*

A. *linkLine*

The *linkLine* decision continues the lengthy historical saga concerning the relationship between regulation and antitrust in the telecommunications industry. In 1982, the Reagan administration resolved the long-standing AT&T antitrust litigation with a consent decree that split AT&T from its local telephone service subsidiaries.¹⁹ Then, in 1996, President Bill Clinton signed into law the Telecommunications Act ("Telecom Act"), which fundamentally restructured the telephone industry by requiring incumbent local exchange carriers (ILECs) to share their telephone networks with competitors.²⁰ Since then, three of the Supreme Court's most important antitrust decisions have involved implications of the Telecom Act for antitrust enforcement.

¹⁷ *Pacific Bell Tel. Co. v. linkLine Communs., Inc.*, 555 U.S. _____, 129 S. Ct. 1109 (2009).

¹⁸ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

¹⁹ *U.S. v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd.* sub nom. *Maryland v. U.S.*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

²⁰ Telecommunications Act of 1996 (1996 Act or Act), Pub.L. 104-104, 110 Stat. 56. See generally *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 372-73 (1999) (explaining that requesting carriers can access the ILEC's network in one of three ways: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network").

In the first case, *Verizon Communications v. Trinko*,²¹ the plaintiffs were local phone company subscribers who alleged that Verizon—the incumbent local exchange carrier—in New York City had shirked its interconnection obligations with competitive local exchange carriers (CLECs) like AT&T, thus delaying the advent of local phone service competition in the New York area.²² There was no dispute in that case that Verizon had, in fact, violated its Telecom Act obligations by stalling when requested to fill the CLECs' interconnection requests, and the Federal Communications Commission fined Verizon \$3 million (through a consent decree).²³ The question was whether Verizon's failure to cooperate with AT&T could also give rise to monopolization liability under Section 2 of the Sherman Act.²⁴ The Supreme Court unanimously ruled for Verizon (although three justices—John Paul Stevens, David Souter, and Clarence Thomas—would have decided the issue on standing grounds and did not opine on the merits). It held that Section 2 of the Sherman Act generally does not impose on monopolists a duty to deal with their rivals and therefore does not impose an obligation to provide a "sufficient" level of service.²⁵ That the Telecom Act imposed a duty to deal did not strengthen the case for an antitrust duty to deal. If anything, held the Court, the power of the FCC to impose fines weakened the case for an antitrust duty to deal, since there was already an administrative mechanism in place to police the interconnection obligations. As we shall see, *Trinko* forms the critical backdrop to *linkLine*.

The second case, *Bell Atlantic v. Twombly*,²⁶ was less directly relevant to *linkLine* but crucially important to pleading private antitrust cases, pleading civil cases generally, and the story of institutional suspicions in antitrust (as we shall see in a moment). In *Twombly*, a putative class action consisting of local telephone and/or high-speed internet subscribers alleged that the ILECs had conspired to stay

²¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410 (2004).

²² 540 U.S. at 403.

²³ 15 FCC Rcd. 5415, 5421, & ¶ 16 (2000).

²⁴ 15 U.S.C. § 2.

²⁵ 540 U.S. at 410.

²⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

out of each other's territories and therefore to divide markets in contravention of the Telecom Act's purposes. By a 7–2 vote, the Supreme Court held that the plaintiffs had failed to allege sufficient facts to survive a motion to dismiss and obtain discovery on the alleged cartel.²⁷

That brings us to *linkLine*. AT&T (for short, because the petitioners consisted of a number of affiliated companies whose names changed over time) owns much of the fiber-optic infrastructure for local telephone services in California.²⁸ In particular, it holds the keys to the “last mile”—the lines connecting residences and business to the telephone network.²⁹ Until 2005, the FCC required the ILECs to sell transmission services to independent digital subscriber line (“DSL”) suppliers so that the independents could provide DSL internet service in competition with the ILECs.³⁰ In 2005, the FCC largely abandoned this requirement, finding that DSL faces vigorous competition from other forms of internet access including cable, wireless, and satellite.³¹ AT&T remains bound to a mandatory interconnection obligation, however, as a condition of the AT&T/BellSouth merger that created the modern AT&T.³² Specifically, AT&T is required to provide “DSL transport” services to independent DSL providers at a price no greater than AT&T's own DSL retail prices.³³

The plaintiffs in *linkLine* were four independent DSL providers who alleged that AT&T engaged in an exclusionary “price squeeze.” Specifically, plaintiffs alleged that AT&T set a high wholesale price to them but then a low retail price to its own customers and that the effect of this squeeze was that they could not profitably compete against AT&T.³⁴ Initially, at least, plaintiffs did not allege that AT&T's retail price was predatory—that is to say, set below marginal cost.³⁵

²⁷ *Id.* at 571.

