THE SHERMAN ACT IS A NO-FAULT MONOPOLIZATION STATUTE: A TEXTUALIST DEMONSTRATION

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The drafters of the Sherman Act originally designed Section 2 to impose sanctions on all monopolies and attempts to monopolize, regardless whether the firm had engaged in anticompetitive conduct. This conclusion emerges from the first ever textualist analysis of the language in the statute, a form of interpretation originally performed only by Justice Scalia but now increasingly used by the Supreme Court, including in its recent Bostock decision.

Following Scalia's methodology, this Article analyzes contemporaneous dictionaries, legal treatises, and cases and demonstrates that when the Sherman Act was passed, the word "monopolize" simply meant that someone had acquired a monopoly. The term was not limited to monopolies acquired or preserved through anticompetitive conduct. A textualist analysis accordingly suggests that Section 2 should be applied to impose liability and corrective remedies on all monopolies and attempts to monopolize.

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A textualist approach to statutory construction would not imply or create unstated exceptions. Since Section 2 of the Sherman Act contains no explicit exception for a monopoly acquired or preserved without proof of anticompetitive conduct, none should be implied or created. Current case law requiring plaintiffs to prove the corporation involved engaged in improper conduct should be overturned.

This Article also briefly analyzes the practical economic implications likely to follow if the courts adopt a "no-fault" approach to monopolization law. This analysis will demonstrate that the overall economic effects will be uncertain. They will depend upon empirical issues whose net effect is speculative or ambiguous. They nevertheless are likely to be beneficial on the whole, and this provides some support for the no-fault position, and a fortiori demonstrate that the Article's textualist conclusions should be implemented.

Imposing sanctions on all extremely large monopolies could improve economic welfare in many ways. This should increase innovation and international competitiveness. It should prevent the allocative inefficiency effects of monopoly pricing and the form of exploitation that arises when monopolies acquire wealth from consumers. It would be likely to decrease the inefficiencies that result from monopolies enjoying a "quiet life." It should avoid the waste that can arise as a firm struggles to attain and protect its monopoly, and some of the time and cost of Section 2 litigation. It should improve privacy and decrease income inequality.

The new standard would admittedly also cause some costs and difficulties. For example, imposing sanctions on all monopolies could sometimes send a confusing or perverse signal to firms engaging in hard but fair competition, especially as a firm's market share neared the ambiguous level required for a violation. No-fault liability could also enable competitors to file baseless lawsuits. The transaction costs involved in imposing sanctions on monopolies could be significant. It also could lead to difficult remedy issues in cases involving natural and patent monopolies. We believe, however, that the benefits of no-fault are likely to outweigh the costs.

Textualism has been used in more and more Supreme Court analyses in recent years. Moreover, there recently have been many calls, from very different parts of the political spectrum, for imposing sanctions on extremely large monopolies without inquiring into whether the firm engaged in anticompetitive conduct. This issue has not, however, been analyzed seriously either from a legal or an economic perspective in roughly a half century.

The purpose of this Article is not to resolve all of the relevant questions. Its goal is to re-kindle debate about the legal and economic issues involved in imposing sanctions on all monopolies and attempts to monopolize under the Sherman Act and also, a fortiori, under Section 5 of the FTC Act. And to demonstrate that its textualism-derived conclusions constitute reasonable policy options.

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INTRODUCTION

Section 2 of the Sherman Act[1] originally was designed to impose sanctions on all monopolies and attempts to monopolize, regardless whether the firm engaged in anticompetitive conduct.[2] This conclusion emerges from the first ever textualist[3] analysis of the language in the

1. 15 U.S.C. §§ 1–7 (2018).

2. *See* Sherman Antitrust Act of 1890, Pub. L. No. 51–647, 26 Stat. 209 (codified at 15 U.S.C. § 2) (making it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations").

3. *See infra* Section II.A (explaining variations of textualism and using the type of textualism championed by Justice Scalia). Author Lande is not a textualist. However,

statute, a form of interpretation originally performed only by Justice Scalia[4] but now increasingly used by the Supreme Court, including in its recent *Bostock v. Clayton County*[5] decision.[6]

Using Scalia's approach, this Article analyzes contemporaneous dictionaries, legal treatises, and cases,[7] and demonstrates that when

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at all times some, and even sometimes all, Supreme Court justices are textualists. *See infra* notes 4–6. For this reason, the goal of this article is to analyze Section 2 using textualist principles.

4. *See* Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Justice Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017) (referring to Justice Scalia as a "pioneer" of textualism). Indeed, in the past, even prominent conservative legal scholars were not textualists. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (basing the Sherman Act analysis on Congress's intent when passing the law and policy considerations); *see also* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 193–94 (2008) (discussing the influence of Bork's analysis of the Sherman Act's legislative history in interpreting the Sherman Act, including on judges such as Richard Posner and Frank Easterbrook).

5. 140 S. Ct. 1731 (2020).

6. *See id.* Even though all three opinions in this case employed textualist analysis, they disagreed with one another as to the specific results of this analysis. Jonathan Skrmetti eloquently observed that in *Bostock*,

> [A]ll nine justices adopt[ed] a purely textualist approach and disagree[d] only about what flavor of textualism the Supreme Court should employ . . . . [T]his is a new highwater mark for textualism . . . with the unanimous court identifying textualism as the sole appropriate method for resolving an important statute's meaning. Gorsuch's proclamation that "[o]nly the written word is the law" did not stir the slightest disagreement. Various members of the court will surely employ other methodologies in upcoming cases, but *Bostock* leaves no doubt that textualism is the predominant method of statutory interpretation for the current court.

Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word Is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law [https://perma.cc/S4JX-5964]. *See* Ryan Lovelace, *Elena Kagan: The Supreme Court Is a 'Textualist Court' that Reasons More like Scalia than Breyer*, WASH. EXAM'R (Oct. 16, 2017, 7:04PM), https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer [https://perma.cc/7JZV-GERP] (reporting that Justice Kagan stated, "[W]e are a generally, fairly textualist court, which will generally think when the statute is clear you go with the statute"); *see also* Alderman & Pickard, *supra* note 4, at 187 (noting that Justice Gorsuch approved of Justices Sotomayor and Kagan's textualist analysis in *Lockhart v. United States*).

7. *See infra* Section II.A (explaining that Justice Scalia's approach to textualism does not consider legislative debates or committee reports; instead, it interprets words and phrases in the context of the history of the time in which the statute was enacted).

Congress passed the Sherman Act, the word "monopolize" simply meant that someone had acquired a monopoly. The term was not limited to monopolies acquired or preserved through anticompetitive conduct. A textualist analysis accordingly suggests that Section 2 should be applied to impose liability and corrective remedies on all monopolies regardless of "fault."[8]

This textualist analysis also will show that when courts use the Sherman Act to impose sanctions on firms that "monopolize[] or attempt to monopolize,"[9] because the statute contained no exceptions for firms that did not engage in anticompetitive conduct,[10] contrary case law should be overturned.[11]

Recent events have transformed this issue into a timely antitrust topic.[12] Prominent politicians on both the left[13] and right[14] have called not just for an investigation into whether important alleged large monopolies, including Facebook, Amazon, Apple, and Google, have engaged in anticompetitive conduct. Senators Sanders and Warren, for

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8. *See infra* Part III (conducting a textualist analysis of Section 2 of the Sherman Act).

9. Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209; *see infra* Section III.A (interpreting the meaning of "monopolize" through dictionaries and legal treatises).

10. *See infra* Section III.C and note 168 and accompanying text (explaining no exception for a monopoly secured without proof of anticompetitive conduct should be implied or created because that exception is not explicit in the Sherman Act).

11. *See infra* Section IV.B (describing the process of overturning statutory precedent while noting that courts have not been particularly bound by Sherman Act precedent).

12. *See infra* Part V (discussing the recent anti-monopoly political rhetoric arising from both parties and explaining the modern economic changes supporting a "no-fault" analysis).

13. *See infra* Part V; *see also infra* notes 220–21 (explaining the views of Senators Elizabeth Warren and Bernie Sanders).

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> The enforcers now encircling the four most innovative and investor-beloved companies in America[,] [Google, Facebook, Apple, and Amazon,] include the Trump Justice Department; the majority Republican FTC; the antitrust subcommittees of both the Democratic House and Republican Senate; a posse of 51 state and territorial attorneys general pursuing Google, and a squad of 47 AGs dogging Facebook.

Roger Parloff, *Behind the Big Tech Antitrust Backlash: A Turning Point for America*, YAHOO FIN. (Dec. 11, 2019), https://finance.yahoo.com/news/amazon-facebook-google-antitrust-backlash-152518336.html [https://perma.cc/6XCZ-TD3V]; *see also infra* notes 219, 221 (noting President Trump's willingness to break up "Big Tech" companies).

example, have bluntly said that these "monopolies" should be broken up.[15] They have called for the implementation of no-fault monopolization.[16]

This Article will re-examine the appropriateness of the current legal standards for what often is called "no-fault monopolization."[17] It will demonstrate that Justice Scalia's opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[18] which clarified relevant case law and emphatically held that fault is required for a Section 2 violation,[19] was wrongly decided. This Article will show how *Trinko* and other cases should have been decided if textualism were applied to Section 2 cases, and that these cases should have had no-fault results.

As background and by contrast, this Article in Part I will first engage in a traditional or "purposivist" analysis of Section 2 of the Sherman

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15. Elizabeth Culliford, *Where U.S. Presidential Candidates Stand on Breaking up Big Tech*, REUTERS (Jan. 24, 2020, 6:20 AM), https://www.reuters.com/article/us-usa-election-tech-factbox/where-us-presidential-candidates-stand-on-breaking-up-big-tech-idUSKBN1ZN16C (reporting Senators Sanders and Warren's views regarding the need to break up Big Tech companies).

16. *See* Lauren Hirsch, *Bernie Sanders Wants 'Criminal' CEOs Locked up, but Lawyers Say that's Unlikely to Happen*, CNBC (Oct. 29, 2019, 4:28 PM), https://www.cnbc.com/2019/10/29/bernie-sanders-wants-criminal-ceos-locked-up-but-lawyers-say-its-unlikely.html [https://perma.cc/4Q5A-M687] ("Bernie Sanders has said he would use the Sherman Antitrust Act to put CEOs of monopolistic companies in jail."); Ted Johnson, *Democratic Candidates Differ on Ways to Rein in Facebook, Other Big Tech Firms*, DEADLINE (Oct. 15, 2019, 7:55 PM), https://deadline.com/2019/10/democratic-debate-facebook-elizabeth-warren-1202761256 [https://perma.cc/F66X-72M7] (quoting Senator Elizabeth Warren as saying, "We need to enforce our antitrust laws, break up these giant companies that are dominating big tech, big pharma, big oil, all of them"); Cristiano Lima, *Bernie Sanders Says He Would 'Absolutely' Try to Break up Facebook, Google, Amazon*, POLITICO (July 16, 2019, 10:41 AM) https://www.politico.com/story/2019/07/16/bernie-sanders-facebook-google-amazon-1416786 [https://perma.cc/95WY-5SFX] (reporting that Senator Bernie Sanders stated that he would appoint an attorney general "who would break up these huge corporations"); *see also infra* Part V (sharing views of other politicians and economists discussing implementation of no-fault monopolization).

17. *See* Marina Lao, *No-Fault Digital Platform Monopolization*, 61 WM. & MARY L. REV. 755, 766–70 (2020) (discussing the history of the term "no-fault" monopolization); *see also* Alfred F. Dougherty, Jr. et al., *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83, 86–88 (1980) (arguing that Congress should adopt the National Commission for the Review of Antitrust Laws and Procedures's endorsement of a no-conduct, or "no-fault," monopolization approach).

18. 540 U.S. 398 (2004).

19. *Id.* at 407 ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."). *But see infra* Section IV.A (analyzing prior Supreme Court opinions that were less clear).

Act, relying upon the law's legislative history. As Part II will then explain, a textualist analysis instead determines the meaning of a law by examining key statutory words and terms as they were used in contemporaneous dictionaries, legal treatises, prior cases, and the earliest cases that followed the enactment of the law.[20] Every method of statutory construction starts with the words of the statute, but textualism ignores the legislative debates and committee reports that are central to a traditional approach to statutory analysis.[21] It does not attempt to discern what Congress "intended to do" other than by examining the words and phrases in the statute.[22] Moreover, under a textualist analysis, as Justice Scalia emphasized, no exception can be read into a law unless it is explicitly contained in the statute.[23]

Textualism is a relatively new method of statutory analysis. Until relatively recently, it was not even employed by most conservative legal scholars. Perhaps for this reason, before now, no one has undertaken a textualist analysis of Section 2 of the Sherman Act to determine whether it requires anticompetitive conduct.[24] This Article undertakes this task in Part III, which demonstrates that Congress intended the Sherman Act to impose sanctions on all monopolies and attempts to monopolize.

Part IV will then discuss the relevant Supreme Court Sherman Act jurisprudence and other cases where the Supreme Court dramatically re-interpreted statutes after a long period. It shows that, despite current case law, the Court should similarly re-interpret the Sherman Act and hold that it imposes sanctions on all monopolies and attempts to monopolize.

Part V will briefly discuss a half-century of evolving economic thinking about the costs and benefits of this issue. This Part shows that the economic effects will be uncertain and dependent upon empirical issues whose net effect is speculative or ambiguous. They nevertheless are likely to be beneficial on the whole, and they provide some support

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20. *See infra* Part II; *see also infra* note 63–64 (noting the importance of history to textualists because they consider a word's usage and meaning at the time that a statute was enacted).

