



ESSAY

Judge Gorsuch on Antitrust

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Introduction

With a career spanning the Justice Department, private practice, and the bench, Judge Gorsuch would bring to the Supreme Court an antitrust background comparable to that of former Justice John Paul Stevens.¹ His background demonstrates a suspicion of unilateral theories of liability and a preference for bright-line rules that points to him leading the Court in future antitrust cases.²

I. Suspicion of Unilateral Theories of Liability

Judge Gorsuch is deeply suspicious of unilateral conduct as a theory of antitrust liability, especially of monopoly leveraging,³ the essential facilities doctrine, and refusals to deal theories, all of which, he writes, “presuppose[] anticompetitive conduct.”⁴ He describes the first as being “und[one]” by *Trinko*,⁵

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1. This observation was made by Carl W. Hittinger and Tyson Y. Herrold. See *The Antitrust Points of View of Supreme Court Nominee Neil Gorsuch*, LEGAL INTELLIGENCER (Feb. 6, 2017), <http://at.law.com/bsVjLY>. Like Judge Gorsuch, Justice Stevens enjoyed a long antitrust career prior to his term on the Court spanning private practice, judiciary committees, and academia. See Robert D. McFadden, *The President's Choice*, N.Y. TIMES (Nov. 29, 1975), <https://nyti.ms/2mtLp2h>.

2. For a discussion of Judge Gorsuch's antitrust career, see Eric Kroh, *Gorsuch Would Lend Antitrust Legal Chops to High Court*, LAW360 (Feb. 1, 2017, 6:19 PM EST), <https://www.law360.com/articles/887217/gorsuch-would-lend-antitrust-legal-chops-to-high-court>. For summaries of his three significant antitrust decisions while a judge on the Tenth Circuit, see Hittinger & Herrold, *supra* note 1.

3. In monopoly leveraging, a monopolist uses a monopoly in one market to achieve a competitive advantage in another with a dangerous probability of successfully monopolizing the second. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993).

4. *Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1222 (10th Cir. 2009) (Gorsuch, J.) (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004)).

5. *Id.*

the second as an “epithet,”⁶ and, as to the third, notes twice that after the Supreme Court accepted the refusals to deal as a theory of liability in *Aspen Skiing* and required a larger ski resort to share ticketing packages with its smaller rival, the smaller rival continued to lose money and the two eventually merged.⁷

Two of Judge Gorsuch’s antitrust opinions demonstrate his dislike of refusals to deal as an antitrust theory of liability. A refusal to deal violates section 2 of the Sherman Act (which prohibits firms from achieving, maintaining, or attempting to achieve or maintain a monopoly⁸ “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”⁹) by ending a voluntary course of dealing (forgoing short-term profits) for anticompetitive ends.¹⁰ Judge Gorsuch, however, argued in *Novell v. Microsoft Corp.* that the conduct, in order to confer liability, must be “irrational but for its anticompetitive effect,”¹¹ a bar arguably higher than that set by Justice Scalia.¹² There, Judge Gorsuch found (1) successful monopoly maintenance could preclude a finding of forgoing short-term profits¹³ (despite monopoly maintenance being an antitrust theory of liability in itself) and (2) monopolization of another product in another market as a result of a refusal to deal could demonstrate that the refusal to deal in the original market was not irrational.¹⁴

Of course, refusal to deal as a theory of antitrust liability is, to put it lightly, controversial—Justice Scalia described *Aspen Skiing* as “at or near the boundary

6. *Id.* at 1223.

7. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 n.3 (10th Cir. 2013) (Gorsuch, J.); *Four Corners*, 582 F.3d at 1224 n.3; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

8. 15 U.S.C. § 2 (2015).

9. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

10. *See Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

11. *Novell*, 731 F.3d at 1075 (emphasis added).