²⁸ *linkLine*, 129 S. Ct. at 1115.

²⁹ *Id.*

³⁰ See *In re Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, 20 FCC Rcd. 14853, 14868 (FCC 2005).

³¹ *Id.* at 14879–14887.

³² *In re AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd. 5662, 5814 (FCC 2007).

³³ *Id.*

³⁴ *linkLine*, 129 S. Ct. at 1115.

³⁵ Under U.S. predatory pricing principles, the plaintiff usually must show that the defendant priced below some measure of incremental or marginal cost, although the Supreme Court still has not decided exactly what measure of cost should be employed.

The District Court for the Central District of California declined to dismiss the complaint but certified to the U.S. Court of Appeals for the Ninth Circuit the question whether “*Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communications laws.”³⁶ On interlocutory appeal, the Ninth Circuit affirmed the district court’s denial of AT&T’s motion for judgment on the pleadings, finding *Trinko* inapposite since it did not involve a price-squeeze claim.³⁷ Judge Ronald Gould, however, filed a dissenting opinion presaging the Supreme Court’s ultimate decision. In his view, a price-squeeze claim without allegations of below-cost pricing by the vertically integrated monopolist was merely the marriage of two previously rejected theories—that a monopolist has a duty to deal in the wholesale market (rejected in *Trinko*) and that a defendant can be found liable for predatory pricing without pricing below cost (rejected in *Brooke Group*³⁸ and earlier cases).

When the Supreme Court granted certiorari, it was clear to most informed observers that *Trinko* and *Brooke Group* presented a perfect Scylla and Charybdis to price-squeeze claims. Plaintiffs tried to avoid an adverse Supreme Court decision by suddenly proclaiming an affinity for Judge Gould’s dissenting opinion and asking to be allowed to file an amended complaint alleging predatory pricing.³⁹ Various pro-enforcement amici curiae, fearful of anything the Roberts Court might say in a monopolization case, asked the Court to dismiss the case as moot. But the Court had already sunk its teeth into the case and would not let go without tasting some blood. It rejected the mootness arguments, declined to pass on whether the plaintiffs should be allowed to (or even needed to) amend, dove into the price-squeeze issue, and unanimously rejected price-squeeze claims.

³⁶ linkLine, 129 S. Ct. at 1116.

³⁷ 503 F.3d 876 (9th Cir. 2007).

³⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). To be clear, plaintiff in *Brooke Group* accepted that it would have to show below-cost pricing to win on a predatory pricing theory, but the Court nonetheless took the opportunity to reaffirm what it had said in a line of cases since the 1980s—that there is no predatory pricing liability unless prices are below an “appropriate measure of cost.” *Id.* at 222. The Court reaffirmed this principle in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), a case that involved “predatory overbidding” allegations.

³⁹ 129 S. Ct. at 1117.

The five most conservative justices (John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito) joined together in an opinion by Chief Justice Roberts. The core of this opinion is relatively formalistic and narrowly applicable (although not necessarily wrong or inappropriate for those reasons). Price-squeeze claims, reasoned the Court, necessarily involve defendants who operate in two markets—an upstream and downstream market—and a plaintiff that operates in only the downstream market. The plaintiff must buy from the defendant in the upstream market in order to compete with the defendant in the downstream market. The plaintiff alleges that the defendant misbehaved in both markets. First, the defendant charged too high a price in the upstream market. That claim is foreclosed by *Trinko*. Since the defendant has no anti-trust duty to deal at all in the upstream market, if it does choose to deal it can charge whatever price it wants.⁴⁰ Second, the plaintiff alleges that defendant priced too low in the downstream market. But unless plaintiff alleges that defendant priced below cost in the downstream market, it runs into *Brooke Group*, which immunizes low prices from liability unless they are below cost. To summarize:

Plaintiffs' price-squeeze claim, looking at the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins.⁴¹

The Court then turned from this juridical analysis to an institutional analysis. Per Chief Justice Roberts, "[i]nstitutional concerns counsel against recognition of such [price-squeeze] claims."⁴² In *Trinko*, the Court had found that "[c]ourts are ill suited to act as central planners, identifying the proper price, quantity, and other

⁴⁰ This is purely from an antitrust perspective. In *Trinko*, the Court had distinguished between regulatory duties to deal (for example, those created by the Telecom Act) and antitrust duties to deal (those created—if ever—by antitrust law).

⁴¹ 129 S. Ct. 1120.

