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# The Antitrust Jurisprudence of Neil Gorsuch

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# THE ANTITRUST JURISPRUDENCE OF NEIL GORSUCH

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ABSTRACT

*In 2017, the U.S. Senate confirmed Neil M. Gorsuch's nomination to serve on the Supreme Court. Like Justice Stevens before him, Gorsuch's primary area of expertise is antitrust law. Like Stevens, Gorsuch both practiced and taught in the field before joining the bench. As a judge for the Tenth Circuit Court of Appeals, Gorsuch penned multiple substantive antitrust opinions.*

*His unique expertise will likely situate Gorsuch as one of the Court's leading voices on antitrust matters for decades to come. A close examination of his prior antitrust opinions thus offers vital insight into his approach to antitrust principles and execution. This Essay provides the first in-depth descriptive and prescriptive analysis of Gorsuch's antitrust jurisprudence. While it reveals (perhaps unsurprisingly) a great deal of sophistication vis-à-vis antitrust doctrine, it also identifies several areas for improvement.*

*While serving on the Tenth Circuit, Gorsuch effectively expanded upon—even rewrote—existing precedent, including Justice Scalia's notable opinion for the majority in* Trinko. *For normative force, Gorsuch's jurisprudence at times rested upon logical fallacies and an unduly one-sided error-cost framework. This Essay offers prescriptive suggestions for Gorsuch and other jurists to follow in future cases, with an eye toward producing a more transparent, coherent, and welfare-maximizing body of antitrust law.*



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## I. INTRODUCTION

On January 31, 2017, President Donald Trump nominated Judge Neil M. Gorsuch, then sitting on the Tenth Circuit Court of Appeals, to serve as a Justice of the U.S. Supreme Court.[1] Following a contentious debate and the invocation of the so-called "nuclear option," the U.S. Senate confirmed Gorsuch's nomination.[2] On April 10, 2017, Gorsuch was sworn in as the Supreme Court's 113th Justice.

Gorsuch's primary area of expertise is antitrust law. Like Justice Stevens,[3] Gorsuch both practiced antitrust law as an attorney and taught antitrust as a professor.[4] As a private attorney, Gorsuch "made a name for himself in the antitrust world" by representing both plaintiffs and defendants in high-stakes antitrust litigation.[5] As a professor, Gorsuch drew admiration from his students.[6] And as an appellate judge, Gorsuch penned multiple substantive antitrust opinions.[7]

Gorsuch's unique expertise in antitrust law will likely situate him as one of the Court's leading voices on antitrust matters for decades to come. A close examination of his prior antitrust opinions thus offers vital insight into his jurisprudential attitudes toward, and approach to, antitrust principles and execution.[8] Understanding antitrust precedent, particularly when it originates from an expert in the

1. *See* Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html.

2. Leigh Ann Caldwell, *Neil Gorsuch Confirmed to Supreme Court After Senate Uses 'Nuclear Option'*, NBC NEWS (Apr. 7, 2f017, 7:33 PM), http://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-after-senate-uses-nuclear-option-n743766 [https://perma.cc/2ZTC-CKC8].

3. *See* Mark R. Patterson, *Justice Stevens and Market Relationships in Antitrust*, 74 FORDHAM L. REV. 1809 (2006).

4. Lauren Salins, *Supreme Court Nominee Neil Gorsuch Has Significant Antitrust Experience*, NAT'L L. REV. (Feb. 24, 2017), http://www.natlawreview.com/article/supreme-court-nominee-neil-gorsuch-has-significant-antitrust-experience [https://perma.cc/W4T8-ZDAR].

5. Carl W. Hittinger & Tyson Y. Herrold, *Antitrust Legacy of High Court Nominee Gorsuch in Private Practice*, LEGAL INTELLIGENCER (Mar. 6, 2017), http://www.thelegalintelligencer.com/home/id=1202780550273/Antitrust-Legacy-of-High-Court-Nominee-Gorsuch-in-Private-Practice?mcode=1202615324341&curindex=1 [https://perma.cc/5GL4-HQV4].

6. Alex Burness, *Students of Supreme Court Candidate Neil Gorsuch at CU Law School Cite Fairness, Dedication to Truth*, DENVER POST (Jan. 31, 2017, 12:06 PM), http://www.denverpost.com/2017/01/31/supreme-court-neil-gorsuch-cu-law-school-students/ [https://perma.cc/6K8K-LC3E].

7. *See infra* Part II (descriptively summarizing Gorsuch's antitrust opinions).

8. Of the approximately 3,000 Tenth Circuit panel decisions in which Gorsuch participated, he included *Kay Electric Cooperative* on a list of his ten "most significant" decisions. S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 25-34 (2017), https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf [https://perma.cc/H9YM-DVN3].

field, requires a depth of treatment often lacking in public discourse. This is doubly true when that discourse is highly politically charged—as was the environment surrounding Gorsuch's nomination.[9] Thus, for example, a contemporary commentator observed (without further explanation or authoritative support) that in one case, *Four Corners*,[10] "Gorsuch found no antitrust violations despite substantial evidence that a dominant player used its power to push out rivals."[11] As explained *infra*, however, there was little to no evidence of competitive harm in *Four Corners*.[12] Moreover, this claim was urged as proof that "Gorsuch has repeatedly blessed actions by big firms to exploit their dominant position."[13] Yet the defendant in *Four Corners* was a nonprofit hospital serving a rural town of 18,000—hardly a "dominant" "big firm."[14]

This Essay provides the first in-depth descriptive and prescriptive analysis of Gorsuch's antitrust jurisprudence. This analysis reveals (perhaps unsurprisingly) a great deal of expertise and sophistication vis-à-vis antitrust doctrine. But it also identifies some areas for improvement. While on the Tenth Circuit, Gorsuch at times showed a great deal of judicial restraint, issuing elegantly narrow rulings that paid appropriate deference to Supreme Court precedent.[15] At times, however, Gorsuch's opinions subtly—but substantially—deviated from the dictates of binding precedent. Perhaps most notably, Gorsuch's opinions in *Four Corners*[16] and *Novell*[17] expanded the scope and altered the substantive content of Justice Scalia's notable majority opinion in *Trinko*.[18] And in *Four Corners*, Gorsuch announced a novel requirement for proving antitrust injury that—contrary to longstanding Supreme Court precedent[19]—is not based on the type of

9. *See, e.g.*, Ted Barrett, *Senate Faces Nuclear Showdown Over Neil Gorsuch Nomination*, CNN (Apr. 3, 2017, 9:24 AM), http://www.cnn.com/2017/04/03/politics/senate-nuclear-neil-gorsuch/ [https://perma.cc/6QYR-DJMP].

10. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009).

11. Zephyr Teachout, *Neil Gorsuch Sides with Big Business, Big Donors and Big Bosses*, WASH. POST (Feb. 21, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/21/neil-gorsuch-always-sides-with-big-business-big-donors-and-big-bosses/?utm_term=.2b924a671738 [https://perma.cc/78RE-AKJ8].

12. *See infra* Part III (normatively critiquing Gorsuch's antitrust jurisprudence).

13. Teachout, *supra* note 11.

14. 582 F.3d at 1217.

15. *See infra* Part II.A.

16. 582 F.3d 1216.

17. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

18. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (Scalia, J.).

19. *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

harm alleged, but on the remedy sought.[20] Such departures from established doctrine, especially by a lower court, could be viewed as unwarranted "judicial activism."[21]

The normative bases for these moves also suggest room for improvement in future antitrust cases. At times, Gorsuch's reasoning exhibits logical fallacies. It also evinces an unduly one-sided conception (and application) of the widely employed error-cost framework of decisionmaking. Like most modern jurists, Gorsuch appears to value a coherent, transparent, efficient, and welfare-maximizing body of antitrust law. To further those goals, these issues warrant correction in future decisions.

This Essay proceeds as follows. Part II descriptively summarizes the facts, holdings, and rationales at play in then-Judge Gorsuch's Tenth Circuit antitrust opinions. Part III critiques those opinions. For normative force, this critique depends primarily on doctrinal, logical, and consequentialist grounds. More specifically, this critique begins with the propositions that departures from binding precedent and internal inconsistencies are undesirable, and that transparency in judicial decisionmaking (particularly in the area of antitrust) is desirable. As a recent Supreme Court antitrust opinion rightly observed, "[b]y exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future."[22] Building on the normative critique in Part III, Part IV offers several prescriptive recommendations for improving future antitrust jurisprudence. Part V briefly concludes.

## II. OPINIONS

As a Tenth Circuit judge, Gorsuch penned three substantive antitrust decisions. One of these, *Kay Electric*,[23] dealt with the state-action doctrine. The remaining two, *Four Corners*[24] and *Novell*,[25] were treated by Gorsuch as refusal-to-deal cases. (As Part III, *infra*, demonstrates, however, *Four Corners* is more properly understood as involving an exclusive-dealing claim.) The following Sections describe the facts, holdings, and rationales of these opinions.

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20. *See infra* Part III.B.

21. Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CALIF. L. REV. 1441, 1442-43 (2004) (describing the widespread condemnation of, and widespread confusion over what is meant by, "judicial activism").

22. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999) (quoting P. AREEDA, ANTITRUST LAW ¶ 1500, at 364 (1986)).

23. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039 (10th Cir. 2011).

24. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009).

25. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

### A. *State Action:* Kay Electric

In *Kay Electric*, Judge Gorsuch faced an appeal involving the state-action doctrine, which shields certain state activities from federal antitrust scrutiny. Newkirk, a city in Oklahoma, and Kay, a privately owned cooperative, both serviced rural electric customers. When Kay offered to provide electricity to a new jail outside Newkirk's geographic boundaries, the city annexed the area, then threatened to withhold sewage services from the jail unless the jail selected Newkirk as its electric provider. Newkirk's complete monopoly over sewage services made this, in effect, an offer the jail could not refuse. Kay sued the city, alleging violations of sections 1 and 2 of the Sherman Act.