12. *Compare Trinko*, 540 U.S. at 409 (stating that the defendant must be seeking “an anticompetitive end”), *with Novell*, 731 F.3d at 1076 (stating that the plaintiff must demonstrate the defendant’s “willingness to sacrifice short-term profits . . . in a manner that [is] irrational but for its tendency to harm competition”).

13. *Novell*, 731 F.3d at 1077 (“And Novell’s own theory of monopoly maintenance posits that Microsoft’s [refusal to deal] helped its position in the operating systems market by wedding consumers to Microsoft applications that themselves could run only on its operating system.”).

14. *Id.* (“[E]ven if Microsoft’s decision to [refuse to deal] ultimately made Windows 95 less successful, any losses in that market have to be considered in light of the acknowledged and immediate gains it achieved in the applications arena.”). Novell did not bring a claim of monopolization in the applications arena (as opposed to the operating systems market) because the statute of limitations had expired. *Id.* at 1069. Had Novell been able to bring this claim, it likely would have been successful, as Judge Gorsuch hints. *See id.* (writing that “one might be excused for thinking Novell’s lawsuit charges Microsoft” with monopolizing in the applications market).

of § 2 liability”¹⁵—and Judge Gorsuch is not alone in his views. The strength of Judge Gorsuch’s views on the topic, however, demonstrates a willingness to closely analyze potential profitability and a belief that only a light touch of antitrust enforcement is necessary to protect the free market from the more “ruthless”¹⁶ aspects of competition.

II. Preference for Bright-Line Rules

In addition, Judge Gorsuch’s opinions demonstrate a preference for bright-line rules. Antitrust law is, of course, no stranger to bright lines: the per se rule condemns certain conduct regardless of its impact on the market because “logic and experience show that the risk of injury to competition from [such] behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior’s procompetitive benefits and its anticompetitive costs.”¹⁷ Judge Gorsuch also sees a bright-line rule in section 2, one which distinguishes “unilateral decisions about with whom [a firm] will deal and on what terms,” which should benefit from presumptive legality,¹⁸ from conduct “involv[ing] some assay by the monopolist into the marketplace,” which, he argues, should not.¹⁹ In his eyes, cases involving tying,²⁰ exclusive

15. *Trinko*, 540 U.S. at 409.

16. *Novell*, 731 F.3d at 1078.

17. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 486-87 (1992) (Scalia, J., dissenting) (footnote omitted). See generally *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927) (explaining the per se rule against price fixing). By contrast, all conduct under section 2 is decided under the Rule of Reason, where courts balance anticompetitive costs against procompetitive gains. See *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342-48 (1982) (describing the Rule of Reason and distinguishing it from per se analysis); *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238-39 (1918) (describing the Rule of Reason).

18. *Novell*, 731 F.3d at 1074, 1076; see also *id.* at 1080 n.5 (“[U]nilateral refusals to deal are almost always lawful Cases that meet the profit sacrifice test represent a ‘limited exception.’” (quoting *Trinko*, 540 U.S. at 409)).

19. *Id.* at 1072. Interestingly, Judge Gorsuch chooses to compare this presumption (which would condemn conduct demonstratively anticompetitive) to per se liability—which condemns even in light of procompetitive justifications—and not the “quick look” rule, where the Court assumes anticompetitive effect but allows the defendant to proffer procompetitive justifications. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999).

20. Tying exists when a firm conditions the purchase of one good on the purchase of another, where the seller has sufficient market power in the tying product market so it can restrain trade in the market for the tied product. See *Eastman Kodak*, 504 U.S. at 461-62. Courts have analyzed tying under both section 1 and section 2, though the general trend has been toward analyzing it under section 2. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 103-05, 108-13 (2007), www.usdoj.gov/atr/public/hearings/ip/222655.pdf. When tying is analyzed under section 1, it is technically analyzed under the per se rule but with an additional inquiry into market power. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984).

dealing,²¹ and fraud are cases of a firm “failing to leave its rivals alone”²² while refusals to deal, the essential facilities doctrine, and predatory pricing are best characterized as “failing to come to [a rival’s] aid”²³ and should benefit from a presumption of legality. In general, Judge Gorsuch, drawing on his extensive antitrust background, finds common qualities among theories of antitrust liability that, he appears to believe, point toward fairly rigid rules.