⁴² *Id.* at 1120-21.

terms of dealing."⁴³ In *Trinko*, the Court had quoted extensively from Philip Areeda's repudiation of the essential facilities doctrine, and it did so again: "No court should impose a duty to deal that it cannot adequately explain or adequately and reasonably supervise. The problems should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."⁴⁴

For extra measure, or perhaps to tweak a recalcitrant colleague, Roberts tossed in a lengthy quote from *Town of Concord*,⁴⁵ an opinion written by now-Justice Stephen Breyer while he was chief judge of the First Circuit Court of Appeals. In that case, Breyer rejected a price-squeeze claim against a vertically integrated electrical company that was rate-regulated at both the wholesale and retail levels.⁴⁶ He wrote:

[H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exists. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?⁴⁷

The Court then considered, and rejected, a few tests proposed by amici (the plaintiff DSL providers didn't propose any, since they were now in full retraction mode, asking to be allowed to assert a predatory pricing claim). It reversed the Ninth Circuit decision and remanded the case, leaving open the possibility that plaintiffs would be granted leave to amend and assert a predation claim.

Breyer, joined by the Court's more liberal members, Stevens, Souter, and Ginsburg, filed a brief opinion concurring in the judgment. We will revert to this opinion in a moment, but its nub suggests accepting plaintiffs' concession that the price squeeze claim was

⁴³ *Id.* (quoting *Trinko*, 540 U.S. at 408).

⁴⁴ *Id.* (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust L. J.* 841, 853 (1989)).

⁴⁵ *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990).

⁴⁶ *Id.* at 29.

⁴⁷ *linkLine*, 129 S. Ct. at 1121 (quoting *Town of Concord*, 915 F.2d at 25).

erroneous and remanding to allow the district court to determine whether plaintiffs should be allowed to replead.

B. Rambus

The D.C. Circuit's recent decision in *Rambus* probably received more attention than the Supreme Court's decision in *linkLine* because of its implications for high-tech product standardization—a hot topic in antitrust and intellectual property circles.⁴⁸ Rambus creates computer memory technology which it licenses to computer hardware manufacturers. During the 1990s, Rambus participated in the Joint Electron Device Engineering Council, which was then in the process of formulating new computer memory standards.⁴⁹ At some point before the finalization of the new standards, Rambus withdrew from JEDEC. According to the FTC's subsequent administrative complaint, Rambus failed to disclose that it had various patents or patent applications on technologies that would be essential to practicing the new standard. After the standard's adoption, Rambus began to demand royalties from firms practicing the standard.

The FTC decided that Rambus violated Section 2 of the Sherman Act (as enforced through Section 5 of the FTC Act) by deceiving JEDEC about its patents and patent applications. The FTC then determined that Rambus should be compelled to license certain of its computer memory patents on reasonable and nondiscriminatory ("RAND") terms (as set by the FTC in a separate order on remedy)⁵⁰ because its participation in JEDEC without disclosure of its patents and patent applications gave Rambus a monopolistic holdout position after the standard was irretrievably adopted.⁵¹

On appeal, the D.C. Circuit vacated the FTC decision. Relying on Section 2 monopolization precedents, the court found that the FTC

⁴⁸ In the interests of full disclosure, I was the primary author of an amicus curiae brief on behalf of 20 law professors and economists urging the Supreme Court to grant certiorari in *Rambus*. The Supreme Court denied certiorari. *FTC v. Rambus*, 129 S. Ct. 1318 (2009).

⁴⁹ *Rambus, Inc. v. FTC*, 522 F.3d 456, 458–60 (D.C. Cir. 2008).

⁵⁰ *In re Rambus, Inc.*, No. 9302 (Final Order Feb. 5, 2007), <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>.

⁵¹ *In re Rambus, Inc.*, No. 9302 (Order Reversing and Vacating Initial Decision August 2, 2006), <http://www.ftc.gov/os/adjpro/d9302/060802rambusorder.pdf>.

had failed to prove anticompetitive behavior. In particular, the Commission had failed to establish the causation necessary to demonstrate that Rambus's conduct had suppressed competition. In its liability decision, the Commission had observed that the but-for world was not fully knowable. In the event that Rambus had disclosed its patent applications, one of two things might have happened. One possibility was that JEDEC would have chosen an alternative technology that did not tread on Rambus's patents. The other possibility was that JEDEC would have negotiated with Rambus for a commitment to license its patents at lower rates than it demanded after sneaking through the standardization process.