The district court applied the two-pronged *Midcal* test for state action, which requires both a clearly articulated intent to displace competition and active supervision by the state.[26] As to the "clear articulation" prong, the court held that "foreseeable" anticompetitive effects will suffice.[27] And, since an Oklahoma statute granted broad power to municipalities to establish and operate public utilities, the court concluded that *Midcal*'s first prong was satisfied. Oklahoma had begun deregulating electricity markets with its Electric Restructuring Act of 1997, potentially leaving room for antitrust scrutiny—but (per the lower court) the lack of any implementing rules or regulations rendered that Act irrelevant to the state-action inquiry.[28] With that settled, the court decided that the "active supervision" prong was also met, and that the city's conduct was shielded from antitrust liability.

Judge Gorsuch, writing for the Tenth Circuit in characteristically vivid style,[29] reversed. His opinion begins by noting a fairly sophisticated distinction between the state-action doctrine, which is motivated by federalist concerns, and core antitrust doctrine, which (under the consensus view) is motivated by economic conceptions of efficiency and consumer welfare.[30] It also notes the distinction—overlooked by the district court—between state and municipality action. Generally, municipal conduct receives state-action immunity where the

26. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (citing City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)).

27. Kay Elec. Coop. v. City of Newkirk, No. CIV-10-347-C, 2010 WL 3222477, at *2 (W.D. Okla. Aug. 16, 2010), *rev'd* 647 F.3d 1039 (10th Cir. 2011).

28. *Id.* at *3.

29. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1041 (10th Cir. 2011) ("Finding themselves stuck between a rock and a pile of sewage, the operators of the jail reluctantly went with the city's package deal.").

30. *Id.* at 1041. This early portion of the opinion also typifies Gorsuch's Socratic-writing style, which often uses questions to introduce new topics.

"clear articulation" prong of *Midcal* is present; the "active supervision" prong is not required.[31]

Next, Judge Gorsuch offered a gentle correction of the district court's reasoning by noting that there is, in fact, some confusion over whether "foreseeable" anticompetitive results alone are enough for a "clear articulation" of state policy.[32] Gorsuch also lightly chided the Supreme Court for this lack of doctrinal clarity and suggested a potential improvement. Citing with approval the leading treatise, which proposes a bright-line "clear articulation" requirement under which "foreseeable results" alone would not suffice, Gorsuch observed that such a rule "makes quite a lot of sense."[33] But, he continued, "[H]owever much sense this makes . . . our lot as a lower court isn't to choose between the Supreme Court's holdings but to apply them."[34]

In any event, the doctrinal confusion turned out not to matter much. Gorsuch elegantly managed to navigate the relevant precedent by reasoning that *at least* "foreseeable results" are required—and, if absent, the city's defense would fail regardless of what the proper rule actually was.[35] With that in mind, Gorsuch was able to approach the task as essentially one of statutory interpretation, invoking the canon *lex specialis derogat legi generali*.[36] That task, to a jurist, offers relatively familiar ground.

The opinion thus delved more deeply than had the district court into the relevant Oklahoma legislation. In particular, Gorsuch found most relevant the Rural Electric Cooperative Act.[37] That Act authorized electric cooperatives to continue operating even in city-annexed areas and proscribed cities from hindering such operations.[38] Contrary to the district court, Gorsuch found the deregulatory (but toothless) Electric Restructuring Act to cut *against* finding state-action immunity.[39] It was not "the place of a court," Gorsuch wrote, "to say whether . . . Oklahoma has moved too slowly or quickly in its efforts to restructure an entire industry."[40] Since these Acts were much more specific vis-à-vis the city's conduct than the general statutory grant of

31. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1112 (2015).

32. 647 F.3d at 1043.

33. *Id.* ("With its usual care Professor Areeda and Hovenkamp's treatise traces all these warps and wefts . . . .").

34. *Id.*

35. *Id.*

36. *Id.* at 1044.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1045.

municipal powers pointed to by the city and the district court, no "clearly articulated" state policy to displace competition was present.[41]

### B. *Refusals to Deal*

#### *1.* Four Corners

The first of Judge Gorsuch's refusal-to-deal opinions, *Four Corners*, was issued in 2009.[42] Mercy Medical Center (Mercy), the defendant, operated a hospital in Durango, Colorado, near a Southern Ute Indian reservation.[43] Dr. Bevan, the plaintiff, operated a nephrology clinic in Farmington, New Mexico.[44] Mercy and the Southern Ute Tribe attempted in vain for years to convince Dr. Bevan to provide inpatient services in Durango.[45] Dr. Bevan consistently refused, though he held "consulting privileges" at Mercy.[46] A second nephrologist, Dr. Saddler, agreed to relocate to Durango—but only on the condition that Mercy and the Tribe underwrite up to $2.5 million in losses to help launch the new practice.[47]

Under the hospital's bylaws, hiring Dr. Saddler terminated Dr. Bevan's consulting privileges.[48] Dr. Bevan then applied for full admittance but was rebuffed.[49] To forestall further reapplications, Mercy and Dr. Saddler entered into an exclusive-supply contract.[50] Mercy's administrators reportedly preferred this arrangement for several interrelated reasons. First, the hospital did not provide sufficient minimum scale to support two competing nephrologists.[51] Second, as a result, the $2.5 million underwriting fund would be more rapidly depleted by two competing nephrologists.[52] Finally, Mercy was concerned that Dr. Bevan would repeat a prior predation scheme he had

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41. *Id.*

42. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009).

43. *Id.* at 1217-18.

44. *Id.* at 1217.

45. *Id.*

46. *Id.* at 1218.

47. *Id.*

48. *Id.*

49. The hospital's bylaws required all staff members to reside within a thirty-minute drive of the hospital. Attempting to circumvent this requirement, Dr. Bevan "first suggested that he resided in Durango office space. When that gambit failed to persuade hospital authorities, he told Mercy he had leased a residence near Durango, which, on investigation, turned out to be a plot of vacant land." *Id.*

50. *Id.* at 1218-19.

51. *Id.* at 1219.

52. *Id.*

(allegedly) carried out before.[53] When a new nephrology practice opened in Page, Arizona, Dr. Bevan had launched a competing satellite clinic.[54] The town could not support two firms, and the rival practice soon exited the market, after which Dr. Bevan closed *his* clinic, leaving the town with no nephrologists at all.[55]

Judge Gorsuch, writing for a unanimous Tenth Circuit, ducked the thorny market-power issue on which the lower court decided the case. Instead, Gorsuch—citing Mercy's answer brief—began by framing the case as a classic refusal to deal.[56] With that as a starting point, Gorsuch engaged in a lengthy discussion of the rationale underlying *Trinko*[57] and *Linkline*,[58] both recent U.S. Supreme Court decisions that express skepticism of refusal-to-deal claims. With those markers staked, Gorsuch's opinion admitted to some disagreement between the parties over how exactly to characterize the challenged conduct—as a refusal-to-deal, "monopoly-leveraging," or essential-facilities claim. That disagreement notwithstanding, Gorsuch observed that "[i]n the end, picking an 'epithet' to fix on Dr. Bevan's argument may be less illuminating than confronting its substance."[59]

Gorsuch next reiterated that the "substance" of Dr. Bevan's claim was a refusal to deal. A monopolist, under *Trinko* and *Linkline*, has no general "antitrust duty to deal with its rivals at all."[60] Gorsuch posited that antitrust plaintiffs can prevail on a refusal-to-deal claim only where a "key fact"—termination of a profitable course of dealing to achieve purely anticompetitive ends—is present.[61] Since that fact was not present in *Four Corners*, the Tenth Circuit affirmed summary judgment for Mercy.[62]

Proceeding in dicta, the opinion also held that Dr. Bevan failed to allege antitrust injury. The trouble, per Gorsuch, arose when Dr. Bevan requested not only damages, but also injunctive relief in the form of court-ordered active medical-staff privileges.[63] If the court were to order Mercy, a (putative) monopolist, simply to grant such privileges, there would be "no guarantee" that consumers would be

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1221.

57. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

58. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009).

59. *Four Corners*, 582 F.3d at 1223.

60. *Id.* at 1221 (quoting *Linkline*, 555 U.S. at 1115) (internal quotation marks omitted).

61. *Id.* at 1225 (citing Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1197 (10th Cir. 2009)).

62. *Id.* at 1225, 1227.

63. *Id.* at 1225-26.

better off.[64] Mercy could simply charge Dr. Bevan monopoly prices, which would (presumably) be passed on to consumers.[65] And mandating competitive terms along with access would, according to Gorsuch's opinion, inappropriately turn the court into a central planner absent an "extensive past course of dealing" upon which the court could base such terms.[66] As a result, Gorsuch concluded, Dr. Bevan did not suffer antitrust injury, for "a producer's loss is no concern of the antitrust laws."[67]

*2.* Novell

The second of Judge Gorsuch's refusal-to-deal opinions, *Novell*,[68] was issued in 2013, four years after *Four Corners*. The underlying suit was brought against Microsoft by Novell, the developer of WordPerfect. After an eight-week trial, the jury hung, and the district court granted judgment as a matter of law in favor of Microsoft.[69] The appeal was argued before the Tenth Circuit by David Boies and David Tulchin, both preeminent antitrust litigators.

The record—though voluminous—was, according to Judge Gorsuch, "straightforward enough."[70] During the 1990s, Microsoft's Windows operating system (OS) enjoyed a dominant market position.[71] Microsoft also sold an "office suite" of Windows-compatible software applications, including Word and Excel.[72] Microsoft's Word directly competed with Novell's WordPerfect. Novell, in turn, aspired "to create an office suite of its own to rival Microsoft Office."[73] Before rolling out the Windows 95 OS, Microsoft shared a beta version, as well as the application-programming interfaces (APIs), of Windows 95 with Novell and other software developers.[74] This early access was supposed to allow developers to create Windows-compatible applications without needing to spend months post-release writing custom code to

64. *Id.* at 1226.

65. *Id.*

66. *Id.* ("This isn't to suggest that it's always and metaphysically impossible to discern judicially administrable terms on which sharing might be mandated.").