21. *See infra* Part I.

22. *See infra* Part I; *see also infra* note 39–41 (stating that a traditional legislative history analysis for the Sherman Act has been done many times).

23. *See infra* Section III.C and note 168 (citing an opinion written by Justice Scalia stating exceptions cannot be read into the law unless explicitly stated).

24. *See infra* Section II.B.

for the no-fault position, and a fortiori demonstrate that the Article's textualist conclusions should be implemented.[25]

No-fault could improve economic welfare in many ways. It should increase innovation and international competitiveness.[26] It should prevent the allocative inefficiency effects of monopoly pricing and the form of exploitation that arises when monopolies acquire wealth from consumers.[27] It would be likely to decrease the inefficiencies that result from monopolies enjoying a "quiet life,"[28] and also the waste that arises as firms attain and protect their monopolies.[29] It should reduce the time and costs of Section 2 litigation.[30] It should improve privacy and decrease income inequality.[31]

The new standard would admittedly also cause some costs and difficulties. For example, imposing sanctions on all monopolies could sometimes send a confusing or perverse signal to firms engaging in hard but fair competition, especially as a firm's market share neared the ambiguous level required for a violation.[32] It could enable competitors to file baseless lawsuits.[33] The transaction costs involved in imposing sanctions on monopolies could be significant.[34] It also could lead to difficult remedy issues in cases involving natural and patent monopolies.[35] We believe, however, that the benefits of no-fault are likely to outweigh the costs.

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25. *See infra* Section V.F.

26. *See* CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 8–9 (2012) (arguing that competition has positive impacts on innovation).

27. *See infra* notes 276–80 and accompanying text (describing the exploitation inherent in monopolies).

28. *See infra* note 307 and accompanying text (explaining the benefits to a monopoly of living a "quiet life").

29. *See infra* notes 273–75 and accompanying text (detailing rent-seeking behavior and the impacts of such behavior with regards to waste).

30. *See infra* notes 319–21 (debating litigation costs in antitrust cases).

31. *See infra* Section V.B; *see also* note 239 and accompanying text (examining income inequality).

32. *See infra* note 358 and accompanying text.

33. *See infra* notes 313–15 and accompanying text (describing research on sham litigation involving antitrust claims).

34. *See infra* note 318 (explaining transaction costs for the digital technology markets).

35. *See infra* Section V.C. Many of the economic uncertainties involving no-fault can be addressed optimally by selecting suitable remedies, and there are a variety of remedies available in Section 2 cases. Historically, relatively few monopolies have been broken up, and we expect that even fewer would be remedied this way under a no-fault

Part VI will discuss the effects this article's conclusions should have on case outcomes under the "monopolize[] or attempt to monopolize" portions of Section 2 of the Sherman Act. It will also very briefly discuss no-fault monopolization as a violation of Section 5 of the Federal Trade Commission ("FTC") Act.[36]

The concluding Part of this Article takes into account the rising influence of textualist analysis and calls for a debate into the legal and economic issues likely to arise from a textualist analysis of Section 2 and its no-fault conclusion. This Part argues that because the article's textualist analysis results in a "non-absurd"—and in fact quite reasonable—policy option, it should be adopted and implemented by the courts.

I. A TRADITIONAL OR PURPOSIVIST LEGISLATIVE HISTORY APPROACH: USING CONGRESSIONAL DEBATES AND COMMITTEE REPORTS

To better explain and to highlight by contrast this article's textualist analysis,[37] this Part will undertake a traditional (sometimes called "purposivist"[38]) legislative history analysis of Section 2 of the Sherman Act, one that (as is not the case for a textualist analysis) examines the relevant legislative debates and committee reports.[39] This was the most

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theory. In other words, even though liability should be determined on a no-fault basis, the most useful remedy often will be one that simply limits a firm's conduct. *See infra* note 306 and accompanying text (detailing economic uncertainty and the incentive to compete).

36. 15 U.S.C. §§ 41–58 (2018).

37. Author Lande is not a textualist, except in the sense that this term is used by Justice Kagan. *See supra* note 6. Author Lande is a purposivist who believes legislative debates should be considered when courts determine the meaning of statutes. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). However, the goal of this article is to determine how a textualist judge should interpret Section 2.

38. A traditional analysis of the legislative history of a statute, one that relies upon the congressional debates and committee reports, is often called a "purposivist" analysis today. *See* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 483, 503 (2013); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 18 (2012) ("[Purposivism] has been called 'the basic judicial approach these days . . . .'").

39. A traditional legislative history analysis has been done for the Sherman Act many times on a variety of antitrust subjects, most famously by Judge Bork. As Judge Bork noted, the task of ascertaining the will of Congress should be "an attempt to construct the thing we call 'legislative intent' using conventional methods of collecting and reconciling the evidence provided by the Congressional Record." Bork, *supra* note 4, at 7 n.2; *see also* Lande, *supra* note 37 (conducting legislative history analysis that reach different results from Bork); Kirkwood & Lande, *supra* note 4 (same).

common method of statutory analysis until relatively recently and was universally used by both conservatives and liberals.[40] Like every method of statutory analysis, it starts with the words and phrases used in the statute, *but*—crucially—it supplements this with an analysis of the relevant legislative debates and committee reports.[41] As this Part will demonstrate, however, a traditional analysis of Section 2 on the no-fault issue produces an inconclusive result.

There appears to be only one reference in the Sherman Act legislative debates or committee reports that is relevant to the question of whether Section 2 requires anticompetitive conduct.[42] It is part of an exchange that took place at the very end of the debates. Senator John Kenna asked:

> Is it intended by the committee, as the section seems to indicate, that if an individual . . . by his own skill and energy, . . . shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act? . . . Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that . . . he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?[43]

Senator George Edmunds gave a direct response to Senator Kenna's hypothetical:

> [I]n the case stated the gentleman has not any monopoly at all . . . . He has not got the possession of all the horned cattle in the United States. He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price. So I assure my friend he need not be disturbed upon that subject.[44]

Senator Edmund's response indicates that he believed that no monopolization was involved in the hypothetical, so he did not really consider the need for an exception for a firm that achieved its monopoly solely by superior skill. Senator George Hoar then gave his answer:

> [I]n the case put by [Senator Kenna, if] a man who merely by superior skill and intelligence . . . got the whole business because

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40. *See* Pojanowiski, *supra* note 38, at 483, 503.

41. *Id.*

42. Author Lande found only a single reference made in debate to an anticompetitive conduct requirement, which is analyzed in this Part. Other conventional legislative history analyses have also failed to reveal any other exchanges that concern the no-fault issue. *See, e.g.*, Bork, *supra* note 4, at 29.

43. 21 CONG. REC. 3151 (1890) (statement of Sen. Kenna).

44. *Id.* at 3151–52 (statement of Sen. Edmunds).

> nobody could do it as well as he could was not a monopolist, [unless] it involved something like the use . . . [of unfair] competition like the engrossing, the buying up of all [rivals].[45]

Senator Edmunds then provided the final answer to Senator Kenna's question:

> I have only to say . . . that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb "to monopolize": 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea. Like the sugar trust. One man, if he had capital enough, could do it just as well as two. 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade . . . . [W]e were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, of one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it.[46]

The Sherman Act, making it illegal to "monopolize" or "attempt to monopolize," was then passed by the Senate.[47]

It is difficult to reconcile the statements of Senators Edmunds and Hoar. They appear to have been defining the markets differently.[48] Senator Edmunds was discussing a large cattle sale to Mexico while Senator Hoar was discussing all of the cattle in the U.S.[49]

Alternatively, Senators Edmunds and Hoar may have provided different answers to Senator Kenna's question. Senator Hoar did not consider a firm to be guilty of "monopolization" if it "got the whole business" by skill and efficiency alone.[50] Senator Edmunds, however, defined "to monopolize" as merely "[t]o engross or obtain by any means."[51] Senator Edmunds believed that "if one person . . . did it, it

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45. *Id.* at 3152 (statement of Sen. Hoar).
46. *Id.* (statement of Sen. Edmunds).
47. *See id.* at 3153 (recording the votes that resulted in passage).
48. *See supra* notes 44–45 (statements of Sens. Edmunds and Hoar).
49. *See supra* notes 44–45 (statements of Sens. Edmunds and Hoar).
50. 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar).
51. *Id.* (statement of Sen. Edmunds).

was just as offensive and injurious to the public interest as if two had combined to do it."[52] Edmunds clearly condemned every monopoly, although by his first response he did not consider the hypothetical situation given to describe a monopoly.[53]

These contradictory statements should be construed as offsetting one another, and Edmunds's statement shows the issue was considered but did not result in a change in statutory language.[54] Thus, there is no evidence of a clear intent of Congress that anticompetitive conduct is required for a Section 2 violation. Nevertheless, if a judgment had to be made, since Senator Edmunds spoke last and he was one of the main drafters and sponsors of the bill,[55] his statements could carry greater weight. Perhaps this dialogue may constitute some support for the no-fault interpretation. Moreover, the fact that this discussion took place at the very end of the Sherman Act debate also could very well mean that it embodied Congress's final view on the subject. Perhaps Senator Edmunds's opinion, for this reason also, should be given even more weight. Alternatively, one could conclude that because these remarks were given so late in the debates, these statements by Senator Sherman or other legislators were less able to correct or oppose these statements, so perhaps they should carry less weight.

In summary, a conventional legislative history analysis of the issue does not give a clear indication of congressional intent.

II. A TEXTUALIST ANALYSIS [56]

A. Defining a Textualist Analysis: What Would Justice Scalia Do?

Justice Scalia long was the chief advocate of a method of interpreting legislation known as the "textualist," fair meaning, ordinary meaning, or plain meaning approach.[57] He often was joined in this methodology

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52. *Id.*

53. *See id.* at 3151–52.

54. *See supra* notes 44–45 (statements of Sens. Edmunds and Hoar).

55. *See* Bork, *supra* note 4, at 12 ("Edmunds[] [ ] appears to have played the primary role in drafting the bill which became the Sherman Act . . . .").

56. Some of the textualist analysis in this Section first appeared in Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013).

57. *See* Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSBLOG (Nov. 14, 2017, 10:48 AM), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/amp [https://perma.cc/YC4M-72WS] (stating that "perhaps [Scalia's] greatest legacy" was

by other Supreme Court Justices,[58] and Justice Neil Gorsuch recently told the Federalist Society he has become Scalia's successor:

> [A] person can be both a publicly committed originalist and textualist and be confirmed to the Supreme Court of the United States. Originalism has regained its place at the table of constitutional interpretation, and textualism in the reading of statutes has triumphed. And neither one is going anywhere on my watch.[59]

Justice Scalia expressly rejected the use of such traditional legislative history sources as the debates in Congress and the reports of congressional committees.[60] He explained:

> In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.[61]

He explained further:

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changing "the way we think about statutes"); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

58. *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 163 n.18 (2018) (providing examples of Supreme Court justices joining in the fair meaning approach).

59. Elizabeth Slattery & Tiffany Bates, *Neil Gorsuch Just Finished Year 1 on the Supreme Court. Here's How He's Making His Mark*, HERITAGE FOUND., (Apr. 11, 2018), https://www.heritage.org/courts/commentary/neil-gorsuch-just-finished-year-1-the-supreme-court-heres-how-hes-making-his-mark [https://perma.cc/B3QM-L24B].

60. Debra Cassens Weiss, *Scalia Weighs in on Posner's Controversial Book Review, Calls Posner's Assertion 'a Lie,'* ABA J. (Sept. 18, 2012, 11:42 AM), http://www.abajournal.com/news/article/scalia_weighs_in_on_a_controversial_book_review/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email [https://perma.cc/E825-2NAN] ("To say that I used legislative history is simply, to put it bluntly, a lie.").

61. SCALIA, *supra* note 57, at 36; *see also id.* at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . . It is the *law* that governs, not the intent of the lawgiver."); *id.* at 23 ("Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean.' And I agree with [Justice] Holmes's [ ] remark, quoted approvingly by Justice Jackson: 'We do not inquire what the legislature meant; we ask only what the statute means.'") (footnotes omitted).

> Why would you think this [material—the legislative debates and committee reports—] is an expression of the legislature's intent? And the more you use that garbage, the less accurate it is . . . . [O]ne of . . . the major[] functions of . . . hot shot Washington lawyers is drafting legislative history. You send it up to the [H]ill, and get a friendly Senator to read it into the record or something else, to change the meaning of the text that's adopted. So, you know, . . . it's crazy.[62]

Instead, Justice Scalia attempted to ascertain the "fair meaning" of the text of statutes by making extensive use of such material as roughly contemporaneous dictionaries and legal decisions to define key terms.[63] Justice Scalia also examined the country's history at approximately the time of the legislation and the legislation's societal context to help define the particular words or phrases in the statutes.[64]

If Justice Scalia's textualist analysis were applied to the Sherman Act, neither its congressional debates nor the committee reports would be analyzed.[65] A textualist analysis would, by contrast, undertake a number of inquiries to ascertain what the statute "originally" and "fairly" meant.[66] To do this, the inquiry would examine:

1. The definitions of the key terms in dictionaries (Justice Scalia seems especially interested in the definitions of key words in contemporary dictionaries[67]), legal dictionaries, and legal treatises that existed when these laws were passed. Ideally, we would find and analyze sources defining these terms as close as possible to when the Sherman Act was passed.[68]

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62. Lande, *supra* note 56, at 2362.