Judge Stephen F. Williams's decision conceded that the first path—the choice of a different technology—might show monopolistic conduct.⁵² But the second path—JEDEC's failure to negotiate a better price—would not.⁵³ The court relied heavily on the Supreme Court's 1998 decision in *NYNEX v. Discon*⁵⁴—a Stephen Breyer opinion for a unanimous Court. In that case, a provider of obsolete telephone equipment removal services alleged that the NYNEX—an ILEC—conspired with a competitor of Discon's to give the competitor all of its removal service work at inflated prices. After regulators approved NYNEX's tariffs, the competitor secretly rebated money to NYNEX. Justice Breyer's opinion held that such cheating on rate regulators was not a monopolization offense, since it did not involve a diminution in the competitiveness of the market. The *Rambus* court took *NYNEX* to mean that mere deception that gives dominant firms the power to charge higher than competitive prices does not rise to antitrust liability.⁵⁵ Because the second possible path found by the FTC merely reflected the possibility that Rambus deceived JEDEC into allowing it to charge a higher-than-competitive price, path two did not describe an antitrust violation.⁵⁶

⁵² 522 F.3d at 463.

⁵³ *Id.*

⁵⁴ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

⁵⁵ 522 F.3d at 466.

⁵⁶ This reasoning is questionable. While it is true that mere deception that gives a monopolist the ability to charge a higher price is not an antitrust violation, when the deception results in the suppression of competition and *that* creates the ability to charge a higher price, there is an antitrust violation.

A barrage of high-tech industry groups, academics, and antitrust advocacy groups urged the Supreme Court to hear *Rambus*.⁵⁷ The stakes for antitrust enforcement in product standardization contexts—where billions of dollars in patent royalties and the path of innovation are at issue—are very high. Nonetheless, the Court declined to hear the case without even seeking the views of the solicitor general. The Court denied certiorari on February 23, 2009, barely a month after President Barack Obama’s inauguration.⁵⁸ It is uncertain what position the Bush Justice Department would have taken if asked for its views. There is little doubt that the Obama Justice Department would have strongly pushed for the grant of certiorari and reversal.⁵⁹

II. The Institutions and Their Suspicions

In the antitrust community, most of the commentary about the *linkLine* and *Rambus* decisions has focused on the merits of the decisions as a matter of law or economics. Could price squeezes be more anticompetitive than simple refusals to deal and above-cost retail pricing? Did the D.C. Circuit misapply the relevant monopolization precedents on misrepresentation and deception? These questions are important, but it is impossible to understand either decision without considering the institutional context that influenced the decisions. Antitrust law is not created in an intellectual vacuum. It is the product of clashing and mutually suspicious institutions. The clash of those institutions has far more explanatory power than economic or legal arguments on the merits.

A. *linkLine’s Institutions*

A conventional account of U.S. antitrust jurisprudence views U.S. courts as captured by a Chicago School ideology that is committed

⁵⁷ The amici supporting the FTC included Hewlett-Packard, Cisco Systems, Inc., Sun Microsystems, Inc., Oracle Corporation, Advanced Media Workflow Association, Consumer Electronics Association; Globalplatform Inc., IMS Global Learning Consortium, Inc., International Imaging Industry Association, Inc., IPC, Association Connecting Electronics Industries; Linux Foundation, Midi Manufactures Association; Mobile Printing and Imaging Consortium, Open Geospatial Consortium, and OpenSAF Foundation.

⁵⁸ *FTC v. Rambus*, 129 S. Ct. 1318 (2009).

⁵⁹ One of the signatories of the academics’ amicus curiae brief urging the Supreme Court to grant certiorari and reverse in *Rambus* was Carl Shapiro, who is currently the Deputy Assistant Attorney General for Economics in the Antitrust Division.

to laissez faire principles and hence seeks to roll back antitrust enforcement.⁶⁰ But, as a number of prominent scholars have recently argued,⁶¹ the real story is considerably more complicated. Modern U.S. antitrust law can be understood as the product of two different schools—the Chicago School of Richard Posner, Frank Easterbrook, Robert Bork, Antonin Scalia, et al., and the Harvard School of Phillip Areeda, Donald Turner, Herbert Hovenkamp, and Stephen Breyer, who often leads the Court's four liberal justices in antitrust cases. Each of these schools deeply mistrusts various of the other institutional actors in the antitrust system. Although the two schools also mistrust each other—which explains why in cases like *linkLine* the Chicago and Harvard Schoolers reach the same result but decline to join each other's opinions—more often than not they reach common ground on outcomes.

The Harvard School's interplay with Chicago School themes is encapsulated in an intriguing passage in Justice Breyer's concurring opinion in *linkLine*. Breyer begins: "A 'price-squeeze' claim finds its natural home in a Sherman Act § 2 claim where *the Government* as plaintiff seeks to show that a defendant's monopoly power rests, not upon 'skill, foresight and industry,'" but upon exclusionary conduct."⁶² Breyer does not explain why it should matter to the viability of a price-squeeze claim that the government, rather than a private party, is the plaintiff. After all, the government and private plaintiffs would be enforcing the same statute.⁶³ Yet Breyer's aim seems to be to rehabilitate the Justice Department's successful price-squeeze claims in *Alcoa*, snubbed by Chief Justice Roberts et al. as overridden by subsequent "developments in economic theory and antitrust jurisprudence."⁶⁴ Breyer argues that price squeezes could

⁶⁰ I explore these themes at greater length in Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. Chi. L. Rev. (forthcoming 2009).