67. *Id.* (quoting Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992) (Easterbrook, J.)) (internal quotation marks omitted).

68. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

69. *Id.* at 1066.

70. *Id.*

71. *See id.* at 1071.

72. *Id.* at 1067.

73. *Id.*

74. *See id.* ("Anticipating the release of Windows 95 to the public sometime in 1995, in June 1994 [Microsoft] shared a beta, or test, version of the operating system with [Independent Software Vendors].").

ensure compatibility. A wider variety of immediately available Windows-compatible applications, in turn, "would help the marketing of Windows 95."[75]

But Microsoft subsequently reversed course, withdrawing from Novell (and other developers) access to its Windows 95 APIs. The "evidence suggest[ed]" that Microsoft withdrew access to make its "own applications, including Microsoft Office, more immediately attractive to users"[76]—even though the move "marginally reduce[d] the attractiveness of Microsoft's new [OS]."[77]

Novell's intuitive claim—monopolization of the "office-suite applications" market—was time-barred. Because the U.S. Justice Department's lawsuit against Microsoft in the 1990s tolled the statute of limitations for conduct in the OS market, Novell instead claimed that Microsoft's conduct "helped Microsoft maintain its monopoly in the [OS] market."[78] More specifically, Novell argued that Microsoft's conduct helped to lock users into Microsoft Office, and thereby into the Windows OS.[79] Novell also argued that its PerfectOffice suite threatened Microsoft's OS market share because other software developers could write applications "directly for PerfectOffice" instead of Windows.[80] Such applications would make the choice underlying OS less salient for users, effectively commoditizing the OS market.[81]

Judge Gorsuch's opinion begins by identifying the basic elements of any Sherman Act section 2 claim: monopoly power, anticompetitive conduct, and antitrust injury.[82] Microsoft did not dispute that it possessed monopoly power during the relevant time period.[83] Nonetheless, the *Novell* opinion devotes two paragraphs to a discussion of market definition and power. "[O]ne could well debate," Gorsuch observed, "whether the same product market that existed back then still exists today."[84] Indeed, Gorsuch went on to provide one side of that debate:

75. *Id.*

76. *Id.* at 1068-69.

77. *Id.* at 1068.

78. *Id.* at 1069.

79. *Id.* at 1070.

80. *Id.*

81. *See id.* ("If PerfectOffice could perform more of the tasks traditionally performed by [OSs], more users would be inclined to 'live in' PerfectOffice rather than Windows. And because PerfectOffice was designed to work on other [OSs], these users too might be more easily enticed away from Windows.").

82. *Id.*

83. *Id.* at 1071.

84. *Id.*

> Not infrequently, the quickly shifting gears of market innovation outstrip the slowly grinding gears of the law, and today Microsoft may face greater competition in providing [OSs] for personal computers (think Apple, which now produces an Intel-compatible operating system) and the personal computer itself may face more competition from other devices (think tablets and smartphones).[85]

That said, since Microsoft had ceded the monopoly-power element to Novell, the discussion turned to—and ended with—the conduct inquiry.

The *Novell* opinion appears to endorse the "no economic sense" test for whether conduct violates section 2,[86] with an additional (relatively heavy) emphasis on the danger of false positives. "[T]he question," according to Gorsuch, "is whether . . . the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power—bearing in mind the risk of false positives (and negatives)."[87] With that basic principle in mind, Gorsuch wrote, courts have fashioned particularized rules for common categories of conduct.

The applicable rule for "purely unilateral conduct"—as Gorsuch characterized Novell's claim—is that such conduct "does not run afoul of section 2."[88] This general rule developed, according to Gorsuch, out of fear that forced access would encourage collusion, discourage innovation, and turn courts into "central planners."[89] The rule is subject to a few exceptions. Gorsuch identified predatory pricing as "a notable and easy example," refusal to deal as a "somewhat more controversial example," and the essential-facilities doctrine as "an even more controversial example."[90]

Novell's only path forward was through what Gorsuch colorfully labeled the "narrow-eyed needle of refusal to deal doctrine."[91] For a plaintiff to succeed under that doctrine, Gorsuch wrote, the requisite elements include "at least" (1) termination of a voluntary course of dealing, (2) that the termination entailed a short-run profit sacrifice, and (3) that the sacrifice was undertaken "to achieve an anti-

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85. *Id.*

86. *See, e.g.*, Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413-14 (2006).

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

88. *Id.*

89. *Id.* at 1073.

90. *Id.* at 1073-74.

91. *Id.* at 1074.

competitive end."[92] As to the third requirement, "the monopolist's conduct must be irrational but for its anticompetitive effect."[93]

Applying the first element was straightforward enough. Microsoft had voluntarily dealt with Novell (and other independent software developers) by offering them access to Microsoft's OS APIs. Microsoft subsequently terminated that course of dealing.

Recognizing that the second element could draw an objection—namely, that anticompetitive conduct need not be unprofitable, even in the short run—Gorsuch explained that the refusal-to-deal doctrine applies only to "a discrete category" of claims and "doesn't seek to displace doctrines that address a monopolist's more direct interference with rivals."[94] Gorsuch also observed that the rule should be underinclusive rather than overinclusive, given the risk of false positives.[95]

With all of that in mind, Gorsuch turned to applying the second element. As to the OS market, it was "not clear" that Microsoft sacrificed profits.[96] Gorsuch pointed to evidence that Microsoft's OS market share grew after it launched Windows 95.[97] He discounted testimony from Novell's CEO to the effect that Windows 95 would have "done even better" in the short run if a wider variety of compatible applications were available.[98] Rather pointedly, Gorsuch observed that Novell's expert witness had "refused to opine on the question."[99] Finally, the opinion noted that Novell's theory was in fact that Microsoft ultimately "*helped* its position in the [OSs] market."[100]

Moreover, regardless of the actual effect on the OS market, the Tenth Circuit held that Novell still failed to show a short-run profit sacrifice. Microsoft's conduct—even if it had caused short-run losses in the OS market—would have allowed Microsoft to recoup (some unspecified amount of) those losses by selling additional office-suite applications.[101] Gorsuch refused to consider disaggregating the two markets because, as he wrote, "[t]he point of the profit sacrifice test

92. *Id.* at 1075 (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)) (internal quotation marks omitted).

93. *Id.* at 1075.

94. *Id.* at 1075-76.

95. *Id.* at 1076 ("If the doctrine fails to capture every nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence . . . than on the other side . . . .").

96. *Id.*

97. *Id.*

98. *Id.* at 1076-77.

99. *Id.* at 1077.

100. *Id.*

101. *Id.*

is to isolate conduct that has *no* possible efficiency justification,"[102] implying that Microsoft's conduct was a "move[] that enhance[d] their overall efficiency, if at the expense of a particular business line."[103] Since Novell did not meet the second element of Judge Gorsuch's refusal-to-deal doctrine, its section 2 claim failed.

## III. PRINCIPLES AND EXECUTION

At times, Gorsuch's Tenth Circuit antitrust jurisprudence displays a great deal of restraint. The *Kay Electric* opinion, in particular, contains an elegantly narrow ruling that pays substantial deference to U.S. Supreme Court precedent.[104] At times, however, Gorsuch's antitrust opinions subtly—but substantially—deviate from binding precedent. Moreover, their reasoning occasionally falls into logical fallacies and relies upon an unduly one-sided error-cost framework.

### A. *Inconsistent Deference*

Judge Gorsuch's antitrust opinions exhibit a somewhat inconsistent deference to the Supreme Court. In *Kay Electric*, Gorsuch explicitly paid a great deal of deference to the Court. Gorsuch related the confusion over—and his personal dissatisfaction with—then-current state-action precedent. He also observed his personal preference for the "bright line rule" set forth by the venerable Areeda and Hovenkamp treatise.[105] "But," wrote Gorsuch, "however much sense this 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*."[106]

Modern refusal-to-deal doctrine is unique in antitrust law. Before the Supreme Court's *Trinko* opinion in 2004, refusal-to-deal claims were treated much like other Sherman Act section 2 claims. *Trinko*, however, expressed a great deal of skepticism for refusal-to-deal claims. The Court's *Linkline* decision in 2009, which also involved (in part) a refusal to deal, reiterated much of the anti-interventionist language in *Trinko*. While the exact reach and requirements of *Trinko* and *Linkline* are less than clear, these opinions do seem to establish a relatively high bar for plaintiffs pursuing refusal-to-deal claims.

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102. *Id.*

103. *Id.*

104. *See infra* Section II.A.

105. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1043 (10th Cir. 2011); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 225(a) (4th ed. 2017).

106. *Kay Elec. Coop.*, 647 F.3d at 1043 (emphasis added).

Only true refusal-to-deal claims should trigger this strict analysis. In his *Four Corners* opinion, Judge Gorsuch cast the plaintiff's theory of harm as a refusal to deal, rather than exclusive dealing. Yet, as the following discussion explains, both the facts and the plaintiff's court filings suggested that exclusive dealing—not refusal to deal—was the proper categorization. This miscategorization of the relevant conduct activated a uniquely anti-interventionist body of Supreme Court precedent. It also allowed the *Four Corners* opinion to avoid applying more relevant (though less defendant-friendly) Supreme Court opinions.[107] *Four Corners* thus stands as an example of what Gorsuch elsewhere decried: "choos[ing] between the Supreme Court's holdings" instead of simply "apply[ing] them."[108] In effect, *Four Corners* expanded the scope of refusal-to-deal doctrine to encompass a broader variety of conduct.

Four years later, *Novell* expanded refusal-to-deal doctrine itself. As the following discussion reveals, *Novell* not only recast, but also added elements to, the standards established by the Supreme Court in previous refusal-to-deal cases. By the time Gorsuch penned the *Novell* opinion, the Court had already set relatively high barriers for plaintiffs attempting to bring refusal-to-deal cases. *Novell* raised those barriers higher still.