63. *See* SCALIA & GARNER, *supra* note 38, at 78 (arguing that "[w]ords must be given the meaning they had when the text was adopted").

64. Scalia distinguished his approach from a traditional legislative history approach:

> [A]ny legal audience knows what legislative history is. It's the history of the enactment of the bill. It's the floor speeches. It's the prior drafts of committees. That's what legislative history is. *It isn't the history of the times. It's not what people thought it meant immediately after its enactment.*

See Richard A. Posner, *Richard Posner Responds to Antonin Scalia's Accusation of Lying*, NEW REPUBLIC (Sept. 20, 2012) (emphasis added), https://newrepublic.com/article/107549/richard-posner-responds-antonin-scalias-accusation-lying.

65. *See* SCALIA & GARNER, *supra* note 38, at 369 (referring to the "false notion that committee reports and floor speeches are worthwhile aids in statutory interpretation").

66. *Id.*

67. *See id.* at 34–35, 37 (citing three sources on guides to statutory interpretation, and then—as examples of permissible and useful sources of meaning—four dictionary definitions of key terms).

68. *Id.* at 78 ("Words must be given the meaning they had when the text was adopted."); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, app. 1784–90 (2020)

2. English common law cases from before 1890 to determine whether the federal antitrust statutes borrowed key terms from the common law and, if so, what they meant in common law decisions.[69] We could also make inferences from state antitrust statutes that existed when the federal antitrust laws were passed, and their interpretations in courts, in case the federal laws borrowed key terms from a state statute.[70]
3. The use of key terms in federal antitrust cases from the 1890s to help determine "what people thought [the statute] meant immediately after its enactment."[71]

(Alito, J., dissenting) (citing five contemporary dictionaries in the appendix of his textualist opinion to ascertain what the word "sex" meant in 1964). *See generally* SCALIA & GARNER, *supra* note 38, app. at 415–24 (explaining the appropriate use of dictionaries to analyze text).

69. SCALIA & GARNER, *supra* note 38, at 320 ("A statute that uses a common-law term, without defining it, adopts its common-law meaning."); *see infra* note 77 (stating that Justice Scalia cited, with apparent approval, a pre-Sherman Act common law antitrust case).

70. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia examined roughly contemporaneous state constitutional provisions and statutes to help determine what various terms in the Second Amendment meant:

> [N]ine state constitutional provisions written in the 18th century or the first two decades of the 19th[] [ ] enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." . . . That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.

554 U.S. at 584–85. Scalia was also guided by analogous state statutes, stating, "Many colonial statutes required individual arms bearing for public-safety reasons—such as [a] 1770 Georgia law . . . . That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843." *Id.* at 601. This surely is the weakest of the aids to interpretation because state statutes could be inconsistent with one another.

71. Posner, *supra* note 64. In *Heller*, Justice Scalia used statutory interpretations of the Second Amendment from the period shortly following its adoption as a guide to determining its meaning. As he explained:

> We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century . . . . [We conduct an] examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the Amendment as we do . . . . [The 19th-century cases that interpreted the Second Amendment universally] protect an individual right unconnected with militia service.

Id. at 605.

4. The "history of the times."[72] It would use the history of the period producing the antitrust laws to help ascertain what Congress meant when it used terms like "monopolize" or "attempt to monopolize" in the Sherman Act.
5. A textualist analysis would not imply or invent any exemptions that are not plainly evident in the words of the statutes.[73] If an antitrust law contains an explicit exemption then of course that exemption would be respected. But no non-explicit exemptions would be inferred in order to achieve some overall goal or purpose of the statute.[74]
6. A textualist interprets language fairly, ordinarily and reasonably, but not "literally." Justice Scalia said that "the good textualist is

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72. SCALIA, *supra* note 57, at 30; *see* SCALIA & GARNER, *supra* note 38, at 399 (arguing that lawyers and judges are qualified to do the historical research that originalism requires); *see also id.* at 400–02 (discussing how the history of gun use in the United States helps interpret a gun control statute). Moreover, Scalia quotes, with apparent approval, Chief Justice Taney:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

SCALIA, *supra* note 57, at 30 (footnote omitted).

73. *See infra* Section III.C (explaining Scalia's view that no exception should be read into a statue unless explicitly contained therein); *see also Bostock*, 140 S. Ct. at 1749 (second alteration in original) (quoting SCALIA & GARNER, *supra* note 38, at 101) ("[U]nexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'").

74. Scalia believed that no exception should be inferred to achieve a greater purpose because:

> [E]ven if you think our laws mean not what the legislature enacted but what the legislators intended, there is no way to tell what they intended *except* the text. Nothing but the text has received the approval of the majority of the legislature and of the President, assuming that he signed it rather than vetoed it and had it passed over his veto. Nothing but the text reflects the full legislature's purpose. Nothing.

Antonin Scalia & John F. Manning, *A Dialogue on Statutory Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

not a literalist."[75] Scalia and Garner explain that the "notion that words should be strictly construed" is untrue.[76] They quote Justice Frankfurter: "Literalness may strangle meaning."[77] As Justice Brett Kavanaugh observed in *Bostock*, "courts must follow ordinary meaning, not literal meaning."[78]

7. A textualist tries very hard not to reach an "absurd" conclusion. The "absurdity doctrine" means that no statute should be interpreted in an absurd manner.[79] Justice Scalia adopted a narrow version of this doctrine that would limit it to technical or drafting errors.[80]

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75. SCALIA, *supra* note 57, at 24.

76. *See* SCALIA & GARNER, *supra* note 38, at 355. They conclude:

> Strict constructionism understood as a judicial straightjacket is a long-outmoded approach deriving from a mistrust of all enacted law . . . . Textualists should object to being called strict constructionists . . . . [It] is an irretrievably pejorative term, as it ought to be. Strict constructionism, as opposed to *fair-reading* textualism, is not a doctrine to be taken seriously.

Id. at 356 (emphasis added) (footnote omitted).

77. *Id.* at 355 (quoting Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1946)).

78. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting). The "literalism" issue is one way of characterizing much of the disagreement between the Court's two leading textualists in the *Bostock* case. Justice Kavanaugh objected to Justice Gorsuch's interpretation of the operative term, writing:

> [C]ourts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase . . . . The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* . . . of the relevant statutory text is the anchor for statutory interpretation." . . . [P]roper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." . . . Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers.

Id.

79. *See* SCALIA & GARNER, *supra* note 38, at 234. Perhaps this explains why Justice Scalia said, "I'm an originalist and a textualist, not a nut." Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens up*, NPR (Apr. 28, 2008, 7:32 AM), https://www.npr.org/templates/story/story.php?storyId=89986017 [https://perma.cc/UL2Y-HLUK].

80. *See id.* at 234, 238.

> Justice Scalia endorsed the [absurdity doctrine], or at least what he called a "narrow version" of it. According to the Justice, two conditions must coincide

These textualist rules of statutory interpretation do not, of course, mean every textualist will always interpret key words and terms identically. Indeed, as Jonathan Skrmetti observed, "the three [Supreme Court] *Bostock* opinions are a master class in defining and applying textualism."[81]

B. Neither Justice Scalia Nor Anyone Else Has Performed a Textualist Analysis of the Relevant Sherman Act Terms

Unfortunately, neither Justice Scalia nor anyone else has ever performed a textualist analysis of any of the antitrust laws on the no-fault issue. Justice Scalia authored five antitrust opinions,[82] three concurrences,[83] and three dissenting[84] opinions in antitrust cases. Most do not even come close to undertaking a textualist analysis of the no-fault issue.[85] Nevertheless, some are instructive illustrations of textualist analysis.

> to justify application of the canon. First, the absurdity "must consist of a disposition that no reasonable person could intend." More precisely, and quoting Joseph Story, "the absurdity and injustice of applying the provision to the case [must] be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Mere oddity or anomaly does not suffice. Second, the absurdity must be "reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error." Satisfaction of these two conditions, the Justice said, establishes that the apparent anomaly was a drafting error, an error that changing or applying a particular word corrects.

Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2036 (2017) (second alteration in original) (footnotes omitted).

81. Skrmetti, *supra* note 6.

82. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

83. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 176 (2004) (Scalia, J., concurring); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 640 (1992) (Scalia, J., concurring); Texaco Inc. v. Hasbrouck, 496 U.S. 543, 576 (1990) (Scalia, J., concurring).

84. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1603 (2015) (Scalia, J., dissenting); Hartford Fire Ins. v. California, 509 U.S. 764, 812 (1993) (Scalia, J., dissenting in part); Eastman Kodak Co. v. Image Tech. Servs., Inc. 504 U.S. 451, 486 (1992) (Scalia, J., dissenting); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 333 (1991) (Scalia, J., dissenting).

85. Most Scalia decisions did not even come close to undertaking a relevant textualist analysis. *See F. Hoffmann-La Roche Ltd.*, 542 U.S. at 176 (Scalia, J., concurring); *Ticor Title Ins. Co.*, 504 U.S. at 640 (Scalia, J., concurring); *Eastman Kodak Co.*, 504 U.S. at 486 (Scalia, J., dissenting); *Summit Health, Ltd.*, 500 U.S. at 333 (Scalia, J., dissenting); *Omni Outdoor Advert., Inc.*, 499 U.S. 365.

For example, in *Hartford Fire Insurance Co. v. California*,[86] Justice Scalia, writing for the majority in part and dissenting in part, performed a textualist analysis of the term "boycott" as it was used in the McCarran-Ferguson Act[87] exception to the antitrust laws:

> Determining proper application of [section] 3(b) of the McCarran–Ferguson Act to the present cases requires precise definition of the word "boycott." It is a relatively new word, little more than a century old. It was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland . . . . Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it."[88]

Justice Scalia then used the Webster's Dictionary definition to resolve a key legal dispute.[89] This is significant because it illustrates Justice Scalia's use of a roughly contemporaneous dictionary definitions (he used a 1950 dictionary to define a term in a 1946 law), a technique that will be discussed below.

The Scalia opinion that would have been most likely to have undertaken the relevant textualist analysis was *Trinko* because the case involved the core meaning of Section 2 of the Sherman Act.[90] Unfortunately, Justice Scalia's opinion did not undertake a textualist analysis of the overall meaning of Section 2. He instead simply cited

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86. 509 U.S. 764 (1993).

87. 15 U.S.C. §§ 1011–15 (2018).

88. *Hartford Fire Ins.*, 509 U.S. at 800–01 (quoting 2 OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989)) (second alteration in original).

89. 1 WEBSTER'S NEW INTERNATIONAL DICTIONARY 321 (2d ed. 1950) (emphasis added) (defining "boycott" as "to withhold, wholly *or in part*, social or business intercourse from, as an expression of disapproval or means of coercion"); *see Hartford Fire Ins.*, 509 U.S. at 801 (citing 1 WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra*) (alteration in original) ("As the definition just recited provides, the refusal may be imposed 'to punish [the target] for the position he has taken up, or *coerce him into abandoning it*.' . . . Furthermore, other dictionary definitions extend the term to include a *partial* boycott—a refusal to engage in some, but not all, transactions with the target.").

90. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (explaining the issue as whether the complaint states a claim under Section 2 of the Sherman Act).

precedent—the *United States v. Grinnell Corp.*[91] case—for his assertion that the Sherman Act contains an exception for a monopolist that gains its monopoly through historical accident or superior efficiency.[92]

Justice Scalia extensively analyzed the term "restraint of trade" in *Business Electronics Corp. v. Sharp Electronics Corp.*[93] using a common-law based textualist analysis,[94] but he was not examining the no-fault issue. Rather, he distinguished the idea of a "restraint of trade" from the understanding of which specific business practices restrained trade.[95] His opinion considered the common law antecedents of modern antitrust law but did not involve the no-fault issue.[96]

Finally, although it did not discuss the issue of no-fault monopoly, it is instructive that in a concurring opinion in *Texaco Inc. v. Hasbrouck*,[97] a Robinson-Patman Act[98] case, Justice Scalia wrote:

> The language of the Act is straightforward: Any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent competition" is prohibited, unless it is immunized by the "cost justification" defense, *i.e.*, unless it "make[s] only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which [the] commodities

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91. 384 U.S. 563 (1966).

92. *Trinko*, 540 U.S. at 407 (citation omitted) (quoting *Grinnell*, 384 U.S. at 570–71) ("The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under [Section] 2 of the Sherman Act, which declares that a firm shall not 'monopolize' or 'attempt to monopolize.' It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'").

93. 485 U.S. 717 (1988).

94. *See id.* at 731–32 (explaining that common law meaning is important, but Congress intended the meaning of "restraint of trade" to be dynamic).

95. *Id.* at 732 ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."). Justice Scalia also cited, with apparent approval, a pre-Sherman Act common law case. *Id.* at 731 (citing Gibbs v. Consol. Gas Co., 130 U.S. 396, 409 (1889)) ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted.").

96. *Id.* at 732 ("[T]he common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error.").

97. 496 U.S. 543 (1990).

98. 15 U.S.C. § 13 (2018).

> are . . . sold or delivered." There is no exception for "reasonable" functional discounts that do not meet this requirement.[99]

This textualist discussion is noteworthy because it affirms the "fair or ordinary reading" conclusion that no exception should be implied in the law unless it is explicitly a part of the statute. This will be important infra Section II.B.3 during the discussion of whether Section 2 of the Sherman Act actually contains an "exception" for monopolies attained by superior efficiency.