⁶¹ See, e.g., William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum Bus L Rev 1; Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions*, 3 Comp Policy Intl 59 (2007).

⁶² 129 S. Ct. at 1124 (Breyer, J., concurring) (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) ("*Alcoa*")) (emphasis added).

⁶³ At least this is true of actions by the Justice Department, which was the party in all of the examples that Justice Breyer gives.

⁶⁴ *linkLine*, 129 S. Ct. at 1120.

theoretically be exclusionary even if the simple refusal to deal upstream would not be exclusionary.⁶⁵ However, the FCC's regulatory presence obviates the difficulty of this issue. "During the time covered by the complaint, [AT&T was] required to provide [DSL] transport service as a common carrier, charging 'just and reasonable rates' that were not 'unreasonably discriminatory.'"⁶⁶ Then, sounding one of the Harvard School's frequent refrains, Breyer notes: "When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."⁶⁷

Within these few lines are packed, and partly hidden, a set of ideological commitments about various institutional players. First, there is the juxtaposition between private enforcement and public enforcement. One mainstay of the Chicago School perspective is a deep suspicion of private antitrust plaintiffs—and their lawyers—as freeloaders on the treble damages bounty automatically afforded to successful plaintiffs in antitrust cases. A substantial body of scholarship views competitor-plaintiffs—the usual plaintiffs in monopolization cases—as strategic abusers of antitrust litigation.⁶⁸

Here, Justice Breyer's Harvard School seems to concur in the Chicago School's suspicion. Juries are quirky, unpredictable, and emotional and inherently inferior to technocratic regulators.⁶⁹ What emerges from the convergence of suspicions is a body of antitrust precedents that expresses nearly unanimous hostility to private litigation.

⁶⁵ *Id.* at 1124 (Breyer, J., concurring).

⁶⁶ *Id.*

⁶⁷ *Id.* Justice Breyer then naturally cites his own *Town of Concord* decision from the First Circuit and the Areeda-Turner treatise, the intellectual repository of Harvard School ideas.

⁶⁸ William J. Baumol & Janusz A. Ordover, Use of Antitrust to Subvert Competition, 28 J.L. & Econ. 247 (1985); Frank H. Easterbook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984); Daniel A. Crane, The Paradox of Predatory Pricing, 91 Cornell L. Rev. 1, 5–32 (2005); R. Preston McAfee & Nicholas V. Vakkur, The Strategic Abuse of the Antitrust Laws, 2 J. Strategic Mgmt. Educ. 37, 37–38 (2005); Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, 90 Mich. L. Rev. 551 (1991).

⁶⁹ Elsewhere, Justice Breyer has argued that neither judges nor juries are very good at making risk assessments. Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 58–59 (1993).

A related institutional actor lurking in Justice Breyer's opinion is the jury. Here again, the Harvard and Chicago Schools' suspicions converge. Private antitrust cases are problematic not only because they involve untrustworthy private plaintiffs, but also because private lawsuits inevitably seek damages—which are the province of juries. For the Chicago School, antitrust juries are perhaps the primary institutional foe. Juries do not understand the economic complexities of antitrust cases and therefore fall back on populist ideas about “fair” competition and moral limitations on the behavior of dominant firms. Juries thus provide a natural check on the economic efficiency oriented trajectory of Chicago School antitrust law and (to Chicagoans) must be curbed through the use of procedural devices like motions to dismiss and for summary judgment, *Daubert* gatekeeping of expert witness testimony by judges,⁷⁰ and sharply contracted liability norms.

The Harvard Schoolers largely concur. They are primarily concerned with comparative institutional competence and prefer expert decisionmaking to lay decisionmaking. In several other antitrust opinions, Breyer has plainly called into question the competence of generalist judges and, in particular, juries.⁷¹ In *Twombly*, Justice Stevens's dissenting opinion accused the majority (including Breyer and Souter) of erecting a high barrier to pleading antitrust cases because of a distrust of juries.⁷² Although Breyer does not explicitly mention juries in *linkLine*, the jury's shadow is implicit in his allusion to a more favorable reception to governmentally initiated price squeeze claims. Government enforcement actions in equity—like the *Alcoa* case he refers to—are not tried before juries.