With the utmost respect for Judge Gorsuch’s considerable antitrust experience and expertise, his groupings appear to be mistaken. There is a line dividing conduct such as exclusionary dealing and tying from refusals to deal and predatory pricing, but it is because exclusionary dealing and tying are, by their nature, vertical restraints of trade and can be challenged under section 1 or section 2, while refusals to deal, essential facilities doctrine, and predatory pricing are restricted to only section 2.²⁴ Attempting to describe such conduct as an “assay” into the marketplace requires a bit of verbal gymnastics, arguably seen when Judge Gorsuch describes tying’s harm as “requir[ing] third parties to purchase a bundle of goods rather than just the ones they really want.”²⁵ This is not why tying is illegal. Tying is illegal because if the seller enjoys sufficient market power in the tying product, the tie can crowd competitors out of the marketplace, reducing competition and inevitably increasing prices and decreasing quality.²⁶ Of course, this makes tying resemble monopoly leveraging, which Judge Gorsuch derides in *Four Corners*,²⁷ and may explain why he chooses to characterize tying by reference to its impacts on consumers generally, instead of in reference to its use of a monopoly in one market to gain a monopoly in another.

Section 2 is not the only place Judge Gorsuch advocates for bright-line rules. In *Kay Electric Cooperative v. City of Newkirk*²⁸—listed by Judge Gorsuch as one of his ten “most significant cases”²⁹—he expressed a strong preference for changing

21. Exclusive dealing contracts are vertical agreements where the buyer is obligated to purchase most or all products from one seller. See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951). Judge Gorsuch argued that exclusive dealing is anticompetitive under section 2 because it prevents free contracting between parties. *Novell*, 731 F.3d at 1072.

22. *Novell*, 731 F.3d at 1072.

23. *Id.*

24. See generally EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 323-24, 359, 368-71 (2d ed. 2011) (discussing vertical agreements that restrict dealing with rivals).

25. *Novell*, 731 F.3d at 1072.

26. See *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 n.19 (1984), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

27. *Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1222 n.2 (10th Cir. 2009) (Gorsuch, J.) (referring to the plaintiff’s claim as “his purported ‘monopoly leveraging’ claim”).

28. 647 F.3d 1039 (10th Cir. 2011) (Gorsuch, J.).

29. U.S. Senate Comm. on the Judiciary, Questionnaire for Nominee to the Supreme Court 25, 33 (n.d.).

the current state action doctrine test as it relates to municipalities to a bright-line rule. Currently, this test grants immunity from antitrust law to state actors but only extends that immunity to municipalities if there is a “clear articulation” of a state policy to authorize the anticompetitive conduct” pursued by that municipality.³⁰ But how clearly a state must articulate this policy and what counts as articulation is unclear.³¹ Judge Gorsuch would prefer a brighter line that would require states to clearly declare their intent to disrupt competition with few exceptions³² but laments that “however much sense [a bright-line rule] makes (and we think it makes quite a lot of sense), our lot as a lower court isn’t to choose between the Supreme Court’s holdings but to apply them.”³³ After making his opinions on the doctrine known, Judge Gorsuch proceeded to—as he does with section 2 liability—discern a few bright lines within the muddled mess that is state action immunity doctrine.³⁴

Conclusion

It is tempting to compare Judge Gorsuch to Justice Scalia, but for the purpose of predicting a Justice Gorsuch’s antitrust jurisprudence, this may be a mistake. Though both may share concerns of overapplying antitrust law, Judge Gorsuch’s concern stems from his pro-business leanings, while Justice Scalia’s likely stemmed (in addition to pro-business tendencies) from doubt in antitrust law’s internal consistency³⁵—a belief standing directly opposite to Judge Gorsuch’s preference for bright-line rules. Justice Alito, who also expresses pro-

30. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985) (quoting *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 51-52 n.14 (1982)).