Justice Gorsuch has written one Supreme Court opinion[100] and three Circuit Court opinions that substantively address Section 2 of the Sherman Act.[101] None perform a textualist analysis of the no-fault issue. The majority opinion in *Apple Inc. v. Pepper*[102] does include a textualist analysis by Justice Kavanaugh, but it concerns the statute's language concerning a plaintiff's right to sue, not the issue of no-fault monopoly.[103]

III. A TEXTUALIST ANALYSIS OF SECTION 2 DEMONSTRATES IT DOES NOT REQUIRE FAULT

A. A Textualist Analysis of "Monopolize"

A Justice Scalia-inspired textualist analysis of the Sherman Act's approach to the no-fault issue leads to a startling result: courts should interpret Section 2 to impose sanctions on all monopolies, not just monopolies acquired by anticompetitive conduct. The Sherman Act should not contain an exception for efficient monopolists.

Section 2 of the Sherman Act prohibits anyone who shall "monopolize[] or attempt to monopolize."[104] The statute never defines "monopolize,"[105]

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99. *Hasbrouck*, 496 U.S. at 579 (Scalia, J., concurring) (alterations in original) (citation omitted).

100. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019) (Gorsuch, J., dissenting).

101. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013); Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039 (10th Cir. 2011); Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009).

102. 139 S. Ct. 1514 (2019).

103. *See Apple Inc.*, 139 S. Ct. at 1522.

104. 15 U.S.C. § 2 (2018).

105. Indeed, it was rare for pre-Sherman Act restraint of trade cases to use the term "monopolize." For an exception (which seems to imply a no-fault approach to the area), see *Leslie v. Lorillard*, 18 N.E. 363, 366 (N.Y. 1888) (implying a no-fault approach and asserting that "[c]orporations . . . if allowed to engage without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, [ ] become a public menace . . . .").

and uses it in place of the more straightforward term "monopoly." Did Congress intend "monopolize" to mean the same thing as "monopoly," or was it meant to be a broader or narrower term, or simply to be different?

The Act's preamble does use the term "monopolies," calling the statute "[a]n act to protect trade and commerce against unlawful restraints and monopolies."[106] It is unclear, however, whether "unlawful" modifies only "restraints," in which case the words of the preamble would tend to condemn all monopolies, or whether "unlawful" also modifies "monopolies," which would be ambiguous. It could mean that all monopolies are illegal, or that some monopolies are legal.

The overriding question is of course whether the statute's prohibition against firms that "monopolize" or "attempt to monopolize" was intended to encompass only the subset of cases that created a monopoly through anticompetitive means—the current legal requirement for a Section 2 violation.[107] As the next Sections will demonstrate, a "fair meaning" or textualist approach to Section 2 leads to a simple conclusion: a firm illegally "monopolizes" if it was a monopoly at the time of the suit, and it engages in an illegal "attempt to monopolize" if it was in the process of seriously attempting to acquire a monopoly. The statute contains no exception for a monopoly acquired through superior efficiency.[108]

1. Roughly contemporaneous dictionaries

As noted earlier, Justice Scalia was especially interested in the definitions of key terms in contemporary dictionaries.[109] Scalia and Garner believe that six dictionaries of the 1851 to 1900 period are "useful and authoritative."[110] We have checked all six for definitions of

106. 15 U.S.C. § 12 (2018). Scalia and Garner write that a textualist should consider such prefatory material: "A preamble, purpose clause, or recital is a permissible indicator of meaning . . . . The title and headings are [also] permissible indicators of meaning." *See* SCALIA & GARNER, *supra* note 38, at 217, 221.

107. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (noting that to violate Section 2 of the Sherman Act, a business must purposefully acquire dominant market power).

108. *See* 15 U.S.C. § 2 (2018).

109. *See* SCALIA & GARNER, *supra* note 38, at 415. As noted earlier, immediately after Scalia and Garner introduce the "fair reading" method, *id.* at 33, they cite three sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, they provide four dictionary definitions of key terms. *Id.* at 37. Their book also has an appendix titled, "A Note on the Use of Dictionaries." *Id.* app. at 415.

110. *See* SCALIA & GARNER, *supra* note 38, app. at 419, 421.

"monopolize" and have also checked other dictionaries, including the Oxford English Dictionary, which Scalia and Garner believe to be useful and authoritative even though it is from 1908. As will be seen, the principle definition of each for "monopolize" was simply that a firm had acquired a monopoly. None require anticompetitive conduct for a firm to "monopolize" a market.

The then-highly esteemed[111] 1897 edition of Century Dictionary and Cyclopedia[112] defined "monopolize" as: "1. To obtain a monopoly of; have an exclusive right of trading in: as, to monopolize all the corn in a district . . . . 2. To obtain or engross the whole of; obtain exclusive possession of. 'As if this age had monopolized all goodness to itself.'"[113]

Serendipitously, a definition of "monopolize" was given in a dictionary that Scalia and Garner believed to be useful and authoritative that was cited during the Sherman Act's legislative debates, just before the final vote on the Bill.[114] As noted in Part I above, Senator Edmunds cited a dictionary to define the term "monopolize." Although normally a textualist would not care about anything uttered during a congressional debate, Senator Edmund's remarks surely should be significant to a textualist because his remarks help a textualist do exactly what Justice Scalia said we should do: use a dictionary to define and demonstrate what Congress was doing when it decided to use the term "monopolize" in the Sherman Act. When Senator Edmunds noted the meaning of "monopolize" as it was used in a contemporary Webster's Dictionary his remarks should be examined not as legislative history, but rather as a piece of evidence as to common linguistic usage in 1890:

> [T]he best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb "to monopolize": 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea . . . . 2. To engross

111. *See Century Dictionary and Cyclopedia*, BRITANNICA https://www.britannica.com/print/article/102958 [https://perma.cc/46RM-2426] (describing the Century Dictionary and Cyclopedia as an American-English dictionary that is "generally regarded as one of the greatest ever produced" and that even "[l]ong after it went out of print, [it] remained one of the most valuable references for etymologists, lexicographers, and historians").

112. SCALIA & GARNER, *supra* note 38, app. at 419.

113. 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3843 (1st ed., New York, The Century Co. 1897).

114. *See* 21 Cong. Rec. 3152 (1890).

> or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district . . . .[115]

This again shows that "monopolize" primarily and fairly meant to acquire a monopoly.[116] The definition was not restricted to acquisitions of monopoly through anticompetitive conduct.[117] It was, moreover, essentially the same as the definitions in the 1828,[118] 1898,[119] and 1913[120] editions of Webster's Dictionary.

The first edition of the Oxford English Dictionary[121] containing the definition of "monopolize" was published in 1908 (not too long after

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115. *Id.* Since "monopolize" can be defined in part by using the word "engross" it should be noted that the relevant definition of "engross" given in the 1886 Webster's Dictionary is: "4. To purchase either the whole or large quantities of, for the purpose of making a profit by enhancing the price; hence to take or assume in undue quantity, proportion, or degree; as to *engross* commodities in market; to *engross* power." WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 449 (London, George Bell & Sons 1886).

116. *See* WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 115, at 855.

117. It is, however, possible that the "with the view to" language could excuse an accidental monopoly. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Hand famously thought there could be accidental monopolies, noting that a monopoly might arise by historic accident or where monopoly had been "thrust upon" a firm. *See id.* at 429.

118. *See* 2 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 138 (New York, S. Converse 1828) (Defining "monopolize" as "One that monopolizes; a person who engrosses a commodity by purchasing the whole of that article in market for the purpose of selling it at an advanced price; or one who has a license or privilege granted by authority, for the sole buying or selling of any commodity. The man who retains in his hands his own produce or manufacture, is not a monopolist within the meaning of the laws for preventing monopolies."); *id*, (defining "monopolize" as: "1. [t]o purchase or obtain possession of the whole of any commodity or goods in market with the view of selling them at advanced prices, and of having the power of commanding the prices; as, to *monopolize* sugar or tea. 2. To engross or obtain by any means the exclusive right of trading to any place, and the sole power of vending any commodity or goods in a particular place or country; as, to *monopolize* the India or Levant trade. 3. To obtain the whole; as, to *monopolize* advantages").

119. WEBSTER'S COLLEGIATE DICTIONARY 540 (Springfield, G. & C. Merriam Co. 1898) (defining "monopolize" as "[t]o have or get a monopoly of").

120. *Monopolize*, WEBSTER'S 1913, https://www.websters1913.com/words/Monopolize [https://perma.cc/2Y5T-6NFW] (defining "monopolize" as "[t]o acquire a monopoly of; to have or get the exclusive privilege or means of dealing in, or the exclusive possession of; to engross the whole of; as, to *monopolize* the coffee trade; to *monopolize* land").

121. This is a dictionary that Scalia and Garner characterize as one of the most useful and authoritative from the 1901–1950 period. *See* SCALIA & GARNER, *supra* note 40, app. at 422.

1890 and which therefore might be an accurate guide to usage when the Sherman Act was passed): "1 . . . . To get into one's hands the whole stock of (a particular commodity); to gain or hold exclusive possession of (a trade); to engross . . . . To have a monopoly. . . . 2 . . . . To obtain exclusive possession or control of; to get or keep entirely to oneself."[122] Not only does the Oxford English Dictionary equate "monopolize" with "monopoly," but nowhere does this definition mention a requirement that a monopolist must have engaged in anticompetitive conduct.[123]

These definitions are in relevant part identical to the definitions in four other dictionaries of the period considered reliable by Scalia and Garner[124] and in five other roughly contemporaneous dictionaries as well.[125] In sum, all of the surveyed roughly contemporaneous dictionaries

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122. 6 A NEW ENGLISH LANGUAGE DICTIONARY ON HISTORICAL PRINCIPLES 624 (1st ed. 1908).

123. *See id.*

124. *See* 5 THE CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 113; *supra* text accompanying note 115 (citing the 1886 Webster's Dictionary definition of "monopolize").

Stormonth's dictionary provides a variety of related definitions. JAMES STORMONTH, ETYMOLOGICAL AND PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 369 (7th ed., Edinburgh and London, William Blackwood and Sons 1882) (defining "monopolise" as "[t]o purchase or obtain possession of the whole of anything with the view of selling at an advanced price and controlling the market; to obtain or engross the whole"; "monopolising" as "obtaining the sole power or right; engrossing"; and "monopolist" as "one who has obtained the exclusive power to trade in a certain article, or who has the command of the market"). Interestingly, its definition of "monopoly" includes not just purchasing all of an article, but also its manufacturer. *See id.* (defining "monopoly" as " . . . the sole power of selling any article by purchase, by superior manufacture, or by patent."

Latham's dictionary contains a similar definition of monopolize. ROBERT GORDON LATHAM, A DICTIONARY OF THE ENGLISH LANGUAGE 247 (abridged ed., London, Longmans, Green, & Co. 1876) (defining "monopolize" similarly as "[e]ngross, so as to have the sole power or privilege of vending any commodity" and defining "monopolizer" as "monopolist"); *see also* 3 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3185 (Robert Hunter & Charles Morris eds., New York, Peter Fenelon Collier 1897) (defining "monopolize" as "1. To obtain or possess a monopoly of; to have exclusive command over for production, sale, or purchase. 2. To obtain or hold exclusive possession of; to engross."); JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 927 (Boston, Hickling, Swan, and Brewer 1860) (defining "monopolize" as "[t]o buy up or obtain possession of the whole of, so as to sell at one's own price; to engross the whole of, as of any branch of trade; to obtain a monopoly of; to forestall").

125. *See* JOHN CRAIG, THE UNIVERSAL ENGLISH DICTIONARY 184 (London, George Routledge and Sons 1869) (defining "monopolize" as "[t]o engross so as to have the sole power, or exclusive privilege of vending any commodity" and "monopolizer" as

define "monopolize" as simply to gain a monopoly.[126] Some definitions included "with a view of" selling the goods at a higher price—language that could perhaps create an exception for an accidental monopolist (assuming they ever exist).[127]

Since many of these dictionaries gave "engross" as one of the ways in which a firm could become a monopoly, it is worth noting that this term had a similar, but more specific, meaning than "monopolize". For example, the 1897 Century Dictionary and Cyclopedia defined "engross" as:

> To monopolize the supply of, or the supplies in; get entire possession or control of, for the purpose of raising prices and enhancing profits: as, to *engross* the importations of tea; to *engross* the market for wheat . . . . To occupy wholly; take up or employ entirely, to the exclusion of other things: as, business *engrosses* his attention or thoughts; to be *engrossed* in study.[128]

Indeed, the five other dictionaries of the period that Scalia and Garner considered useful and authoritative defined "engross" similarly—as simply to obtain a monopoly. None of these dictionaries required otherwise anticompetitive conduct as a part of engrossing (except of course for the very act of obtaining a monopoly).[129] By

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"[o]ne who engrosses a commodity by purchasing the entire article, with a view to enhance the price"); THE NEW EXCELSIOR DICTIONARY 183 (Nashua, C.C. Parker 1889) (defining "monopolize" as "to engross the whole"); THE AMERICAN POPULAR DICTIONARY 196 (New York, Hurst & Co. 1879) (defining "monopolize" as "to obtain or engross the whole"); ROBERT SULLIVAN, A DICTIONARY OF THE ENGLISH LANGUAGE 179 (Dublin, Alexander Thom & Sons 1854) (defining "monopolize" as "to engross all of a commodity or business into one's own hands").

126. For example, Latham's dictionary used one example involving anticompetitive conduct in its definition of "monopolizer": "There was in it the fraud of some old patentees and monopolizers in the trade of bookselling." LATHAM, *supra* note 124, at 247.