### 1. *Expansion of Refusal-to-Deal Doctrine: Miscategorizing Claims*

In *Four Corners*, Judge Gorsuch found Dr. Bevan's claim to be "analytically parallel to *Trinko*" because both plaintiffs "argued that a putative monopolist engaged in anticompetitive conduct by failing to provide a *rival* access to certain of its facilities."[109] This characterization activated the Supreme Court's unusually defendant-friendly refusal-to-deal precedent. In particular, labeling Dr. Bevan's claim a "refusal to deal" brought it under *Trinko*, in which Justice Scalia, writing for the majority, expressed skepticism of refusal-to-deal plaintiffs and praised the virtues of monopoly as an incentive for beneficial competition and innovation.

In *Trinko*, the "putative monopolist" was Verizon, an incumbent local exchange carrier (ILEC). Prior to 1996, Verizon enjoyed a government-granted monopoly over providing telephone services in New York. The Telecommunications Act of 1996, however, mandated that

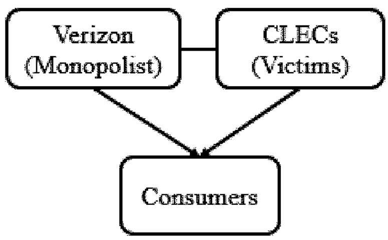
107. *E.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); *see also* United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

108. *Kay Elec. Coop.*, 647 F.3d at 1043.

109. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1223 (10th Cir. 2009) (emphasis added).

ILECs open their networks to competitive local exchange carriers (CLECs). The plaintiffs alleged that Verizon nonetheless withheld access to its telephone network from CLECs, violating section 2 of the Sherman Act. As Figure 1 illustrates, the "putative monopolist" (Verizon) and the parties with whom that monopolist refused to deal (the CLECs) were, indeed, "rivals." Verizon and CLECs competed head-to-head for consumers' business. Their relationship was horizontal.

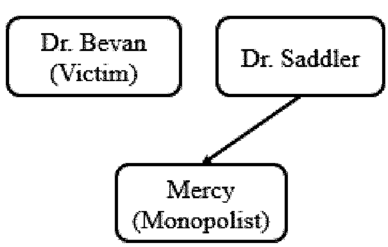
**Figure 1**




*Trinko* thus presented as a classic refusal-to-deal case. The "monopolist" and the "victims" were horizontal marketplace competitors. The same was true of the "monopolist" and the "victim" in *Aspen*, the leading Supreme Court refusal-to-deal precedent prior to *Trinko*.[110]

But Dr. Bevan and Mercy, the plaintiff and defendant in *Four Corners*, were not horizontal "rivals." Instead, Dr. Bevan (and Dr. Saddler, with whom Mercy entered into an exclusive contract) sought to *supply* nephrology services *to* Mercy. The relationship (or lack thereof) between Dr. Bevan and Mercy was vertical, as illustrated by Figure 2.

**Figure 2**




110. In *Aspen*, the leading U.S. Supreme Court decision on refusals to deal before *Trinko*, the relationship was similar. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). There, the plaintiff (Highlands) owned one of the four downhill-skiing facilities in Aspen, Colorado. *Id.* at 587-88. Highlands sued a "putative monopolist" (Ski Co.), alleging that Ski Co. anticompetitively refused to join Highlands in offering an "All-Aspen ticket" that would allow skiers access to all of Highlands' and Ski Co.'s facilities. *Id.* at 593-95. The relationship between the monopolist and the victim was that of marketplace competitors.

At a few points, the *Four Corners* opinion appeared to recognize this relationship—Gorsuch explained, for example, that "Mercy decided to preempt any future application from Dr. Bevan . . . by designating . . . Dr. Saddler . . . as the *sole provider of . . . services to the hospital.*"[111] As this quote suggests, the "monopolist" (or, more appropriately, the "monopsonist") and the "victim" in *Four Corners* were not horizontal rivals.

If Dr. Bevan was not pursuing a refusal-to-deal claim, what was the theory of his case? Even a cursory reading of Dr. Bevan's complaint reveals that it did not allege a refusal to deal, but rather "exclusive dealing." Both the complaint and Dr. Bevan's appellate briefs are replete with references to the "exclusive contract" and the "exclusive arrangement" between Mercy and Dr. Saddler.[112] This was no mere exercise in creative pleading: as the foregoing illustrates, the facts of the case itself strongly suggest an exclusive-dealing theory, not a refusal to deal.

Exclusive dealing, which interferes with horizontal interbrand competition, is generally thought to pose a greater potential for anticompetitive harm than a refusal to deal.[113] Exclusive dealing also presents relatively less serious administrability concerns. Remedying a refusal to deal generally requires forced sharing, which—as Gorsuch noted in both *Four Corners* and *Novell*—carries the risk of court-facilitated collusion between horizontal rivals. It also places a court in the awkward role of "central planner," particularly where there is no prior course of dealing after which a court could craft its remedial terms.[114] But exclusive-dealing claims, which are vertical in nature, do not present the risk of facilitating horizontal collusion. And exclusive dealing is relatively easy to remedy: a court can simply enjoin the exclusive deal, rather than mandate a "new" deal. As a result, exclusive-dealing doctrine is relatively plaintiff-friendly, while refusal-to-deal doctrine is relatively defendant-friendly.

By miscategorizing the plaintiff's theory as a "refusal to deal," the *Four Corners* opinion activated and applied an inappropriate body of

111. 582 F.3d at 1218-19 (emphasis added).

112. *See, e.g.*, Opening Brief of Appellant at 29, *Four Corners*, 582 F.3d (No. 08-1231) ("Mercy changed its agreement with Dr. Saddler to an exclusive contract, so that no other nephrologists can practice at Mercy without Dr. Saddler's permission. . . . This action created a complete barrier to entry and blocked access to Mercy for Dr. Bevan . . . ."); *see also* Complaint at 18, *Four Corners*, 582 F.3d (No. 08-1231) ("By entering into an exclusive contract with Dr. Saddler and denying Dr. Bevan . . . active medical staff privileges . . . [Mercy] has effectively excluded Dr. Bevan . . . from the nephrology physician services market.").

113. *See generally* AREEDA & HOVENKAMP, *supra* note 105, ¶ 1800a ("[E]xclusive dealing is said to be an 'interbrand' restraint in that it forbids the buyer of the defendant's goods from purchasing similar goods from a rival as well." (footnote omitted)).

114. *See* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013).

precedent. In essence, the miscategorization allowed the opinion to "choose between the Supreme Court's holdings" instead of simply "apply[ing] them,"[115] a practice Gorsuch condemned elsewhere.[116]

This categorical approach is all the more puzzling in light of the fact that the *Four Corners* opinion itself suggests a preference for a *non*categorical approach to antitrust analysis. "In the end," the opinion observes, "picking an 'epithet' to fix on Dr. Bevan's argument may be less illuminating than confronting its substance."[117] To be sure, the substance of Dr. Bevan's argument was not compelling. Dr. Bevan's past conduct strongly suggested his "interest" in actually expanding his practice to Durango was feigned and that he instead sought only to cause Dr. Saddler to exit the market.[118] Mercy's exclusive agreement with Dr. Saddler likely caused no anticompetitive effects—on the contrary, it was likely procompetitive and welfare-enhancing.

The danger presented by the approach in *Four Corners* was not that it may have resulted in a discrete false negative; the outcome in that particular case was almost certainly correct. Rather, the danger lies in the over-expansion of refusal-to-deal doctrine, which was carefully crafted by the Supreme Court to apply only to a particular type of conduct.[119] Almost any conduct by a monopolist could, following the lead of *Four Corners*, be labeled a "refusal to deal." Predatory pricing, for example, could be viewed as "refusal to deal on the terms desired by the customer." Tying could be viewed as "refusal to deal the tying product." And so forth. But such linguistic gymnastics would subvert decades of antitrust doctrine and force non-refusal-to-deal plaintiffs to face higher bars than the Supreme Court has established.

Though *Four Corners* likely reached the correct outcome, it miscategorized the challenged conduct. The unique concerns presented by refusals to deal with a horizontal rival are not present in exclusive-dealing cases, which are governed by a different body of case law. This miscategorization effectively nullified governing Supreme Court precedent and instead activated inapposite Supreme Court precedent.

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115. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1043 (10th Cir. 2011).

116. *Id.* at 1043.

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

118. *See supra* notes 42-53 and accompanying text.

119. Elsewhere, Judge Gorsuch noted that the courts have, in fact, "develop[ed] . . . specific rules for common forms of alleged misconduct—like tying . . . *exclusive dealing* . . . or efforts to defraud or lie to regulators or consumers . . . ." *Novell*, 731 F.3d at 1072 (emphasis added). No similar passage appears in *Four Corners*.

### 2. *Rewriting* Trinko

In *Novell* (unlike in *Four Corners*), the court confronted a true refusal to deal. Gorsuch's opinion drew heavily from the Supreme Court's *Trinko* opinion, which occupies a prominent position in the narrow area of refusal-to-deal doctrine. Critiquing *Novell*, then, requires first understanding the backdrop against which it was decided.

*Trinko* was immediately, and has remained, controversial.[120] Prior to *Trinko*, the leading case was *Aspen*, a 1985 opinion that recognized refusals to deal as a valid category of Sherman Act section 2 violations. Justice Scalia, writing for the majority in *Trinko*, recast the *Aspen* opinion as lying "at or near the . . . boundary of [section] 2 liability."[121]

Scalia distinguished the facts of *Trinko* from those of *Aspen* on three grounds. First, the defendant in *Aspen* had withdrawn from a voluntary cooperative venture with the plaintiff.[122] But in *Trinko*, the defendant had never voluntarily dealt with its rivals; any relationship(s) therewith were mandated by the Telecommunications Act of 1996.[123] Second, the defendant in *Aspen* had refused to deal "even if compensated at retail price," thereby "reveal[ing] a distinctly anticompetitive bent."[124] Again, that fact was lacking in *Trinko*.[125] The third factor was, according to Justice Scalia, "more fundamental."[126] In *Trinko*—unlike in *Aspen*[127]—the "services allegedly withheld [we]re not otherwise marketed or available to the public" until the Telecommunications Act of 1996 mandated their production and availability.[128] In other words, the relevant product itself was the result of regulation, not market forces. Scalia did not hold that those three grounds for distinguishing *Aspen* from *Trinko* were necessary elements of every refusal-to-deal claim. Given those three factors, however, *Trinko* fell outside the "boundary of [section] 2 liability."[129]

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120. *See, e.g.*, Neal R. Stoll & Shepard Goldfein, *Is § 2 of the Sherman Act on Hold?*, 231 N.Y.L.J. 20 (Feb. 17, 2004) ("The [*Trinko*] decision was greeted with a collective wow by the Antitrust Bar . . . because of the potential consequences of Justice Antonin Scalia's sweeping majority opinion.").

121. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

122. *Id.* at 409.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 409-10.

127. In this regard, *Trinko* was also unlike *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), a pre-*Aspen* decision that had validated a refusal-to-deal claim.

128. *Trinko*, 540 U.S. at 410.

129. *Id.* at 409.

In *Novell*, Novell (the plaintiff) and Microsoft (the defendant) competed horizontally in the office-suite applications market. The challenged conduct was not an exclusive deal between Microsoft and a third party (as was the case in *Four Corners*), but rather Microsoft's termination of Novell's access to Microsoft's Windows APIs. Thus, *Novell* squarely implicated the Supreme Court's *Trinko* and *Aspen* decisions.

As recast by Gorsuch in *Novell*, however, Justice Scalia's carefully crafted *Trinko* opinion was distorted. Where *Trinko* had distinguished, *Novell* mandated. According to *Novell*, Scalia had held in *Trinko* that "there *must* be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival"[130] for section 2 liability. Additionally, Gorsuch asserted (selectively quoting from *Trinko*) that "the monopolist's discontinuation of the preexisting course of dealing *must* 'suggest[] a willingness to forsake short-term profits to achieve an anti-competitive end' "[131] for section 2 liability. Third, "the monopolist's conduct *must* be irrational but for its anti-competitive effect"[132] for section 2 liability.

A side-by-side comparison of the two analyses reveals how strikingly *Novell* departed from *Trinko.*

**Figure 3**

| ***Trinko* (distinguishing *Aspen*)** | ***Novell* (mandating)** |
|---|---|
| • Defendant did not withdraw from a prior voluntary course of dealing. | • Defendant must have withdrawn from a prior voluntary course of dealing. |
| • Defendant did not refuse to deal even if compensated at retail prices. | • Defendant must have anticompetitively forsaken short-term profits. |
| • Defendant's product was not available absent regulatory compulsion. | • Defendant's conduct must have been irrational but for its anticompetitive effect. |

The first two distinctions in *Trinko* became required elements of a plaintiff's claim in *Novell*. In *Trinko*, Scalia had observed that the defendant's "termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[133] But in *Novell*, Gor-

130. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013) (emphasis added).

131. *Id.* at 1075 (alterations in original) (emphasis added) (quoting *Trinko*, 540 U.S. at 407).

132. *Id.* (emphasis added).

133. *Trinko*, 540 U.S. at 409 (emphasis omitted).

such—selectively quoting from *Trinko*—declared that "the monopolist's discontinuation of the preexisting course of dealing *must* 'suggest[] a willingness to forsake short-term profits to achieve an anticompetitive end.' "[134] The difference is subtle, but has the effect of subverting Justice Scalia's sophisticated, case-specific reasoning. Scalia was merely noting multiple factors that distinguished the case at bar from *Aspen*—nowhere in the *Trinko* opinion does Scalia require that each of the factors be proven by every refusal-to-deal plaintiff.

Missing altogether from *Novell* was any analysis of the factor that Scalia had found most "fundamental" in *Trinko*: whether the allegedly withheld product had ever been available absent regulatory compulsion.[135] *Trinko*, which involved an industry that previously had been heavily regulated but was undergoing substantial regulatory upheaval, presented a unique fact pattern. Scalia relied heavily on that unique factor in crafting a uniquely defendant-friendly opinion. But *Novell* involved the relatively unregulated software-applications industry. And access to Microsoft's APIs had been "otherwise available," unlike the sought-after access in *Trinko*. By ignoring this factor, the *Novell* opinion expanded *Trinko* well beyond the metes and bounds established by Justice Scalia. It is unclear why *Novell* omitted analysis of this factor; it may be worth noting that the factor would clearly have favored the plaintiff, Novell.

In place of the missing factor, *Novell* mandated an entirely new requirement: that the challenged conduct must have been economically irrational but for its anticompetitive effects (the "no economic sense" test). In support of this novel mandate, Gorsuch cited *Aspen*.[136] Yet a side-by-side comparison of *Aspen* and *Novell* reveals that this reliance was misplaced.

**Figure 4**

| ***Aspen*** | ***Novell*** |
| --- | --- |
| "[A] company which possesses monopoly power and which . . . refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal."[137] | "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect."[138] |

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

135. 540 U.S. at 410.

136. The opinion cited, for additional support, *Trinko*, the Areeda and Hovenkamp treatise, and an academic article.

137. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

138. 731 F.3d at 1075.

The *Novell* opinion declined to explore what the *Aspen* Court contemplated in the passage above: whether "valid business reasons" justified the refusal to deal. Curiously, *Novell* lacks any discussion of the challenged conduct's likely effects on consumers, in stark contrast to Gorsuch's earlier opinion in *Four Corners*, which explored such effects at some length.[139]

This inattention to consumer welfare in *Novell* is surprising in light of the fact that Microsoft's conduct had no discernible procompetitive justification, a fact that indicates a high likelihood of consumer harm. In stark contrast to Mercy's conduct in *Four Corners*, Microsoft's conduct had the anticompetitive effect of *reducing* its own product's quality and limiting consumer choice. Gorsuch himself recognized as much, noting that withdrawing access to APIs "reduce[d] the attractiveness of Microsoft's new [OS]."[140]

At any rate, the *Novell* opinion effectively rewrote Supreme Court precedent by imposing the "no economic sense" requirement. Gorsuch rightly observed that "a monopolist can find ways to harm competition while still making money,"[141] tacitly admitting that this novel requirement would likely yield false negatives and allow anticompetitive conduct to escape liability. But he ultimately decided that the risk of false positives took precedence and justified imposing the heightened requirement.

In sum, *Novell* recast two of the three factors Scalia had used to distinguish *Aspen* as requirements. *Novell* ignored entirely the third, "more fundamental" factor. And *Novell* imposed a new requirement—the "no economic sense" requirement—that was created out of whole cloth.

Even despite these newly heightened standards, the plaintiff's case in *Novell* was fairly compelling. Microsoft and Novell had a prior, voluntary course of dealing. Microsoft's conduct had the effect of making its own OS less attractive to consumers, necessarily constituting a short-run profit sacrifice. And that conduct appeared irrational but for its anticompetitive, exclusionary effect—certainly Microsoft did not allege any *pro*competitive justifications for withholding access.

139. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1223-24 (10th Cir. 2009) ("Having made a substantial investment . . . Mercy is entitled to recoup its investment without sharing its facilities with a competitor. And doing so may well help consumers. Prior to the hospital's arrangement with Dr. Saddler, there were no full-time nephrologists in Durango. Now there are two, Dr. Saddler and his partner. As a result, the consumers . . . have greater access to nephrology services . . . .").

140. *Novell*, 731 F.3d at 1068.

141. *Id.* at 1075-76.

Nonetheless, Gorsuch's opinion managed—by employing fallacious arguments and misapplying its own standards—to reject the plaintiff's claim. As to short-run profit sacrifice, Gorsuch found that even if Microsoft had sacrificed profits by reducing the quality of its own OS, the plaintiff nonetheless failed to satisfy the requirement.[142] The "point" of the requirement, according to the *Novell* opinion, "is to isolate conduct that has *no* possible efficiency justification."[143] Yet Microsoft's conduct may have allowed it to capture increased revenues from sales of its office suite. Gorsuch therefore credited Microsoft's conduct as a "move[] that enhance[d] their overall efficiency, if at the expense of a particular business line."[144] As a result, the opinion concluded, Microsoft's conduct had an "efficiency justification" and did not constitute a profit sacrifice.

This reasoning commits a common logical fallacy. Restated as a syllogism, *Novell*'s argument was as follows:

1. Microsoft's conduct caused it to sacrifice profits from OS sales.
2. Microsoft's conduct allowed it to recoup some of those sacrificed profits via additional applications sales.
3. Microsoft did not sacrifice profits.

The fallacy—that of an undistributed middle[145]—is readily apparent. Even if the "short-run profit sacrifice" requirement espoused by Gorsuch were consistent with Supreme Court precedent, the test appears to have been satisfied in this case. The fact that Microsoft recouped *some* profits should not have doomed the plaintiff's claim.

It also bears emphasizing that, from a decision-theoretic standpoint, the profit-sacrifice requirement as applied in *Novell* is massively, and unduly, one-sided. Under the reasoning of *Novell*, a plaintiff bears the burden of proving not only that the defendant's conduct entailed a short-run profit sacrifice in the relevant market, but also that the defendant failed to recoup *any* of its lost revenues in *any* related market(s). That burden would often be—as the defendant-friendly outcome of *Novell* suggests—impossible to satisfy.[146]

142. *Id.* at 1076.

143. *Id.* at 1077.

144. *Id.*

145. *See generally* John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. (forthcoming 2018) (manuscript at 10 n.57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827277 (explaining the fallacy of the undistributed middle).