A third institutional actor singled out by Justice Breyer is the regulator. In *linkLine*, as in *Trinko* and *Credit Suisse*, Breyer authored or signed onto opinions that argue against antitrust intervention

⁷⁰ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

⁷¹ See, e.g., *Credit Suisse Secs., (USA) LLC v. Billings*, 551 U.S. 264, 281 (2007) (observing the risks of inconsistency entailed in entrusting decisional authority to “different nonexpert judges and different nonexpert juries”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) (arguing that “[o]ne cannot fairly expect judges and juries in [resale price maintenance] cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs”).

⁷² 550 U.S. at 573 (Stevens, J., dissenting).

where a regulator already is active in the sector. Suspicious of juries and private plaintiffs, the Harvard Schoolers favor technocratic regulation to police market power problems.

This, of course, is a point of divergence between the two schools. The Chicago School surely does not favor regulators over market solutions. To be sure, in *Trinko*, *linkLine*, and *Credit Suisse*, the Chicago Schoolers were willing to give a nod to the active presence of the Federal Communications Commission or the Securities and Exchange Commission in the relevant sectors as a reason to withhold antitrust intervention. But in cases involving the reach of agency regulatory authority, the clash between Harvard and Chicago often becomes apparent.⁷³ The two schools agree, then, that antitrust solutions should be rejected when regulators are present. They disagree about whether *regulatory* solutions should be rejected when regulators are present—but those conflicts do not usually arise in antitrust cases.

The Chicago-Harvard divergence over regulators invokes another “institution,” broadly speaking—the market. Chicagoans tend to trust the market to produce optimal outcomes.⁷⁴ In *Trinko*, Justice Scalia’s opinion asserts that monopoly profits are not merely an unfortunate side effect of market systems but an affirmatively beneficial feature insofar as they spur innovation and investment in infrastructure.⁷⁵ The Harvard Schoolers have no such affinity for monopoly profits and no such trust of markets. They suspect markets as much as the Chicago Schoolers suspect regulators. However, the Harvard School suspicions of juries and private plaintiffs are almost always sufficient to overcome their suspicion of markets where a regulator is theoretically able to take care of business.

So Harvard and Chicago often combine to beat up on plaintiffs in private antitrust cases. Although the two schools diverge on the relative trust they have in dominant firms, unregulated markets,

⁷³ See generally *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In *Brown & Williamson*, the five conservative justices held that the FDA lacked authority to regulate tobacco, while the four liberal justices joined a Breyer dissent.

⁷⁴ Or at least that was historically the Chicago perspective. The economic crisis of 2008 has led to some Chicago School re-evaluations of market self-correction theory. See Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (2009).

⁷⁵ 540 U.S. at 407.

and regulators, they share a disdain for treble damages cases, juries, complaining competitors, and the antitrust plaintiffs' bar. In cases like *Trinko*, *Twombly*, and now *linkLine*, the two schools' grudging alliance served up unanimous or nearly unanimous defeats to the plaintiffs.

B. Rambus's Institutions

Rambus was an FTC case so there were no treble damages, jury, rent-seeking competitors, or greedy trial lawyers to worry about. Still, those "institutions" played a large shadow role in *Rambus*. The FTC explicitly stated that it was relying on general Sherman Act Section 2 law in bringing its challenge to Rambus's conduct.⁷⁶ The D.C. Circuit relied heavily on antitrust doctrines created in private cases. Those cases, which substantially contracted liability norms, reflect the full gamut of Harvard and Chicago School institutional suspicions. In *NYNEX*, for example, Justice Breyer's opinion worried that applying antitrust rules to "regulatory fraud . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases."⁷⁷ Because private cases outweigh public cases by a margin of ten to one, most antitrust law today develops in private cases. When the agencies sue, they have to work with liability norms that have been substantially contracted in generation after generation of private lawsuit. Hence, the Harvard and Chicago School's suspicions of treble damages, juries, and private litigants often contribute significantly to the agencies' defeats, even though those factors have no direct role in a particular agency's enforcement action.

In a case in which the FTC itself was the plaintiff, the Harvard School might well echo Justice Breyer's *linkLine* concurrence and explain that private enforcement decisions should not apply with equal force when the Commission is the party. The FTC has reached the Supreme Court as a party to an antitrust case just once in the last two decades—in *California Dental*—and that case resulted in a 5-4 decision with a Chicago School majority rejecting the FTC's claim and Justice Breyer supporting it.⁷⁸ Notably, in *California Dental*,

⁷⁶ 522 F.3d at 462.

⁷⁷ 525 U.S. at 136-37.

⁷⁸ *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Justice Breyer invoked the FTC's expertise in false advertising cases as a reason to defer to the Commission's antitrust enforcement action against a dental association's advertising restrictions,⁷⁹ a classically Harvard School position on the comparative advantages of technocratic regulators over generalist judges.