127. *See* CRAIG, *supra* note 125, at 184; STORMONTH, *supra* note 124, at 369.

128. 5 THE CENTURY DICTIONARY AND CYCLOPEDIA , *supra* note 113, at 1934. Similarly, "engrosser" was defined as "[o]ne who takes, or gets control of, the whole; a monopolizer; specifically, a monopolizer of commodities or a commodity of trade or business." *Id.*

129. *See* LATHAM, *supra* note 124, at 481 (defining "engross" as "[s]eize in the gross; seize, obtain commodity for the sake of selling at a high price; monopolize"); STORMONTH, *supra* note 124, at 180 (defining "engross" as "to make great, to increase, to enlarge—the primary signification being to buy up a commodity in order to increase the price, to occupy the whole, as the thoughts; to take or assume in undue quantities or degrees," defining "engrossing" as "the invidious occupation of anything which ought to be shared with others," and defining "engrossment" as "the act of appropriating things in undue quantities."); 2 UNIVERSAL DICTIONARY OF THE ENGLISH

analogy, to "engross" is similar to the modern idea of acquiring a monopoly through merger. If one meaning of "monopolize" in Section 2 is to "engross," then the statute specifically prohibited attaining a monopoly through merger.

Crucially, none of the definitions of "monopolize" specifically require any conduct that we would today characterize as anticompetitive. A few definitions did give specific examples of how a firm might become a monopoly by anticompetitive means, or by engrossing (which is similar to merging), and some used a phrase like "controlling the market" which is ambiguous as to whether anticompetitive conduct must be involved.[130] Crucially, however, none of these dictionaries exempted efficient monopolists from the term "monopolize" or specifically restricted the definition of "monopolize" to a monopoly gained by anticompetitive conduct. All of the dictionary definitions of the period therefore support a no-fault characterization of Section 2.

2. Roughly contemporaneous legal dictionaries and legal treatises

We did not find "monopolize" defined in any of the eight 1851 to 1900 legal dictionaries and treatises characterized by Scalia and Garner as "useful and authoritative."[131] The only available contemporary legal treatise that define "monopolize" contain virtually the same definition of the term as was found in the dictionaries of the period. This can be seen in Green's legal treatise from 1889, which itself cited Webster's dictionary:

> To monopolize, as defined by Webster, is, 1. To purchase or obtain possession of the whole of any commodity or goods in the market, with the view of selling them at advanced prices, and of having the power to command the prices. 2. To engross or obtain by any means

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LANGUAGE, *supra* note 124, at 1887 (defining "engross" as to "buy up the whole or large quantities of any commodity with the object of controlling the market, and thus being able to sell again at an enhanced price"); WORCESTER, *supra* note 124, at 485 (defining "engross" as "[t]o buy up in large quantities in order to raise a demand and sell again at a higher price; to forestall; to monopolize" and defining "engrossing" as "[t]he act or the practice of buying up or forestalling"); *supra* note 115 (citing the 1886 Webster's Dictionary definition of "engross").

Although the term "engrossing" was mostly concerned with monopolizing commodities, it surely would also encompass becoming a monopoly through a series of mergers of companies owning the goods in question.

130. *See* STORMONTH, *supra* note 124, at 369. "Controlling the market" is ambiguous because it could be simply a description of a monopoly, or it could imply anticompetitive exclusionary conduct.

131. *See* Scalia & Garner, *supra* note 38, app. at 421.

> the exclusive right of trading to any place, and the sole power of vending any commodity or goods in a particular place or country.[132]

See also the "useful and authoritative" 1897 edition of Bouvier's Law Dictionary, which did not directly define "monopolize" but effectively defined the term when it discussed a related term, "forestalling the market" in a manner that did not require anticompetitive conduct:

> In the United States forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate, or to restrict its manufacture or production in such a manner as to enhance the price.[133]

Other roughly contemporaneous legal dictionaries such as Black's Law Dictionary defined "engrossing"[134] and "monopoly," but not

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132. SANFORD MOON GREEN, CRIME: ITS NATURE, CAUSES, TREATMENT, AND PREVENTION 308–09 (Philadelphia, J. B. Lippincott Company 1889); *see also* 1 MARSHALL D. EWELL, ESSENTIALS OF THE LAW 517–18 (Boston, The Boston Book Company 1889) (defining "engrossing" and "monopolies" using terms similar to those in Webster's Dictionary).

133. *See* 1 BOUVIER'S LAW DICTIONARY 826 (Boston, The Boston Book Company 1897). Bouvier's 1856 edition also defined a similar term, "engrosser," as not requiring anticompetitive conduct. *See* 1 BOUVIER'S LAW DICTIONARY 469 (6th ed., Philadelphia, Childs & Peterson 1856) (defining an "engrosser" as "[o]ne who purchases large quantities of any commodities in order to have the command of the market, and to sell them again at high prices").

134. *See Engrossing*, BLACK'S LAW DICTIONARY (1st ed., St. Paul, West Publishing Co. 1891) (citation omitted) (defining "engrossing" in English law as "The getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. The total engrossing of any other commodity, with intent to sell it at an unreasonable price. This was a misdemeanor, punishable by fine and imprisonment." and defining "engross" in "old criminal law" as "To buy up so much of a commodity on the market as to obtain a monopoly and sell again at a forced price.").

Two other law dictionaries in the Scalia and Garner list provide similar definitions. *See* WILLIAM C. ANDERSON, A DICTIONARY OF LAW 402 (Chicago, T.H. Flood and Company 1889) (defining "engross" as "At common law the offense of engrossing was the getting into one's possession, or buying up, large quantities of corn [grain] or other dead victuals, with intent to sell them again. An injury to the public. If permitted, one or more men could raise the price of provisions at will. The total engrossing of any other commodity, with intent to sell it at an unreasonable price, was also an indictable offense." (alteration in original) (footnote omitted)); J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY 282 (Chicago, Callaghan and Company 1893) (defining "engross" as "to buy up any commodity in large quantities, so as to obtain a monopoly, with an intent to sell it at an unreasonable price" and defining "engrossing" in English law as "[t]he buying up of large quantities of grain or other dead victuals, with intent to sell again; the total engrossing of any other commodity, with intent to sell it at an unreasonable price").

"monopolize."[135] None of these definitions required a monopoly to have been formed in part or in whole through the use of anticompetitive conduct.

3. Roughly contemporaneous antitrust cases

Pre-Sherman Act common law antitrust cases must be interpreted with caution because the legal standards were changing. As Professor Letwin concluded:

> [A]s a federal judge observed . . . [in 1892,] the English common law on monopolies had for some years been drifting toward greater leniency while "in the United States there is a tendency to revive, with the aid of legislation, the strict rules of the common law against all forms of monopoly or engrossing."[136]

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135. *See Monopoly*, BLACK'S LAW DICTIONARY, *supra* note 134 ("A privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particularly commodity."). Even its 1910 edition did not define "monopolize." *See* BLACK'S LAW DICTIONARY 790 (2d ed. 1910); *see also* 2 BOUVIER'S LAW DICTIONARY (6th ed.), *supra* note 133, at 186 (defining "monopoly" but not "monopolize"); 2 ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 207–08 (2d ed., New York, Baker, Voorhis & Co. 1870) (same). Two contemporary legal dictionaries favored by Scalia and Garner also define "monopoly." *See* 2 BOUVIER'S LAW DICTIONARY 253 (15th ed., Philadelphia, J. B. Lippincott & Co. 1883) ("The abuse of free commerce by which one or more individuals have procured the advantage of selling alone all of a particular kind of merchandise, to the detriment of the public . . . . A patent for a useful invention, under the United States laws, is not, in the old sense of the common law, a monopoly[] . . . ."); 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 834–35 (Jersey City, Frederick D. Linn & Co. 1883) ("§ 1. A license or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of anything whatsoever . . . . § 2. The popular meaning of 'monopoly' at the present day seems to be, the sole power (or a power largely in excess of that possessed of others) of dealing in some particular commodity, or at some particular place or market; or of carrying on some particular business. It is generally obtained by engrossing the market or the getting up of a 'corner' in the thing proposed to be made the subject-matter of the monopoly.").

136. William Letwin, *The First Decade of The Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900, 904 (1959) (quoting Oliver v. Gilmore, 52 F. 562, 566 (C.C.D. Mass. 1892)). After Congress enacted the Sherman Act, lower court cases came down on both sides of the no-fault issue. *See id.* at 901–05 (discussing early cases arising under the Sherman Act). For example, a district court in Louisiana held in 1891 that the concern of Section 2 was simply whether the defendant held a monopoly. *See* Am. Biscuit & Mfg. Co. v. Klotz, 44 F. 721, 724–25 (C.C.E.D. La. 1891) (per curiam) ("[T]he law-maker has used the word [monopolize] to mean 'to aggregate' or 'concentrate' in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others . . . . Now it is to be observed that these

Moreover, the pre-Sherman Act common law antitrust cases are of limited relevance because we found only one that used the term "monopolize" (it did so in a manner consistent with a no-fault approach).[137] Some common law cases stated that if entry was easy, a firm could not be a "monopoly,"[138] but others did not.[139]

The Supreme Court decided six Sherman Act cases in the decade after the law went into effect.[140] The overriding lesson of these cases is that these opinions are not helpful in determining whether "monopolize" in Section 2 requires anticompetitive conduct. The lower court decisions of the period sometimes did, however, require anticompetitive conduct.[141]

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statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc . . . ."). The district court thus appeared to expressly reject the need for anticompetitive conduct. *See id.* at 725 ("The offense is defined . . . [as] 'to monopolize, or attempt to monopolize, any of the trade or commerce.' To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense.").

137. Leslie v. Lorillard, 18 N.E. 363, 366 (N.Y. 1888) ("Corporations . . . if allowed to engage without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and *monopolize* the avenues to that industry in which they are engaged, [ ] become a public menace . . . ." (emphasis added)).

138. *See, e.g.*, Diamond Match Co. v. Roeber, 13 N.E. 419, 422 (N.Y. 1887) ("But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies."); Chappel v. Brockway, 21 Wend. 157, 163 (N.Y. Sup. Ct. 1839) ("That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise."); Att'y Gen. v. Consol. Gas Co. of N.Y., 108 N.Y.S. 823, 825 (App. Div. 1908) ("In no sense can the consolidation of the lighting companies in the city of New York into a single corporation be said to create such a monopoly for it gains thereby no exclusive right. The field is still open to any other company that can obtain the necessary consents from the constituted authorities, and neither the production nor the price can be arbitrarily fixed by the Consolidated Company."); Watertown Thermometer Co. v. Pool, 4 N.Y.S. 861, 863 (Gen. Term. 1889) ("But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies.").

139. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 133 (1876); Cravens v. Rodgers, 14 S.W. 106, 107–08 (Mo. 1890); Angelica Jacket Co. v. Angelica, 98 S.W. 805, 812 (Mo. Ct. App. 1906); Rafferty v. Buffalo City Gas Co., 56 N.Y.S. 288, 290 (App. Div. 1899).

140. *See* Letwin, *supra* note 136, at 914, 928. Letwin includes *In re Debs*, 158 U.S. 564 (1895), but *In re Debs* is actually about the prosecution's use of an alternative to a Sherman Act proceeding. *Id.* at 911–14.

141. *See, e.g.*, *In re* Greene, 52 F. 104, 116 (C.C.S.D. Ohio 1892) ("[A]n 'attempt to monopolize' . . . must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging

It should, however, be instructive that these very early Supreme Court cases sometimes used the terms "monopolize" and "monopoly" interchangeably.[142] Although none of the early Supreme Court cases explicitly said that Section 2 did not require anticompetitive conduct, by equating these two terms, they implicitly support a no-fault approach.

For example, *United States v. E.C. Knight Co.*[143] was concerned with firms that became a "monopoly" and implied that the Sherman Act regulated every monopoly.[144] Significantly, the Court characterized the defendant as a "monopoly" that had "monopolized," even though it only had 98% of the market.[145] The Court also held that "all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly, it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."[146] In this expansive holding, the Court thus held that a company violated Section 2 by simply being a monopoly, and that it did not need to have 100% of the relevant market.[147]

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therein."). In addition, complaints or indictments that failed to allege exclusionary acts were dismissed for failure to state a claim. *See, e.g.*, United States v. Greenhut, 50 F. 469, 469–70 (D. Mass. 1892) (dismissing a claim notwithstanding allegations that the Distilling and Cattle Feeding Company controlled 75% of all the distilled spirits manufactured and sold within the United States and increased prices). For a slightly later case, see *Whitwell v. Cont'l Tobacco Co.*, 125 F. 454 (8th Cir. 1903). *Id.* at 462–63 (noting that while the Sherman Act clearly prohibits clear attempts to monopolize where "the necessary effect . . . is to stifle or to directly and substantially restrict competition in commerce," monopolies arising in the natural course of competitive commercial markets cannot be illegal "because such attempts are indispensable to the existence of any competition in commerce among the states").

142. *See infra* notes 148–51.

143. 156 U.S. 1 (1895).

144. *See id.* at 11 ("The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill . . . ."). *See generally* Richard O. Zerbe, *The American Sugar Refining Company, 1887–1914: The Story of a Monopoly*, 12 J.L. & ECON. 339, 339 (1969) (discussing the "formation and aspects of the operation . . . of the American sugar monopoly").

145. *Id.* at 3 (noting that the American Sugar Refining Company controlled all U.S. sugar refineries except for Revere of Boston, which produced 2% of all refined sugar).