31. For a summary of past case law, see *Kay Elec.*, 647 F.3d at 1042.

32. *Id.* at 1043 (stating that courts should require states to declare their intentions clearly instead of falling back on assumptions based on legislation passed).

33. *Id.*

34. *Id.* at 1043-44. Coincidentally, Judge Gorsuch is not the only recent Supreme Court nominee to have strong views on the state action immunity doctrine as it relates to municipalities. In *Antitrust and State Action: Economic Efficiency and Political Process*, Judge Merrick B. Garland argues that the current judicial approach to state action is fundamentally correct. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 *YALE L.J.* 486, 487-88 (1987). Perhaps even more coincidentally (and perhaps unfortunately for Judge Gorsuch), the article was cited in Justice Kennedy’s majority opinion in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111 (2015), though as support for an unrelated proposition.

35. See *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 36 (1986) (statement of Judge Antonin Scalia) (“[I]n law school, I never understood [antitrust]. I later found out . . . that I should not have understood it because it did not make any sense then.”). It is unlikely that Judge Gorsuch, who has devoted his career to antitrust law, believes antitrust law lacks internal consistency.

business, pro-laissez faire views, may be a better comparison,³⁶ but he lacks an extensive antitrust judicial history.³⁷

In general, Judge Gorsuch's considerable experience in antitrust and willingness to question established antitrust principles³⁸ make it difficult to compare him to any one Justice. His established expertise, conversational and confident writing style, and clear appreciation for antitrust law will give his views considerable heft on the Court. Those hoping for increased antitrust scrutiny, especially in unilateral conduct, will likely be left disappointed, but those who desire experience with and deep understanding of antitrust law should be quite pleased.

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36. Two of Justice Alito's past cases support this similarity between Justice Alito's and Judge Gorsuch's views on antitrust. Justice Alito joined the majority opinion in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009), which Judge Gorsuch cited frequently in *Novell*. Justice Alito also wrote a dissenting opinion in *North Carolina State Board of Dental Examiners*, 135 S. Ct. 1101, advocating simplicity—"the Sherman Act . . . do[es] not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter," *id.* at 1117-18. (Note, though, that Justice Alito was not arguing for a bright-line rule for the state action doctrine as applied to municipalities but rather that the Court had incorrectly applied the municipality rule unnecessarily to a state agency.)
37. Justice Alito does not appear to have written any majority opinions in antitrust cases, and he appears to have only departed from the majority once, in *North Carolina State Board of Dental Examiners*. However, his similarities with Judge Gorsuch are noticeable in other antitrust-related cases, such as his dissent in *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), in which—and in a break from Justice Scalia, who joined the majority—he argued, on efficiency and economic grounds, for overturning the *Brulotte* rule that prohibits a patent holder from charging royalties for the use of her invention after its patent term has expired. Compare *Kimble*, 135 S. Ct. at 2416 (Alito, J., dissenting) (discussing the positive benefits of post-term royalties on innovation and certainty), with *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (discussing the positive benefits of allowing monopolists to refuse to deal with rivals on innovation and certainty). He also demonstrates a Judge Gorsuch-like willingness to overturn past precedent that he feels is untenable. *Kimble*, 135 S. Ct. at 2417-19 (Alito, J. dissenting) (arguing in favor of overturning prior precedent on policy grounds).
38. See, e.g., *Novell*, 731 F.3d at 1074 (arguing that *Aspen Skiing's* "preexisting voluntary and presumably profitable course of dealing" requirement for refusals to deal "risks deterring the termination of joint ventures when they no longer make economic sense."); *Kay Elec.*, 647 F.3d at 1043.