Unfortunately for the FTC, the Chicago School has not looked particularly favorably on the Commission.⁸⁰ During the 1970s, when Chicago was ascendant, the FTC was the major bulwark of pro-enforcement sentiment. The Commission was thus on a collision course with Chicago. Thus, for example, while the Chicago School was urging the Supreme Court to roll back all antitrust policing of vertical restraints such as resale price maintenance, the FTC was seeking to overturn the *Colgate* doctrine—which allowed manufacturers to establish suggested resale prices and was thus the one exception to the Court's historic hostility to resale price maintenance.⁸¹

In recent times, the interventionist Commission has overtly clashed with the Chicago School-oriented Antitrust Division. The overt bickering began when the FTC asked the Supreme Court to reverse its defeat in the Eleventh Circuit Court of Appeals over the legality of pharmaceutical patent settlements while Justice Department recommended the denial of certiorari.⁸² Payback time came in *linkLine*, when the Justice Department filed a brief arguing against price squeeze liability. The FTC issued a press release explaining why it did not join the Justice Department brief and urged the Supreme Court to deny certiorari.⁸³ The final straw came when the Justice Department issued its Section 2 report⁸⁴ and three FTC Commissioners issued a shrill dissenting statement, disagreeing with

⁷⁹ *Id.* at 787 (Breyer, J., dissenting) (noting that the FTC "is expert in the area of false and misleading advertising").

⁸⁰ See, e.g., Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969) (arguing that the FTC has no institutional advantage over Article III courts).

⁸¹ See *Russell Stover Candies, Inc. v. FTC*, 718 F.2d 256, 257 (8th Cir. 1983) (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)).

⁸² Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough Corp.* (May 17, 2006), 2006 WL 1358441.

⁸³ Statement of the Federal Trade Commission, *Petition for a Writ of Certiorari in Pacific Bell Tel. Co. d/b/a AT&T California v. linkLine Comms. Inc.* (No. 07-512) (May 23, 2008), available at <http://www.ftc.gov/os/2008/05/P072104stmt.pdf>.

⁸⁴ *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

almost everything in the report and warning that the FTC “stands ready to fill any Sherman Act enforcement void that might be created if the Justice Department actually implements the policy decisions expressed in its Report.”⁸⁵

This interagency hostility probably diminished the effectiveness of the two agencies in carrying on their antitrust missions, even when they were not directly squabbling. That is, it is hard to justify deference to the antitrust agencies’ decisions based on their expertise when the supposed experts perpetually contradict each other. And even though the hostility has abated considerably since Obama’s inauguration, the Chicago School courts are unlikely to give the FTC any quarter. *Rambus* is but the latest decision in which the full panoply of judicial suspicion of private antitrust litigation has led to the defeat of FTC enforcement actions as well.

Taken together, *linkLine* and *Rambus* demonstrate the feedback effects of the Harvard and Chicago Schools on the entire system of antitrust enforcement. Although mutually suspicious of one another, the two schools coalesce in suspicion of juries, generalist judges, treble damages, private plaintiffs, and the plaintiffs’ bar. The Harvard School’s suspicions of dominant firms and unregulated markets are muted in cases where a regulator could theoretically intervene—which is perhaps the majority of significant modern antitrust cases. Private antitrust actions thus face high hurdles in the Supreme Court. Although the two schools’ grudging alliance should—and sometimes does—fray in government enforcement cases, the predominance of private litigation over public litigation results in the creation and then application of contracted liability norms to even public lawsuits. And the Chicago School has enough of an upper hand over the Harvard School on the Supreme Court and in many lower courts that even when the two schools diverge in public enforcement cases, the Chicago School’s free marketeerism and distrust of the antitrust agencies often prevails. These are the realities facing President Obama’s antitrust ambitions.

III. The Obama Administration’s Ambitions

With the benefit of hindsight, *linkLine* and *Rambus* may prove to represent monopolization law at its nadir in the United States. Under

⁸⁵ Press Release, FTC, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

Varney's leadership, the Antitrust Division appears to be headed in a more European direction. Almost across the board, the European Union is far more interventionist than the United States in monopolization cases. In the European Union, Pacific Bell and Rambus would have met or did meet very different fates. The European Commission's Guidance paper on abuses of a dominant position—the analog to the now-retracted DOJ report on unilateral exclusionary conduct—calls for policing of “margin squeezes” that prevent equally efficient firms from profitably trading in the downstream market “on a lasting basis.”⁸⁶ In June of 2009, Rambus reached a tentative agreement with the EC to settle the EC's administrative complaint (known as a “Statement of Objections”) by capping its royalty rates for dynamic random access memory for a five-year period.⁸⁷ And even while the FTC was continuing its own ponderous investigation of Intel, the EC issued its \$1.5 billion fine. The new administration's antitrust enforcers are eyeing these and similar influences across the Atlantic and contemplating their replication in the United States.