146. *Id.* at 16.

147. *Id.*

Most of the other early Supreme Court cases, such as *United States v. Trans-Missouri Freight Ass'n*,[148] *Anderson v. United States*,[149] and *Addyston Pipe & Steel Co. v. United States*,[150] also appeared to use the terms "monopolize" and "monopoly" interchangeably.[151] The remaining early cases, *United States v. Joint Traffic Ass'n*[152] and *Hopkins v. United States*,[153] were silent on the issue. In addition, *Standard Oil Co. of New Jersey v. United States*[154] and the cases it cited, like *E.C. Knight*, seemed to use the term "monopoly" to even include markets where the defendant did not possess 100% of the market.[155]

If these very early Supreme Court cases had clearly stated that a monopolization violation required anticompetitive conduct (if they had stated, for example, that, "It is well established that the word 'monopolize' in Section 2 of the Sherman Act requires anticompetitive conduct for a violation") we would have to reconcile these statements

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148. 166 U.S. 290 (1897).

149. 171 U.S. 604 (1898).

150. 175 U.S. 211 (1899).

151. *See id.* at 237 ("But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies."); *Anderson*, 171 U.S. at 619 ("If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none."); *Trans-Missouri Freight Ass'n*, 166 U.S. at 299–301 (using the term "monopolized" to describe a monopoly).

152. 171 U.S. 505 (1898).

153. 171 U.S. 578 (1898).

154. 221 U.S. 1 (1911).

155. *See id.* at 33, 70, 73–74. A pre-Sherman Act case, *Munn v. Illinois*, 94 U.S. 113 (1876), essentially equated monopoly and "virtual" monopoly. *Id.* at 131–32. ("[S]omething had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here."). A slightly later Supreme Court case, *Swift & Co. v. United States*, 196 U.S. 375 (1905), is difficult to interpret on this point. The Supreme Court, per Justice Holmes, sustained an injunction entered in connection with the defendants' violations of Sections 1 and 2 of the Sherman Act. *Id.* at 398. Holmes noted an allegation in the petition pertaining to the Section 2 charge:

> By force of the consequent inability of competitors to engage or continue in such commerce [due to defendants' use of rebates from railroads and other devices], the defendants are attempting to monopolize, have monopolized, and will monopolize the commerce in live stock and fresh meats among the States and Territories, and with foreign countries . . . .

Id. at 392. The alleged rebates were exclusionary acts, but it is difficult to ascertain the extent to which Holmes relied on this allegation to sustain the Section 2 charge. His primary focus was on the conspiracy among the defendants. *Id.*

The authors are grateful to Dale Collins for this insight.

with the absence of an anticompetitive conduct requirement in the contemporary dictionary definitions of "monopolize." But as Section IV.A below demonstrates, not until 1966 did the Supreme Court state in a relatively clear manner that Section 2 requires anticompetitive conduct.[156] All of this suggests or is at least consistent with a no-fault interpretation of Section 2 as it was drafted.

It might seem astonishing to many 21st century observers that in 1890, Congress passed a law that fairly should be read as being designed to impose sanctions on monopolies without inquiring into whether they engaged in anticompetitive conduct. This sentiment can, however, be seen today in the views of Senators Sanders, Warren, and others, who have called for the break-up of a large number of alleged monopolies, including Facebook, Google, and Amazon, without inquiring into whether they have engaged in anticompetitive conduct.[157] It should not be surprising that the no-fault sentiment existed at other points in our nation's history as well.

B. A Textualist Analysis of "Attempt" To Monopolize

A textualist interpretation of Section 2 also should analyze the word "attempt" as it was used during the 1890 period to gain understanding as to what Congress meant by the "attempt to monopolize" offense. However, no unexpected or counterintuitive result comes from this examination. Around 1890 "attempt" had its colloquial 21st Century meaning. There was no requirement that an "attempt" to monopolize needed anticompetitive conduct.

The "useful and authoritative" 1897 Century Dictionary and Cyclopedia's defines "attempt" thusly: "1. To make an effort to effect or do; endeavor to perform; undertake; essay: as, to *attempt* a bold flight . . . . 2. To venture upon: as, to *attempt* the sea.— 3. To make trial of; prove; test . . . . 4. To try with afflictions. 5. To endeavor to obtain or attract."[158]

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156. *See infra* note 176. The ambiguous 1945 *United States v. Aluminum Co. of America* opinion also can be read to require anticompetitive conduct. *See infra* note 184.

157. *See supra* notes 12–16 and accompanying text (discussing calls to break up present-day technology trusts).

158. *See* 1 CENTURY DICTIONARY AND CYCLOPEDIA, *supra* note 113, at 371 (citation omitted). Three other contemporary legal treatises Scalia and Garner deemed reliable have a similar definition. *See* KINNEY, *supra* note 133, at 81 (defining "attempt" as "[a]n act of endeavor to do a particular thing, with intent, by means of that act in whole or in part, to do it; more particularly an act of endeavor to commit some offense, carried beyond mere preparation, but falling short of actual commission"); *see also* 1 BENJ. VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH

The 1898 Webster's Dictionary gives a similar definition:

> Attempt . . . 1. To make trial or experiment of; to try. 2. To try to move, subdue, or overcome, as by entreaty. 3. To attack; to make an effort or attack upon . . . .' An essay, trial, or endeavor; an undertaking; an attack, or an effort to gain a point.[159]

The 1913 edition of Webster contains a similar definition.[160] These definitions are essentially identical to its modern definition of "attempt".[161] The 1888 Oxford English Dictionary similarly reads: "1. A putting forth of effort to accomplish what is uncertain or difficult; a trial, essay, endeavour; effort, enterprise, undertaking".[162]

JURISPRUDENCE 106 (Boston, Little, Brown, and Company 1879) (defining "attempt" as "[t]o endeavor; to try to accomplish . . . . an effort or endeavor; some act tending towards the accomplishment of a purpose which exceeds a mere intent or design or preparation, and falls short of an execution of it. Usually spoken, in jurisprudence, of acts tending towards perpetration of offences."); BLACK'S LAW DICTIONARY, *supra* note 134 (citation omitted) (defining "attempt" in criminal law as "An effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, and which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design. An intent to do a particular criminal thing combined with an act which falls short of the thing intended. There is a marked distinction between "attempt" and "intent". The former conveys the idea of physical effort to accomplish an act; the latter, the quality of mind with which an act was done. To charge, in an indictment, an assault with an attempt to murder, is not equivalent to charging an assault with intent to murder.").

159. WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 119, at 62.

160. *Attempt*, WEBSTER'S 1913, *supra* note 120 ("A[n] essay, trial, or endeavor; an undertaking; an attack, or an effort to gain a point; esp. an unsuccessful, as contrasted with a successful, effort . . . . Attempt to commit a crime (Law), such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime which it was designed to effect. [Synonyms include,] Endeavor, Effort, Exertion, Trial. These words agree in the idea of calling forth our powers into action . . . . An *attempt* is always directed to some definite and specific object . . . . [T]o try; to endeavor to do or perform (some action); to assay; as, to *attempt* to sing; to *attempt* a bold flight.").

161. *Attempt*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/attempt [https://perma.cc/X5HH-H9VE] (defining "attempt" as "to make an effort to do, accomplish, solve, or effect"); *see also Attempt*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/view/Entry/12765?rskey=WdNqpF&result=1&isAdvanced=false#eid (defining "attempt" as "[a] putting forth of effort to accomplish what is uncertain or difficult; a trial, essay, endeavour; effort, enterprise, undertaking").

162. 1 A NEW ENGLISH LANGUAGE DICTIONARY ON HISTORICAL PRINCIPLES 547 (1st ed., Oxford, Clarendon Press 1888). In its first edition, the Oxford English Dictionary was published in "fascicles," mini-volumes that would contain one or a few letters. *OED editions*, OXFORD ENGLISH DICTIONARY, https://public.oed.com/history/oed-editions/

However, the word "attempt" in a statute had a specific meaning under the common law circa 1890. It meant "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended."[163] Although one definition stated that the act needed to be "sufficient both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small."[164] None defined the magnitude or nature of the necessary acts with great specificity (indeed, this task might well be impossible). However, it is noteworthy that in 1881 Oliver Wendell Holmes wrote about the attempt doctrine in his celebrated treatise, *The Common Law*:

> Eminent judges have been puzzled where to draw the line . . . the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man buys matches to fire a haystack . . . there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match . . . there is very little chance that he will not persist to the end . . . .[165]

#first-edition [https://perma.cc/A8J2-536H]. The volume containing the letter "A" was published in 1888, while the volume containing the letter "M" was not published until 1908. *Id.*

163. 6 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 728 (6th ed., Boston, Little, Brown, and Company 1877).

164. *Id.*; *see also* SEYMOUR F. HARRIS, PRINCIPLES OF CRIMINAL LAW 19 (Cincinnati, Robert Clarke & Co. 1883) ("An attempt may be said to be the doing of any of the acts which must be done in succession before the desired object can be accomplished . . . ."); FRANKLIN FISKE HEARD, HEARD ON THE CRIMINAL LAW 385 (2d ed., Boston, Little, Brown, and Company 1882) ("An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."); JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 39 (5th ed., London, Macmillan and Co. 1894) ("An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."); WILLIAM C. ROBINSON, ELEMENTARY LAW § 472 (Boston, Little, Brown, and Company 1882) ("*An [a]ttempt* consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission . . . . *The act done* must be, in its nature, adapted to accomplish the crime intended.").

165. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 68–69 (Boston, Little, Brown, and Company 1881); *see also* WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL LAW 103 (1st ed., St. Paul, West Publishing Co. 1894) (footnote omitted) ("An attempt to commit a crime is an act done with intent to commit that particular crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent

It was clear, however, that acts constituting mere preparation or planning were insufficient.[166]

Congress's choice of the phrase "attempt to monopolize" surely built upon the existing common definitions of an "attempt" to commit robbery and other crimes.[167] It implies that Congress intended a meaning of "attempt to monopolize" different from the current requirements of the offense. Although the meaning of a criminal "attempt" to violate a law may have

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of the doer's will, constitute its actual commission. [ ] The act must be such as would be proximately connected with the completed crime.").

166. *See* BISHOP, *supra* note 162, § 728 (describing the act as "sufficient both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small"); LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE § 266 (2d ed. 1904) (footnote omitted) ("In order to constitute the offense of attempt, there must be an act in the nature of a direct movement towards the commission of the offense and, concurrent with such act, an actual purpose, or specific design, to commit the particular crime . . . . It is sufficient that one step be taken towards the commission of the contemplated crime; but mere preparation or planning is insufficient."); EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 5 (Washington, Gales & Seaton 1828) (defining "attempt" as "an endeavor to accomplish [an offense], which has failed from some other cause than the voluntary relinquishment of the design"); JOHN WILDER MAY, THE LAW OF CRIMES § 29 (1st ed., Boston, Little, Brown, and Company 1881) (stating that to constitute attempt, "it is necessary that some act should be done in the pursuance of the intent, immediately and directly tending to the commission of the crime; an act which, should the crime be perpetrated, would constitute part and parcel of the transaction, but which does not reach to the accomplishment of the original intent"); JOHN WILDER MAY, THE LAW OF CRIMES § 18 (2d ed., Boston, Little, Brown, and Company 1893) (footnote omitted) ("An attempt is an act done in part execution of a design to commit a crime. There must be an intent that a crime shall be committed, and an act done, not in full execution, but in pursuance, of the intent."); EMLIN MCCLAIN, OUTLINES OF CRIMINAL LAW AND PROCEDURE 84–85 (Iowa City, Emlin McClain 1883) ("[A] criminal attempt is an intent to commit a specific crime, coupled with an act adapted to the commission of that crime which the law regards as sufficiently tending to its accomplishment to be a part of it, without, in itself, being the consummation of the crime."); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 561 (Philadelphia, James Kay, Jun. and Brother 1846) (defining a person guilty of attempt as "[e]very person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same.").

167. In Swift & Co. v. United States, 196 U.S. 375, 402 (1905), Justice Holmes noted the common law origin of the attempt to monopolize offense: "The distinction between mere preparation and attempt is well known in the criminal law."

The authors are grateful to Marc Winerman for suggesting this research issue.

evolved since the common law formulations presented above,[168] a textualist approach to the "attempt to monopolize" prong of Section 2 would move it a considerable way back towards the common law approach to the "attempt" doctrine. Attempted monopolization should require the intent to take over a market, planning and preparation, and at least one serious act in furtherance of this plan. But attempted monopolization should not require anticompetitive conduct.

C. No Exceptions Should Be Implied for Monopolization or Attempts to Monopolize Not Accompanied by Anticompetitive Conduct

These definitions of "monopolize" and "attempt to monopolize" include all monopolies, even those acquired by luck or superior efficiency. Like the actual text of Section 2 of the Sherman Act, the definitions contain no exceptions.