146. In that sense, it is similar to the Second Circuit's decision in *United States v. American Express Co.*, 838 F.3d 179, 205-07 (2d Cir. 2016). There, as in *Novell*, the appellate court deviated from long-standing Supreme Court precedent regarding market definition in two-sided platform markets. And, again as in *Novell*, the opinion requires the plaintiff not only to prove the elements of its own case (in *American Express*, that the defendant

As to the "no economic sense" test, *Novell* went astray in its application. Contrary to Gorsuch's holding, Microsoft's conduct was almost certainly not efficient. Microsoft offered no procompetitive justification for its actions.[147] The evidence indicated that Microsoft's conduct was intended to, and did in fact, disadvantage its rivals and advantage its own products in the office-suite applications market.[148] But that advantage was not alleged to be the result of competition on the merits. In fact, there was evidence suggesting that "Microsoft was concerned that if [access] were not withheld . . . Word and Excel would have to 'battle against their competitors on even turf.' "[149] Microsoft, in other words, undertook to *avoid* competition on the merits. Where a monopolist is able to recapture (some) of the lost profits caused by reducing its own product quality via sales of a complementary product—sales that would not have occurred in a competitive environment—that result cannot be said to be "efficient."[150] It represents an allocative inefficiency.

In short, *Novell* committed the fundamental error of mistaking an anticompetitive effect for an efficiency. The increase in Microsoft's applications sales volume (and market share) was the inefficient result of exclusion—an anticompetitive effect—not the efficient result of competition on the merits. Microsoft's conduct decreased the attractiveness of its own OS, but increased the market share of its applications by excluding Novell (and others). That conduct should therefore have passed the "no economic sense" requirement: it was irrational but for

had the power to control price and output vis-à-vis its merchant customers) but also to *dis*prove a mere possibility raised by the defendant (in *American Express*, that any price increases to merchants *may* have been passed through to cardholders in the form of rewards programs). *See id.* at 205-07. To the extent it is relevant, the Author represented the United States in *United States v. American Express*. This Essay does not reveal any confidential information and does not represent the views of the United States in that or any other matter.

147. More precisely, Microsoft attempted to show procompetitive justifications for its conduct, but the trial court held that a reasonable jury could have found that those justifications were pretextual. Novell, Inc. v. Microsoft Corp., No. 2:04-cv-01045-JFM, 2012 WL 2913234, at *15 (D. Utah July 16, 2012). On appeal from a grant of judgment as a matter of law, the facts are to be viewed in the light most favorable to the non-moving party. Thus, for purposes of analyzing the Tenth Circuit's opinion, Microsoft offered no valid procompetitive justifications.

148. *Novell*, 731 F.3d at 1069 (quoting, from the trial record, an email from Bill Gates to that effect).

149. *Novell*, 2012 WL 2913234, at *3 (quoting from a Novell exhibit).

150. *Cf.* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1, at 20 (2010) ("A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.").

its anticompetitive effect. Thus, *Novell* not only created a novel requirement; it went on to misapply its own test.

Following its issuance in 2004, the *Trinko* decision was immediately criticized for its defendant-friendly rhetoric[151] and what some viewed as an inappropriate deference to the principle of stare decisis.[152] The actual holding of *Trinko* was, however, fairly narrow.[153] Gorsuch's opinion in *Novell* expanded on, and deviated from, Justice Scalia's carefully crafted *Trinko* opinion. Despite all of that, the plaintiff in *Novell* appeared to be on fairly solid footing. Nonetheless, the Tenth Circuit's opinion pulled the rug out from under Novell's feet by applying an extreme variant of the profit-sacrifice test that was, effectively, impossible to meet. Under *Novell*'s reasoning, a plaintiff may manage to satisfy the "prior course of dealing" requirement and prove that the defendant engaged in inefficient conduct that caused anticompetitive harm to consumers—yet nonetheless fail even to reach a jury, even where the defendant failed to offer any procompetitive justification for its actions. Such a result is untenable in light of lower courts' duty to faithfully apply Supreme Court precedent; it is also untenable in light of the modern consensus view that antitrust law is meant to safeguard competition and maximize consumer welfare.

### *B. Departure from Antitrust-Injury Doctrine: Double-Counting Error Costs*

The "antitrust-injury" doctrine was developed by the U.S. Supreme Court to ensure that antitrust law protects the competitive process itself, rather than particular competitors. More specifically, requiring plaintiffs to show antitrust injury has the salutary effect of weeding out claims brought by competitors upset about competition—for example, a lower-cost product being offered by a more efficient rival—and not about anticompetitive conduct, the appropriate target of the antitrust laws.

151. *E.g.*, Robert A. Jablon et al., Trinko *and* Credit Suisse *Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility*, 34 ENERGY L.J. 627, 635-36 (2013) ("[I]n spite of its narrow holding, the Court's expansive *dicta* suggests that at least in some circumstances courts may adopt a diminished antitrust enforcement role in regulated industries, thereby failing to protect competition. Because the Court's *dicta* is largely based on flawed assumptions, it would be most unfortunate for American consumers and the place of antitrust law as the 'Magna Carta of free enterprise' if these concerns are allowed to prove valid.").

152. *E.g.*, Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, 27 ANTITRUST 50 (2012) ("[T]he distinction commonly offered, that the conduct at issue in *Aspen* involved a break from a prior course of dealing while *Trinko* did not, is a distinction that is . . . inconsistent with other Supreme Court precedent . . . .").

153. *E.g.*, Jablon et al., *supra* note 151, at 638.

The leading Supreme Court decision is *Brunswick*.[154] At issue was a firm's acquisitions of several failing bowling alleys. According to the plaintiffs, who operated rival bowling alleys, the defendant's more efficient size would have allowed it to profitably operate the formerly failing facilities.[155] The resulting competitive pressure would have reduced plaintiffs' profits. In other words, the plaintiffs were seeking redress for "harm" caused by competition, the very "harm" antitrust laws are designed to encourage.[156] The Court roundly rejected this theory, holding that antitrust plaintiffs must prove injury "of the *type* the antitrust laws were intended to prevent," i.e., injury caused by anticompetitive conduct.[157]

Properly understood, then, the Supreme Court's antitrust-injury doctrine is about *types of harm*. If a plaintiff's theory of the case hinges on the wrong type of harm (harm from competition), the case should be dismissed. Only cases that involve the correct type of harm (harm from anticompetitive conduct) should proceed.

It follows that the antitrust-injury doctrine is not about *ability to remedy* harm. The *Brunswick* Court was not concerned about whether an effective remedy could be crafted in that or any other case. The supposed "harm" alleged in *Brunswick* may well have been remediable—the *Brunswick* plaintiffs sought, for example, an injunction against future acquisitions by the defendant, which would have been relatively straightforward for a court to issue.[158] Instead, the Court was concerned with preventing recovery by plaintiffs who suffered the wrong type of losses—"losses which are of no concern to the antitrust laws."[159]

In *Four Corners*, however, Gorsuch applied a starkly different antitrust-injury requirement, one that would have been unrecognizable to the *Brunswick* Court. According to Gorsuch's opinion, the plaintiff,

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154. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

155. *Id.* at 479-80.

156. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 35 (1984) ("The plaintiff in *Brunswick* . . . complained that the acquisition kept in the market bowling emporiums that otherwise would have failed, thus diverting business from its lanes to Brunswick's and producing lower prices.").

157. *Brunswick*, 429 U.S. at 489 (emphasis added). Particular anticompetitive effects that can generally serve as the basis for a finding of antitrust injury "include higher prices (i.e., overcharges), reduced output, lower quality, or less innovation." John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 58 (2016).

158. 429 U.S. at 480-81.

159. *Id.* at 487. In fact, the *Brunswick* Court could be said to have been even more concerned with the fact that the plaintiffs had failed to demonstrate a statutory violation altogether—consider, for example, the following passage: "[T]he antitrust laws are not merely indifferent to the injury claimed here." *Id.* at 488. The Court also refused to order a new trial on the damages claim, citing the "rather unimpressive" evidence of anticompetitive conduct. *Id.* at 490 n.15.

Dr. Bevan, failed to prove antitrust injury for two (related) reasons. First, "even if we were to force Mercy to accommodate Dr. Bevan's demand, the hospital could simply impose [monopolistic] costs and conditions on Dr. Bevan's activities."[160] Second, preventing that outcome would have been a "difficult[]" task for the court.[161]

The error in this line of reasoning is readily apparent. A faithful application of Supreme Court precedent would have entailed analyzing the type of harm alleged by Dr. Bevan—yet that analysis is lacking altogether from the antitrust-injury portion of the *Four Corners* opinion. Instead, the focus was exclusively on judicial ability to remedy harm.

In support of this incongruous notion of "antitrust injury," *Four Corners* relied on inapposite sources. As to the first prong of reasoning (the market could achieve a monopolistic equilibrium whether or not Dr. Bevan had access to Mercy's facilities), the *Four Corners* opinion cited a passage from the Areeda and Hovenkamp treatise.[162] Yet the quoted passage is from a portion of the treatise that addresses the requirements for establishing that a unilateral refusal to deal is exclusionary—not the requirements for proving antitrust injury.[163]

As to the second prong (remedying the challenged conduct would be a difficult judicial task), the *Four Corners* opinion first cited a passage of the Supreme Court's *Linkline* decision, which in turn quoted *Trinko*: "Courts are ill suited 'to act as central planner, identifying the proper price, quantity, and other terms of dealing.' "[164] But in neither *Linkline* nor *Trinko* was the Supreme Court discussing the antitrust-injury doctrine. Instead, both cases were—like the passage from the Areeda and Hovenkamp treatise—addressing the requirements for establishing that a refusal to deal is exclusionary.[165] In fact, neither the majority opinion in *Linkline* nor the majority opinion in *Trinko*[166] mentioned "antitrust injury" at all.

160. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1226 (10th Cir. 2009).

161. *Id.*

162. *Id.*

163. *See* AREEDA & HOVENKAMP, *supra* note 105, ¶ 773.

164. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 452 (2009) (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004)).

165. Leslie observes an analogous move by Judge Easterbrook vis-à-vis predatory-pricing doctrine: "Judge Easterbrook converted *Matsushita*'s observation about the difficulty of recoupment into a requirement that plaintiffs must prove recoupment in section 2 predatory pricing cases." Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1703 (2013).