Still, even in the post-economic-crisis environment, where markets are under suspicion and the Obama administration rides a pro-regulatory tide, it seems unlikely that U.S. monopolization law will come to resemble E.U. abuse of dominance law. The courts have the last word on antitrust cases and there is little indication that they are about to abandon their institutional suspicions.

Curiously, many members of the antitrust community—present or former enforcement officials, practicing lawyers, economists, and academics—continue to believe that the key to reinvigorated antitrust enforcement is convincing the courts that the balance has tipped too far in favor of dominant firms and that certain business practices really do harm consumers. On a number of occasions, I have heard senior antitrust enforcement officials (former and present) comment that no progress can be made until the composition of the Supreme

⁸⁶ Press Release, European Commission, Communication from the Commission: Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings ¶ 80 (February 9, 2009), available at http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf.

⁸⁷ See Press Release, European Commission, Antitrust: Commission Market Tests Commitments Proposed by Rambus Concerning Memory Chips, (June 12, 2009) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/273&format=HTML&aged=0&language=EN&guiLanguage=en>.

Court changes. But in the current context antitrust is not like abortion, where a one- or two-justice shift could radically alter the balance.

Modern antitrust law represents the alliance—albeit mutually suspicious—of Chicago and Harvard. Since Breyer joined the Court in 1994, the Supreme Court has decided 14 antitrust cases. In those cases, there have been 108 votes for the majority position and only 14 votes in dissent. Breyer has been on the losing side only twice, as often as Thomas. Many of the decisions most reviled by the pro-enforcement camp have been unanimous or nearly so. Even if the antitrust views of Supreme Court nominees mattered to presidents—and they don't—it would take decades to break the Chicago-Harvard "double helix," as former FTC Chair Bill Kovacic has called it.⁸⁸

So the Obama administration's suspicions of unbounded markets are destined to run into the courts' suspicions of juries, generalist judges, treble damages, the plaintiffs' bar, and even the enforcement agencies themselves. Merely repealing the Section 2 report and calling for more aggressive enforcement—or even filing more aggressive lawsuits—will not get the administration very far. To be successful in its antitrust ambitions, the administration needs a calculated, nuanced strategy to address the courts' institutional suspicions head-on and, where possible, to draw out the Harvard School justices and their sympathizers in the lower courts.

The core of this strategy will have to be a clearly and convincingly articulated position on why the antitrust agencies should be accorded greater latitude than private plaintiffs to push the boundaries of antitrust liability. In legal briefs, enforcement guidelines, and public speeches the agencies need to acknowledge directly the impulses that have reduced antitrust liability norms—the suspicion of competitor plaintiffs, the chilling effect of the treble damages remedies and fee-shifting, the error costs of false positives, and the limited capacity of lay jurors. Whether or not they embrace these impulses as legitimate, the agencies need to accept them as presently unchangeable facts. Then they need to explain why they should not have to carry the baggage of private antitrust litigation, how the liability norms created in private litigation need not apply wholesale in public litigation, and how there is ample room within antitrust

⁸⁸ Kovacic, *supra* note 61.

law's statutory framework for treating public enforcers more generously than private ones. Finally, to be successful, they need to move beyond a "just trust us" framework for deference to agency decisions and offer concrete and judicially administrable principles to delimit the boundaries of agency enforcement discretion.

Having articulated their principles, the agencies will need to start testing them in litigated cases. Even with an institutionalist focus, the road ahead will be bumpy. Winning over the Harvard School nets only four justices on the Supreme Court and the occasional victory in the lower courts. The pay-off for an institutionally focused strategy will thus not be immediate. But it is much more likely to result in enhanced public antitrust enforcement over the next decade than a strategy that simply tries to establish the theoretical proposition that price squeezes, patent ambushes, or other business practices are harmful and should be condemned. To borrow from James Carville: It's the institutions, stupid.

Conclusion

Despite the pro-regulatory sentiment brought about by the financial crisis, the Obama administration's zeal for reinvigorated antitrust enforcement faces some serious obstacles. For one, although regulation may increase in times of financial crisis, antitrust enforcement has historically been a casualty of economic crises.⁸⁹ More fundamentally, cases like *linkLine* and *Rambus* reveal the courts' deep skepticism about the need for vigorous monopolization enforcement and, most of all, the immovable obstacle formed by the uneasy alliance of the Harvard and Chicago Schools. Only a deliberate and patient strategy that addresses the two schools' institutionalist concerns stands a chance of advancing the new administration's ambitious agenda.

⁸⁹ See Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, *Global Competition Policy* (Dec. 2008).