166. Justice Stevens, who wrote a separate *Trinko* opinion concurring in the judgment, would have disposed of the plaintiff's claim on the grounds that the plaintiff was an indirect purchaser of Verizon's services. *See Trinko*, 540 U.S. at 416-18 (Stevens, J., concurring

The opinion in *Four Corners* thus provides another example of "choos[ing] between the Supreme Court's holdings" instead of "apply[ing] them."[167] It is *Brunswick*, not *Linkline* or *Trinko*, that supplies the appropriate antitrust-injury precedent. The Tenth Circuit's proper task was to faithfully apply *Brunswick* to the issue of antitrust injury. It failed to carry out that task.[168]

Moreover, by misapplying *Linkline* and *Trinko* to craft a novel antitrust-injury requirement, the *Four Corners* opinion committed at least two additional errors. First, the *Four Corners* rule (especially if used with the heightened requirements of *Novell*) double-counts error costs. Second, it fails to contemplate or address claims seeking damages, despite the fact that the very claim before the Tenth Circuit requested damages.

In *Four Corners*, Gorsuch—as he did later in *Novell*, and as did the Supreme Court in *Linkline* and *Trinko*—used an error-cost framework to inform the inquiry into whether a unilateral refusal to deal was anticompetitive. Specifically, Gorsuch expressed substantial concern regarding the risk of false positives, i.e., wrongly condemning innocent conduct. After noting the "general rule" that a monopolist has no duty to deal with rivals, Gorsuch's opinion posits that "[t]his presumption should hardly surprise"—after all, "[t]o deny the [monopolist's] payoff is to deter the [procompetitive] investment."[169] *Trinko* likewise expressed concern about false positives,[170] as did *Linkline*.[171] It is the risk of false positives that, according to all three

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in the judgment). Justice Stevens offhandedly mentioned "antitrust injury" once, but would not have decided the case on antitrust-injury grounds. *Id.* at 417 ("[I]t remains the case that whatever antitrust injury respondent suffered because of Verizon's conduct was purely derivative of the injury that AT&T suffered.").

167. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1043 (10th Cir. 2011).

168. Again, the present argument is not meant to address the merits of Dr. Bevan's claim. On the record, it appears that Dr. Bevan did not suffer any injury-in-fact (given the pretextual appearance of his alleged desire to actually open a long-term practice in Durango) and/or that Mercy had valid procompetitive justifications for its conduct. But, as the leading treatise explains:

> To say that the plaintiff has not alleged or shown any injury-in-fact requires dismissal on grounds of causation or lack of injury. To say that the plaintiff has not shown any injury to competition is to conclude that the antitrust laws have not been violated at all. Neither of these is "antitrust injury" in the sense that *Brunswick* used the term, where the Court assumed both injury-in-fact and an antitrust violation.

AREEDA & HOVENKAMP, *supra* note 105, ¶ 337a.

169. Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1221-22 (2009).

170. 540 U.S. at 414 (noting the "problem of false positives").

171. *Linkline* dealt with a "price squeeze" claim. As to the wholesale-pricing aspect of the "squeeze," the Court straightforwardly applied *Trinko*. *See* Pac. Bell Tel. Co. v. Linkline

cases, justifies the uniquely heightened requirements for proving that a unilateral refusal to deal is exclusionary.

But the *Four Corners* opinion goes on to invoke the same error costs a second time, in the antitrust-injury context. While the risk of false positives is real, a given claim presents a given amount of risk.[172] Justice Scalia, writing for the *Trinko* majority, accounted for that risk by minimizing *Aspen*, effectively raising the bar for plaintiffs.[173] A plaintiff pursuing a unilateral-refusal-to-deal theory must, like all section 2 plaintiffs, prove monopoly power, anticompetitive conduct, and antitrust injury. The Supreme Court bolstered the conduct requirement to account for what the unique risk of error costs presented by refusal-to-deal plaintiffs. *Four Corners*, however, counted those error costs yet again *en route* to fashioning its novel antitrust-injury rule.

Moreover, the *Four Corners* opinion fell into a logical fallacy by failing to address claims seeking damages. Restated in syllogistic form, its antitrust-injury argument ran as follows:

1. Dr. Bevan requests damages and forced access to Mercy's facilities absent a prior voluntary course of dealing.
2. A plaintiff who requests forced access to the defendant's facilities absent a prior voluntary course of dealing fails to prove antitrust injury.
3. Dr. Bevan did not prove antitrust injury.

Like *Novell*, the *Four Corners* opinion commits the fallacy of the undistributed middle. The minor premise does not dispose of the entirety of the major premise. Even if refusal-to-deal claims seeking injunc-

Commc'ns, Inc., 555 U.S. 438, 449 (2009). As to retail prices, the Court observed that "mistaken inferences are 'especially costly, because they chill the very conduct the antitrust laws are designed to protect.' " *Id.* at 451 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

172. That risk is not compounded by adding the antitrust-injury requirement. As *Brunswick* illustrates, antitrust injury is a relatively straightforward concept, one that does not require a complex set of potentially difficult-to-administer rules. Even as early as 1984, Easterbrook's seminal article on error costs was able to identify at least ten appellate decisions applying the antitrust-injury requirement to weed out baseless competitor lawsuits. *See* Easterbrook, *supra* note 156, at 35-39. If there were obvious contrary examples of courts mis-applying the requirement, one would expect Easterbrook—who was a great deal more concerned about false positives than false negatives—to identify and roundly criticize them. But the article only observes, without supporting citations, that "there are contrary holdings," *id.* at 37 n.78, and that "plaintiffs seem to get away with" such lawsuits, *id.* at 38. For an argument that concern about baseless competitor lawsuits (and baseless agency enforcement actions supposedly incited by competitors) is overstated, see Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 27 (2015) ("This concern states what is at best an implausible hypothesis.").

173. 540 U.S. at 414.

tive relief necessarily fail to satisfy the antitrust-injury requirement—a faintly ludicrous proposition—Dr. Bevan's complaint also sought damages. And damages as a remedy are not subject to the same concerns regarding judicial administrability.

This antitrust-injury jurisprudence is troubling. It reveals an effectively, if perhaps unconsciously, inconsistent deference to the Supreme Court—i.e., "choos[ing] between the Supreme Court's holdings"[174] instead of applying them. If the antitrust-injury inquiry loses its focus on harm, it will fail to perform its doctrinal role; a role that is almost universally heralded as welfare-enhancing.[175] Moreover, altering antitrust-injury requirements based on administrability concerns, where those concerns have already been addressed elsewhere, effectively double-counts error costs, systematically and suboptimally skewing outcomes.[176]

### C. *Façade of Neutrality*

The error-cost framework that underlies much of Justice Gorsuch's antitrust jurisprudence is supposed to be a "neutral economic tool."[177] Awareness of error costs was at the center of the modern revolution in antitrust law. That revolution did much to rationalize antitrust doctrine. Yet, as demonstrated by the discussion of antitrust injury above, the error-cost framework can also be manipulated to produce certain outcomes. Gorsuch's Tenth Circuit antitrust opinions suggest at least two additional areas for improvement vis-à-vis error-cost analysis.

#### 1. *False Positives (Always) Trump False Negatives*

Error-cost-based antitrust analyses have recently come under criticism for "systematically overstat[ing] the incidence and significance of false positives," while simultaneously "understat[ing] the incidence and significance of false negatives."[178] Much of the trouble springs from a time-inconsistent application of the error-cost framework.[179] Before the Modern Era of antitrust (which is generally supposed to

174. Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1043 (10th Cir. 2011).

175. *See, e.g.*, Baker, *supra* note 172, at 26 ("In the judgment of Herbert Hovenkamp, a leading mainstream antitrust commentator, 'while anticompetitive decisions were once relatively common, they are much less frequent today.' " (quoting HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 71 (2005)).

176. For an argument that the error-cost framework—which is, in theory, neutral—already unduly favors antitrust defendants, see Baker, *supra* note 172.

177. *Id.* at 2.

178. *Id.*

179. *Id.* at 37 ("[T]oday's antitrust conservatives . . . sound[] at times as though neither antitrust law nor antitrust economics has changed since the late 1970s . . . .").

have begun in 1979 with the Supreme Court's *GTE Sylvania*[180] decision[181]), the risk of false positives was relatively far greater, and the risk of false negatives lower, than those risks are today.[182]

Some of this evolution entailed raising the bar for proving that particular types of conduct are anticompetitive. Thus, for example, the Supreme Court in 2007 overruled one of the last remaining decisions mandating per se illegality for vertical restraints of trade, imposing instead the relatively difficult-to-satisfy requirements of the rule of reason.[183] Some of the evolution is due also to refining non-conduct requirements for plaintiffs to succeed—for example, the Court's *Brunswick* decision imposing the antitrust-injury requirement. And some of the evolution is due to heightened pleading standards[184] and impediments to class-action litigation.[185]

Taken together, these developments alter—or at least ought to alter—the balance of error costs substantially. One recent study of rule-of-reason cases decided during 1999-2009, for example, revealed that modern "plaintiffs almost never win under the rule of reason."[186] During that decade, defendants won 221 of 222 rule-of-reason cases.[187] Similarly, an exhaustive recent meta-analysis of merger retrospectives concluded that, as to "close call" mergers, "agency decisions regarding challenges appear too tolerant. Simply put, many mergers that result in price increases are cleared."[188]

Yet, where Gorsuch's antitrust jurisprudence explicitly employs an error-cost decisional framework, those costs are uniformly presumed to disfavor enforcement and favor defendants. The *Novell* decision contains Gorsuch's most extended discussion of error costs. Consider the following passage, which frames the basic task of judicially analyzing section 2 claims:

> [T]he question we often find ourselves asking is whether, based on the evidence and experience derived from past cases, the conduct

180. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

181. *E.g.*, Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors: Causes and Consequences*, 23 GEO. MASON L. REV. 1205 (2016).

182. Baker, *supra* note 172, at 26.

183. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)).

184. *E.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556-57 (2007); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986).

185. *E.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

186. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

187. *Id.*

188. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 159 (2015).

> at issue before us has little or no value beyond the capacity to protect the monopolist's market power—bearing in mind *the risk of false positives (and negatives)* any determination on the question of liability might invite, and the limits on the administrative capacities of courts to police market terms and transactions.[189]

The subtle use of parentheses to minimize false negatives is telling. And, indeed, the *Novell* opinion goes on to identify several risks of false positives without again discussing or even mentioning false negatives.[190] Most explicitly, the opinion later buttresses the argument in favor of its extreme form of the short-run-profit-sacrifice and no-economic-sense requirements as follows: "If the doctrine fails to capture every nuance . . . it should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—[rather] than . . . face the risk of inducing collusion and inviting judicial central planning."[191]

It may well be that unilateral refusal-to-deal cases present some unique error costs, though Professor Hovenkamp persuasively suggests that calculus is altered in networked markets lacking *Trinko*'s heavy regulatory backdrop.[192] But a blindered focus on false positives will tend to produce inefficient, welfare-reducing outcomes. The double-counting of false positives noted above exacerbates this problem. Error-cost analysis should be a "neutral economic tool,"[193] not a basis for scaling back antitrust enforcement *ad infinitum*.

### 2. *Predatory Pricing as "A Notable and Easy Example"*

Today, successful Sherman Act section 2 cases are relatively rare.[194] Section 2 claims that challenge "purely unilateral conduct," a category that includes refusals to deal, face an even steeper uphill battle than other section 2 claims. But, as the Supreme Court pointed

189. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (emphasis added).

190. *Id.*

191. *Id.* at 1076.

192. *See* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1642 (2010).

193. Baker, *supra* note 172, at 2.

194. Public enforcement of section 2, which targets monopolistic conduct, is exceedingly rare. Between 2006 and 2015, for example, the U.S. Department of Justice did not file a single contested complaint alleging a section 2 violation. *See* ANTITRUST DIVISION, WORKLOAD STATISTICS FY 2007-2016, at 5, https://www.justice.gov/atr/file/788426/download [https://perma.cc/JP7Q-2XWG] (last visited Sept. 5, 2017). The Department of Justice did file one complaint during that time period; that complaint was resolved via consent decree. *See* United States v. United Reg'l Health Care Sys., No. 7:11-CV-00030-O, 2011 WL 11544325 (N.D. Tex. Sept. 29, 2011).

out in *Linkline*, "there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct."[195]

Writing for the Tenth Circuit in *Novell*, Gorsuch echoed this language. *Novell*, however, went on to create a hierarchy of those "rare" instances. "Predatory pricing," Gorsuch began, "presents a *notable and easy* example."[196] Refusals to deal are "another if somewhat more controversial example."[197] And "[e]ssential facilities doctrine offers perhaps an even more controversial example."[198]

The implication seems to be that predatory-pricing claims are (at least relative to other unilateral section 2 claims) notably easy for plaintiffs to bring and win. This, in part, provided the normative justification for *Novell*'s unusually hostile treatment of refusals to deal—other avenues (or at least one other avenue) remain open to antitrust plaintiffs harmed by unilateral monopolistic conduct.[199] But is that the case?

In 1993, the Supreme Court's *Brooke Group* decision explicitly imposed a new requirement for plaintiffs bringing predatory-pricing claims: such plaintiffs must prove that the defendant will likely recover its losses stemming from the predation period by charging supracompetitive prices in the future.[200] The Court was explicitly motivated to impose this requirement by the fear of false positives.[201] (It failed to mention the costs of false negatives.) This new "recoupment requirement" single-handedly "effectively eliminated the viability of predatory pricing claims."[202]

Today, with *Brooke Group* in place, predatory pricing does not, under any reasonable interpretation of those two words, present a "notable and easy example" of section 2 liability. At a bare minimum, then, *Novell*'s unsupported reference to predatory pricing as such was descriptively incorrect. A fortiori, the reference can be viewed as another example of time-inconsistent and one-sided analysis. It sug-

195. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009).

196. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013) (emphasis added).

197. *Id.* at 1074.

198. *Id.*

199. *See id.* at 1073 (suggesting that predatory pricing is a "notable and easy example" of antitrust law addressing the "most glaring" instances of harmful unilateral conduct).

200. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25 (1993).

201. *Id.* at 226 ("[T]he costs of an erroneous finding of liability are high.").

202. Leslie, *supra* note 165, at 1698-99. Even Crane, writing in defense of the heightened predatory-pricing standards in 2005, identifies only two examples of plaintiffs succeeding at trial on predatory-pricing claims after 1993. Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 4 n.12 (2005).

gests a worldview in which "neither antitrust law nor antitrust economics has changed since the late 1970s."[203]

This line of reasoning also subtly, but effectively, double-counts (again) the error costs of false positives. As of 2013, when *Novell* was issued, the Supreme Court had already imposed unique rules in the areas of predatory-pricing and refusals to deal. The Court's heightened standards were explicitly designed to compensate for any unique risks of false positives posed by such cases. *Novell* situated refusals to deal in the middle of an error-cost-based hierarchy of unilateral conduct. According to this hierarchy, refusals to deal present greater error costs (which, under this view, equate solely the risks of false positives) than predatory pricing. Drawing on this hierarchy as a normative justification, *Novell* went on to impose a burden on refusal-to-deal plaintiffs even higher than that imposed by the Supreme Court. Yet the Court had already "counted" the risk of false positives in *Trinko* and *Brooke Group*. *Novell* appears to have counted that risk yet again.[204]

## IV. SUGGESTED IMPROVEMENTS

Justice Gorsuch's antitrust jurisprudence exhibits (perhaps unsurprisingly, in light of his extensive experience) a relatively sophisticated understanding and application of antitrust doctrine. *Kay Electric*, in particular, is a model of judicial restraint and elegant reasoning. (Indeed, the Supreme Court cited *Kay Electric* approvingly in its *Phoebe Putney* decision.[205]) As a jurist, Gorsuch appears to embrace the modern consensus view that antitrust law is meant to safeguard competition and maximize consumer welfare, a view that has done much to rationalize antitrust law.

The foregoing discussion does, however, reveal some areas for improvement. The following suggestions briefly summarize the normative implications of that discussion. While these suggestions reflect the particular issues discussed in Part III, they also are generally applicable—all antitrust jurists would do well to apply them.

### A. *Not All Unilateral Conduct Is a "Refusal to Deal"*

The Supreme Court's refusal-to-deal doctrine has been refined over the course of decades to address a particular type of conduct: a

203. Baker, *supra* note 172, at 37.

204. This cycle could foreseeably continue until Sherman Act section 2 claims become (truly) impossible to win. After raising the bar for refusal-to-deal plaintiffs (as did *Novell*), one might argue that predatory-pricing claims had become relatively too "easy" to win, thereby justifying a (further) raising of *that* bar. And so forth.

205. FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 231 (2013).

monopolist's refusal to deal with a horizontal rival. Because of the particular risks of false positives posed by claims targeting such conduct, the Court created uniquely stringent requirements for plaintiffs bringing such claims. Due to the vagaries of language, many other types of unilateral conduct—for example, exclusive dealing—could be (mis)categorized as "refusals to deal." But those types of conduct do not pose the particular risks noted above. As a result, they should not trigger the uniquely stringent refusal-to-deal rules.

### *B.* Trinko *Is a Narrow Holding*

The Supreme Court's *Trinko* holding arose from the unique facts of that case. In particular, most "fundamental" to *Trinko*'s analysis was the fact that the allegedly withheld product had never been "otherwise marketed or available to the public" absent regulatory compulsion.[206] This unique fact is present in very few factual scenarios. Where it is not present, *Trinko* does not apply (or is of limited applicability). If the facts of a given refusal-to-deal case suggest a greater potential for anticompetitive harm than was present on the singular facts of *Trinko*, a case-specific analysis is appropriate.[207] Moreover, Justice Scalia's *Trinko* opinion, with its heavy emphasis on the risk of false positives, was motivated by the unique regulatory backdrop in that case. It was not intended to, and should not, serve as the normative basis for narrowing the scope of antitrust *ad infinitum*. *Trinko* is a narrow holding and should be applied as such.

### *C. Antitrust Injury Relates to Types of Harm*

The antitrust-injury requirement relates to the type of harm alleged by a plaintiff. Only harms that result from lessened competition are cognizable. Whether a plaintiff has alleged or proven antitrust injury does not depend on the type of remedy sought by that plaintiff. Neither does it depend on whether a court could easily or efficiently craft a remedy. Such concerns are addressed elsewhere in antitrust doctrine. Allowing them to affect antitrust-injury analyses risks double-counting error costs and suboptimally skewing outcomes.

### *D. The Balance of Error Costs Has Shifted in the Modern Era*

To the extent that focusing exclusively on the risk of false positives was once justified in the antitrust context, such a focus is inappropriate in the twenty-first century. Antitrust doctrine has imposed new

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206. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004).

207. *See* Hovenkamp, *supra* note 192.

and more stringent elements for plaintiffs to prove that particular types of conduct are anticompetitive, refined other elements of plaintiffs' claims (e.g., antitrust injury) to weed out baseless complaints, and imposed heightened pleading standards on plaintiffs and new impediments for plaintiffs pursuing class-action litigation. Against this backdrop, the need for the error-cost framework to serve its intended purpose—as a neutral tool for improving decisionmaking—is especially vital. False negatives, as well as false positives, must factor into error-cost analyses. Where available, empirical retrospectives of the impact of prior rule changes should inform such analyses.

## V. CONCLUSION

Taken as a whole, the antitrust jurisprudence of Neil Gorsuch exhibits a sophisticated understanding and application of existing doctrine. It also contains some areas for improvement. Gorsuch appears to value a coherent, transparent, efficient, and welfare-maximizing body of antitrust law. To further those goals, these areas warrant correction in future cases. Because Gorsuch brings such a unique wealth of expertise to the topic, thereby facilitating extensive examination, his decisions offer lessons of value to the broader antitrust enterprise.