Moreover, as Justice Scalia reminded us in *Texaco Inc.*, no exception should be read into a statute unless, of course, it is explicitly contained in the statute.[169] Justice Gorsuch similarly noted in *Bostock*, "[U]nexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'"[170] Moreover, one of the earliest antitrust

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168. The adoption of the Model Penal Code may have changed the classic definition of attempt. *See* 2 WAYNE R. LAFAVE ET AL., SUBSTANTIVE CRIMINAL LAW § 11.4(e) (1986); 4 WHARTON'S CRIMINAL LAW § 704 (15th ed. 1996). The Model Penal Code's formulation, now adopted by a majority of jurisdictions, requires "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime." MODEL PENAL CODE § 5.01(c) (AM. L. INST. 1962). The substantial step must be "strongly corroborative" of the defendant's criminal purpose. *Id.* § 5.01(2). The Model Penal Code enumerates several examples of a "substantial step," including "lying in wait," "search[ing] for or following the contemplated victim of the crime," and "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission." *Id.*

169. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 579 (1990) (Scalia, J., concurring) ("I cannot, however, adopt the Court's reasoning, which seems to create an exemption for functional discounts that are 'reasonable' even though prohibited by the text of the Act . . . . The language of the Act is straightforward[] . . . . There is no exception for 'reasonable' functional discounts that do not meet this requirement."). It is difficult to speculate how far Justice Scalia would have taken his belief that no exemptions should be implied. For example, the Supreme Court held that the Sherman Act was not meant to apply to the activities of states. *See* Parker v. Brown, 317 U.S. 341, 351 (1943). Should this statutory exemption not have been implied?

170. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1749 (2020) (second alteration in original) (quoting SCALIA & GARNER, *supra* note 38, at 101).

cases, *Trans-Missouri Freight Ass'n*, explicitly held that no exceptions to the antitrust statutes should be implied:

> [W]e are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do . . . . If the act ought to read as contended for by defendants, Congress is the body to amend it and not this [C]ourt, by a process of judicial legislation wholly unjustifiable.[171]

Since the text of Section 2 of the Sherman Act does not contain an express exemption for monopolies and attempts to monopolies unaccompanied by anticompetitive conduct, none should be implied or imposed by courts today.

IV. CASES WHERE THE SUPREME COURT HAS DRAMATICALLY RE-INTERPRETED A STATUTE AFTER A LONG PERIOD

*A. The Vagueness of Pre-*Trinko *Section 2 Law*

There is no doubt that in 2004 the Supreme Court in *Trinko* clearly interpreted Section 2 of the Sherman Act as requiring that a firm engage in anticompetitive conduct to violate Section 2.[172] Scalia's majority opinion also contained much more praise for monopolies than had ever before appeared in a Supreme Court decision.[173] Moreover, many agree with Justice Scalia that clear opinions deserve more stare decisis deference than ambiguous opinions.[174]

Trinko was different in tone and clarity, and arguably even in its overall holding, from not only the Section 2 cases decided during the 1890s and analyzed above in Section III.A.3, but also from the then-

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171. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897); *see also id.* at 328 ("[N]o exception or limitation can be added without placing in the act that which has been omitted by [C]ongress.").

172. *See supra* notes 90–92.

173. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (describing "monopoly" as "an important element of the free-market system" and stating that it "produces innovation and economic growth").

174. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2129, n.40 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); *see also* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1741 (2013) (noting the value of stare decisis stems from the "benefits of clarity and predictability [that] can outweigh the costs of having each judge, in each different case, develop and apply different sets of rules").

existing monopolization standard from the 1966 decision in the *United States v. Grinnell Corp.* case.[175] *Grinnell* merely held that a willfully acquired or maintained or "consciously acquired" monopoly should be condemned "as distinguished from [a monopoly acquired] as a consequence of a superior product, business acumen, or historic accident."[176] *Grinnell* usually is read to require anticompetitive conduct,[177] and the Court in *Grinnell* found that the defendant in that case had engaged in "unlawful and exclusionary" behavior.[178] The *Grinnell* Court, however, never explicitly held that a Section 2 violation always requires anticompetitive conduct.

Indeed, Professor Donald Turner interpreted *Grinnell* to be ambiguous on the no-fault issue because it failed to properly "distinguish between 'exclusionary' conduct and 'skill, foresight and industry.'"[179] Turner found the Court's formulation unhelpful because "[a]ny highly successful competitive strategy tends to confer market power and tends to 'exclude' competitors, and everyone who engages in such strategy knows this; thus, power obtained and maintained by any highly successful competitive strategy is 'will[]fully' acquired."[180] Turner stated: "I have come to believe . . . that courts can fairly be asked to extend the scope of the Sherman Act's application . . . to single-firm monopoly beyond what past precedents, except possibly *Alcoa*, have reached."[181] Ultimately, however, Turner concluded

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175. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under [Section] 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

176. *Id.* at 570–71, 576 n.7. Note 7 states:

> Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like.

Id. at 576 n.7.

177. *See id.* at 570–71; *see also* United States v. Microsoft Corp., 253 F.3d 34, 50, 58 (D.C. Cir. 2001) (quoting *Grinnell*'s elements and reading it as requiring anticompetitive conduct).

178. *Id.* ("[A]s the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices.").

179. Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1219 (1969).

180. *Id.*

181. *Id.* at 1217.

Grinnell suggested that monopoly "solely attributable to accident" should not be an offense.[182] This approach was included in the 1978 Areeda-Turner treatise, which advocated monopolization without a demonstration of fault, with important qualifications that made their proposal closer to a presumption of illegality than to true no-fault.[183]

Similarly, the immediately prior relevant Supreme Court decision, *United States v. Griffith*,[184] was also somewhat ambiguous on the fault issue:

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. To require a greater showing would cripple the [Sherman] Act.[185]

The Court then continued with an ambiguous quote from *Swift & Co. v. United States*[186]:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.[187]

Similarly, in *American Tobacco Co. v. United States*,[188] a conspiracy to monopolize case, the Court held that "[n]either proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential

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182. *Id.* at 1219.

183. *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 163 n.55 (2005) (discussing the Areeda-Turner proposal and noting it has not been adopted by any court).

184. 334 U.S. 100 (1948).

185. *Id.* at 105 (citations omitted). The opinion continued: "As stated in *United States v. Aluminum Co. of America*, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." *Id.* (citations omitted); *see also id.* at 107 (citation omitted) ("So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under [Section] 2 even though it remains unexercised. For [Section] 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of [Section] 2, provided it is coupled with the purpose or intent to exercise that power.").

186. 196 U.S. 375 (1905).

187. *Id.* at 396.

188. 328 U.S. 781 (1946).

competitors is essential to sustain a charge of monopolization under the Sherman Act."[189] Two years later, the Court in *Schine Chain Theatres, Inc. v. United States*[190] read *United States v. Aluminum Co. of America*[191] (*Alcoa*) as holding that "[t]he mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed."[192]

One could reasonably conclude that the *Grinnell* and *Griffith* Courts—in opinions written by Justice Douglas, certainly no fan of monopolies—were being deliberately vague and arguably self-contradictory.[193] Perhaps Justice Douglas was knowingly and deliberately preserving the ambiguity of the then-prevailing *Alcoa* standard,[194] which could be read either as requiring fault, as not requiring fault, or as a cleverly disguised no-fault standard.[195]

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189. *Id.* at 810.
190. 334 U.S. 110 (1948).
191. 148 F.2d 416 (2d Cir. 1945).
192. *Schine Chain*, 334 U.S. at 130.
193. *See supra* notes 176–87 and accompanying text.
194. *Alcoa*, 148 F.2d at 429.
195. *Id.* at 431–32. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), the Second Circuit described the *Alcoa* decision as "cryptic" and "a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes." *Id.* at 273. The court continued to explain the contradictory nature of *Alcoa*: "Having stated that Congress 'did not condone "good trusts" and condemn "bad" ones; it forbad[e] all,' [Judge Learned Hand] declared with equal force, 'The successful competitor, having been urged to compete, must not be turned upon when he wins.'" *Id.* (citation omitted).

Former Federal Reserve chairman Alan Greenspan criticized *Alcoa* in an essay published in *Capitalism: The Unknown Ideal*. Alan Greenspan, *Antitrust*, *in* CAPITALISM: THE UNKNOWN IDEAL 63, 71 (Ayn Rand ed., 1966). His criticism was in part because he believed that it was a no-fault case: "ALCOA is being condemned for being too successful, too efficient, and too good a competitor." *Id. See generally* William E. Kovacic & Marc Weinerman, *Learned Hand,* Alcoa*, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295 (2013) ("[C]onsistent with Hand's philosophy of legislative interpretation, the decision sought to implement [c]ongressional intent as Hand perceived it—and that intent was sufficiently clear, Hand believed, that the public would 'quite rightly, write us down as asses' unless the panel found a [S]ection 2 violation."); *see also id.* at 296 (alteration in original) (quoting Judge Hand as stating, "There are two possible ways of dealing with [monopolies]: to regulate, or to forbid, them. Since we have no way of regulating them, we forbid them. I don't think much of that way, but I didn't set it up."). It seems likely that Judge Hand wrote his opinion in a manner that was deliberately ambiguous on the anticompetitive conduct issue because Hand's fair or plain reading of the statute (the term "textualism" didn't exist in 1945) convinced him that Section 2 was supposed to be a no-fault statute. Hand might well have been nervous that the Supreme Court would not accept this

As noted earlier, when Justice Scalia authored the opinion in *Trinko*, he did not undertake a textualist analysis of Section 2.[196] He simply cited precedent for his assertion that the Sherman Act contains an exception for a monopolist that gained its monopoly through superior efficiency.[197]

Nevertheless, the pro-monopoly tone of Justice Scalia's language in *Trinko* went much further than that of any other Supreme Court monopolization opinion.[198] Elsewhere Justice Scalia has denounced the type of expansion of precedent he undertook in *Trinko*.[199] We can only speculate why Justice Scalia avoided undertaking a textualist analysis in *Trinko*, but instead used the opportunity to move the law of monopolization even further away from the result that should follow from a textualist approach.

B. Overturning Old Statutory Precedent

Justice Brandeis articulated the general criteria courts employ to guide their use of the doctrine of stare decisis:

> *Stare decisis* is not[] . . . [an] inexorable command . . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . ,

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interpretation—so he obfuscated. This "fair reading" of Section 2 would explain much of the self-contradictory *Alcoa* opinion. *See* Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 780 (1993) (describing Justice Cardozo's oft-used strategy of modifying the law by writing ambiguous interim opinions, which evaded easy criticism, and then building on them).

196. *See supra* Section III.A.

197. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (citing United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)) ("It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'").

198. *Compare supra* Section III.A.3 (quoting language from various monopoly cases that is less effusive towards monopolies), *with Trinko*, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

199. *See* Connick v. Thompson, 563 U.S. 51, 77 (2011) (Scalia, J., concurring) (decrying "*sub silentio* expansion" of substantive precedent).

> even where the error is a matter of serious concern, provided correction can be had by legislation.[200]

More recently, the Court noted a specific complexity relating to antitrust: "*[S]tare decisis* [has] less-than-usual force in cases involving the Sherman Act,"[201] which gives courts "exceptional law-shaping authority."[202] The Court explained: "We have [ ] felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences."[203] This is consistent with an explanation in *State Oil Co. v. Khan*[204] as to why stare decisis matters less in antitrust cases:

> [T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." . . . [This] Court [ ] reconsider[s] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.[205]

Leegin Creative Leather Products, Inc. v. PSKS, Inc.[206] might have gone even a step further, stating that "*[s]tare decisis* is not as significant . . . because the issue before us is the scope of the Sherman Act."[207] Moreover, though the Supreme Court had twice declined to overturn

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200. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting).

201. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2412 (2015); *see also* Barak Orbach, *Antitrust Stare Decisis*, ANTITRUST SOURCE 1 (Oct. 2015), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_orbach_10_19f.authcheckdam.pdf [https://perma.cc/XK4W-BUTM] (noting that "*Kimble* declared that the Court is more willing to overrule antitrust precedents than other precedents").

202. *Kimble*, 135 S. Ct. at 2413.

203. *Id.* at 2412–13. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. *Id.* at 2412.

204. 522 U.S. 3 (1997).

205. *Id.* at 20–21.

206. 551 U.S. 877 (2007).

207. *Id.* at 899. However, as Barak Orbach points out, this is not always the case. *See* Orbach, *supra* note 200, at 8–9 (noting that some antitrust precedent "[is] truly anomalous, yet enjoy[s] 'a super-strong presumption of correctness.' Two key examples are the baseball exemption and the filed-rate doctrine . . . . Neither doctrine can be justified other than by the reluctance of the Court to overrule it").

the 1911 precedent implicated in *Leegin*,[208] Justice Scalia—despite joining the Court in those instances—ultimately ignored that history in *Leegin*, where he joined Justice Kennedy in the Court's rebuke of stare decisis.[209]

Supreme Court precedent, even sixteen years old—such as the opinion by Justice Scalia in *Trinko*, which unequivocally held that Section 2 requires anticompetitive conduct—certainly deserves deference, and should not be overturned lightly. A fortiori, a precedent fifty-four years old, such as *Grinnell*, deserves even more respect under stare decisis. However, *Grinnell* deserves less deference because it is ambiguous.[210]

The longest period after which the Supreme Court dramatically re-interpreted the Sherman Act apparently was ninety-six years, when *Leegin* overturned the holding in the 1911 case, Dr. Miles Medical Co. v. John D. Park & Sons Co.[211] decision concerning the legal status of resale price maintenance ("RPM").[212] *Dr. Miles* has been interpreted by the Court as making RPM per se illegal,[213] but in 2007, the Court changed the legal standard to rule of reason.[214]

The Court did not make this change, however, because it acknowledged it had misread the Sherman Act. Rather, the basis of its reasoning concerned evolving or changing economic learning surrounding how

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208. *Leegin*, 551 U.S. at 881–82 (overturning *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

209. *See id.* at 880. Interestingly, on other occasions, Justice Scalia gave more weight to precedent. Scalia and Garner wrote: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction." *See* SCALIA & GARNER, *supra* note 38, at 322.

210. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1935 (2017) ("While he did not think that specific dispositions were set in stone, he thought that the Court should 'retain [its] ability . . . sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict.'").

211. 220 U.S. 373 (1911).

212. *See Leegin*, 551 U.S. at 877, 882.

213. *Id.* at 887 (noting that "[t]he Court has interpreted [*Dr. Miles Medical Co.*] as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices."). The actual history, however, is quite complicated. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 389–91 (1989) (expounding upon the complex history of courts interpreting the *Dr. Miles holding*).

214. *See Leegin*, 551 U.S. at 899.

often RPM is anticompetitive.[215] In dissent, four justices cited the importance of ninety-six years of precedent as an important reason for keeping the *Dr. Miles* standard.[216] Stare decisis was not enough, however, for the Court's majority.[217]

Surely the changing state of knowledge or the Court's views as to the economics profession's changing opinion over time concerning the issue of how often, or what percentage of the time, a practice is anticompetitive, should count for less than the fair reading of the relevant statutory language. Surely the foremost task of the Supreme Court should be to determine the fair meaning of the statutes the legislative branch enacts.

V. THE EVOLVING ECONOMIC ANALYSIS

Most economists at first glance probably think a no-fault monopolist law would be inefficient. With a second glance the inefficiency is by no means clear. The antitrust field has not seriously undertaken an overall economic analysis of the no-fault approach to monopolization law in half a century.[218] Perhaps this is because the subject has not been taken seriously on a political level during most of this period so that first glances were deemed sufficient. We here take a second glance and find the possibility that no-fault is efficient and in other ways desirable. This is not only in the usual sense of lower prices and higher levels of quality and variety of goods and services for consumers, but also in the possibility of improvements according to other relevant criteria affecting society's welfare.

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215. *See id.* at 889 (noting that most literature contains procompetitive justifications for using RPM).

216. *See id.* at 918 (Breyer, J., dissenting) (noting that the Court had never "overturned so well-established a statutory precedent").

217. *See id.* at 882.

218. Justice Brandeis was the earliest prominent U.S. legal scholar to condemn all privately attained monopolies. *See infra* note 436. No-fault monopolization's high point came in the 1960s and 1970s when a number of mainstream scholars advocated for it using their expansive interpretation of Section 2 of the Sherman Act. Lao, *supra* note 17, at 762 (stating that many antitrust intellectuals, such as Donald Turner, Phillip Areeda, and Oliver Williamson, advocated for the no-fault theory in the late 1960s and 1970s). Their scholarship helped spur the first major no-fault policy initiative, President Andrew Johnson's Neal Task Force, and the first no-fault bill, which Senator Philip Hart introduced in 1976. *Id.* at 769. *See generally* Lawrence J. White, *A Proposal for Restructuring the Automobile Industry (I)*, 7 ANTITRUST L. ECON. REV., no. 3, 1975, at 89 (providing an excellent no-fault oriented study of the U.S. auto industry from this period).

Recently, a significant number of prominent politicians have demonstrated an interest in breaking up firms they perceive as being "monopolies"—often without inquiring into whether they engaged in anticompetitive conduct.[219] It is perhaps unsurprising that breaking up such possible monopolies[220] like Amazon, Facebook, and Google—without first finding that they engaged in anticompetitive conduct—has been suggested by politicians on the left of the political spectrum, including Senators Warren[221] and Sanders.[222] What has perhaps been surprising, in light of conservatives' traditional deference towards big business, has been harsh criticism from the right, including from President Trump,[223] and even calls for their break-up or regulation

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219. Our view is that if antitrust authorities adequately deal with exclusionary practices break up may not be appropriate or necessary.

220. *See* Makena Kelly, *Donald Trump on Tech Antitrust: 'There's Something Going On,'* VERGE (June 10, 2019, 11:51 AM), https://www.theverge.com/2019/6/10/18659619/donald-trump-facebook-google-amazon-apple-antitrust-european-union-eu (reporting that, in reference to Google and Facebook, President Trump said, "I think it's a bad situation, but obviously there's something going on in terms of monopoly"). We make no judgment as to whether Google or Facebook is a monopoly. We merely note that some prominent politicians believe that they are.

221. *See* Elizabeth Warren, *Here's how we can Break up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/3ZVW-Y9YF].

222. Senator Bernie Sanders, when asked whether he would break up Facebook, Google, and Amazon if he were elected President, responded "absolutely," adding that he would appoint an attorney general "who would break up these huge corporations." Lima, *supra* note 16. Senator Sanders also introduced a bill that would break up the largest financial institutions in the United States and establish a cap on size going forward. Bernie Sanders, *Sanders, Sherman Introduce Legislation to Break up Too Big to Fail Financial Institutions* (Oct. 3, 2018), https://www.sanders.senate.gov/newsroom/press-releases/sanders-sherman-introduce-legislation-to-break-up-too-big-to-fail-financial-institutions [https://perma.cc/Q23M-VWEF]. Senator Sanders said he would "use the Sherman Antitrust Act to put CEOs of monopolistic companies in jail." Hirsch, *supra* note 16.

223. *See* Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017), https://twitter.com/realDonaldTrump/status/889675644396867584 (arguing that Amazon constitutes a "no-tax monopoly"). President Trump also said he was looking at breaking up all three companies. Kim Hart & Sara Fischer, *Trump's Big Tech Contradictions*, AXIOS (Nov. 5, 2018), https://www.axios.com/trump-big-tech-google-amazon-facebook-957600ac-2d45-476c-a5ee-9bf534c85f80.html [https://perma.cc/CNA8-5V2F]; *see also* Emily Stephenson, *Trump Vows to Weaken U.S. Media 'Power Structure' if Elected*, REUTERS (Oct. 22, 2016, 1:25 PM), https://www.reuters.com/article/usa-election/trump-vows-to-weaken-u-s-media-power-structure-if-elected-idUSL1N1CS08H (opposing the AT&T-Time Warner merger and advocating

from a large number of other leading conservative figures, including Steve Bannon[224] and Senator Ted Cruz.[225]

This Article will not undertake a complete analysis of the economics of no-fault monopolization. This Article's much more modest goal is to present an overview of many of the most important economic issues involved. Even this brief overview will demonstrate, however, that this is a topic that deserves careful analysis and debate by the antitrust community. It will suggest only that sanctioning all monopolies is a reasonable proposal that is worth considering seriously.

Our analysis begins with a brief historical overview of the evolution of the profession's scholarship concerning the no-fault issue, and then briefly discusses one of its most important economic facts: the probable effects of a no-fault policy on innovation.[226] The Article then gives an overview of its possible effects on international competitiveness, on allocative inefficiency, and on the prevention of wealth transfers from consumers to monopolies.[227] The Article then briefly discusses its possible effect on income equity and equality, and then on privacy.[228] As a part of these discussions it will note the inefficiencies that can arise as firms attain and protect their monopoly.[229]

This Article also will consider the downsides of this approach, including the possibility that it could send a confusing or perverse signal to firms engaging in hard but fair competition.[230] This approach

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Comcast's divestiture of NBC Universal because "[d]eals like this destroy democracy" and "concentrat[e] [ ] power in the hands of too few").

224. *See* Robinson Meyer, *What Steve Bannon Wants to Do to Google*, ATLANTIC (Aug. 1, 2017), https://www.theatlantic.com/technology/archive/2017/08/steve-bannon-google-facebook/535473 (reporting that Steve Bannon, a right-wing ideologue and President Trump's former chief strategist, called for public utility regulation of tech platforms like Facebook and Google).

225. Jessica Guynn, *Ted Cruz Threatens to Regulate Facebook, Google and Twitter over Charges of Anti-Conservative Bias*, USA TODAY (Apr. 10, 2019, 3:41 PM), https://www.usatoday.com/story/news/2019/04/10/ted-cruz-threatens-regulate-facebook-twitter-over-alleged-bias/3423095002 [https://perma.cc/VHE7-6Z6C]; *see also* Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. ST. L.J. 75, 91–99 (2020) (providing examples of current conservative and liberal political leaders calling to break up firms that allegedly have market power).

226. *See infra* Section V.A–B.

227. *See infra* Section V.B.

228. *See infra* Section V.B.

229. *See infra* Section V.B.

230. *See infra* Section V.C.

could be especially likely to discourage firms from competing hard when a firm's size nears the ambiguous market share levels required for a violation. Moreover, at least 90% of antitrust cases are private actions. A relevant question is: what are the effects of no-fault on such actions? Would it increase or decrease the extent to which firms use the Sherman Act for protectionist business purposes? In addition, the transaction costs involved in sanctioning monopolies could be significantly changed under no-fault. No-fault could also lead to special problems for natural monopolies and patent monopolies, so it seems virtually certain they would require conduct remedies rather than structural relief.[231]

It must be emphasized that we will not attempt to fully analyze these issues to determine the overall net effects of no-fault on economic welfare. Its modest goal is to encourage the antitrust profession to re-start the analysis and debate over sanctioning all monopolies. The indeterminacy can support arguments for either "no-fault" actions or for a "no-action-at-all" policy as it is easy to marshal economic arguments on both sides. The balance of these arguments necessarily depends upon an evaluation of how effective and efficient antitrust policy is likely to be (including the number and magnitudes of false positive and false negative errors) while also considering litigation and other costs generated by the policy.[232] We only suggest that the existing literature contains enough support for a no-fault position so that the doctrine is not a priori unreasonable.[233]

A. Economists' Evolving Opinions

The Sherman Act initially had broad appeal.[234] Later surveys suggest that in general, economists continue to favor the Act. In a survey of a

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231. This article will not, however, undertake an extensive analysis of monopolies achieved through merger because, in light of the Clayton Act, this is a rarity. *See generally* Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783 (analyzing monopolies obtained through mergers).

232. These concerns are sometimes called Type I, Type II, and Type III errors. *See* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1670–71 (1983) (discussing the different type of errors that can underlie merger policy decisions).

233. *See infra* Section V.F.

234. *See* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 221–22 (1956) ("In the years immediately before the Sherman Act, between 1888 and 1890, there were few who doubted that the public hated the trusts

random sample of economists, 75% agreed that the antitrust laws should be used aggressively to reduce monopoly power.[235] More than a half-century ago there were, however, plenty of opinions on the subject, but little evidence about the economic effects of monopolies.[236] One of the earliest important attempts to determine the efficacy of antitrust was by Nobel Laureate George Stigler.[237] In 1952, Stigler was a proponent of no-fault monopolization, although later he changed his view.[238] Although we will not attempt to trace the evolution of economists' analysis since Stigler, we note that quite recently, Thomas Philippon argued that oligopoly is now pervasive in the U.S. and costs the typical American household more than $5,000 per year.[239] The following is a brief survey of a number of possible economic effects of a no-fault monopoly proposal.

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fervently."); *see also* Arthur Robert Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW AND CONTEMP. PROBS. 301, 301–02 (1937) (highlighting the Sherman Act's appeal at the time of its enactment); Sanford D. Gordon, *Attitudes Towards Trusts Prior to the Sherman Act*, 30 S. ECON. J. 156, 157–58 (1963) (surveying a broad array of academic and mainstream sources from the 1880s and concluding that they were almost ubiquitously hostile to trusts).

235. Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV., 986, 988 (1984); *see also* J.R. Kearl et al., *What Economists Think: A Confusion of Economists?*, 69 AM. ECON. REV. 28, 30 (1979) (providing statistical data on the percentage of economists that believed government should use the antitrust laws to vigorously reduce monopoly power).

236. *See generally* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966) (summarizing what could be called the no-fault approach to the monopoly problem during the Great Depression). Hawley thoroughly discusses the opinions of prominent government officials, academics, and businesspeople on monopoly and the no-fault approach during the Great Depression. *Id.* at 12. It shows the substantial sentiments against not just monopoly, but also against corporate size itself. *Id.* These sentiments were associated with what Hawley called the "Brandeisians," intellectuals that felt that small business promoted equity and an ambience of community. *See generally id.* at 281–89 (discussing the scholars that adhered to Brandeis's philosophy).

237. George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J.L. & ECON. 225, 225 (1966) (quantifying the effects of antitrust laws).

238. *See* Lao, *supra* note 17, at 766–67.

239. David Leonhardt, Opinion, *Big Business Is Overcharging You $5,000 a Year*, N.Y. TIMES (Nov. 10 2019), https://www.nytimes.com/2019/11/10/opinion/big-business-consumer-prices.html.

B. Overview of Economic Effects Mostly Supporting No-Fault

1. Likely effects on innovation

A trenchant argument in favor of no-fault antitrust actions lies in the evidence that monopoly on average retards innovation.[240] By innovation, we mean both technological invention and better ways of doing things. Carl Shapiro's review of the literature finds that "[t]he unifying principle . . . is that innovation, broadly defined, is spurred if the market is contestable; that is, if multiple firms are vying to win profitable future sales."[241] In other words, competition is usually good for innovation.

As Whinston notes in his review of Carl Shapiro's work, the forces determining innovation are complex, but market structure is itself important.[242] The major thrust of the literature is that the rate of innovation tends to be greatest when a market is competitive.[243] This result is consistent with the work of Pakes and McGuire[244] and is illustrated in the following diagram, which shows low levels of innovation with very competitive markets, high research and development ("R&D") rates for contestable markets, and a leveling off of innovation for markets with little competition, with monopolies innovating the least.

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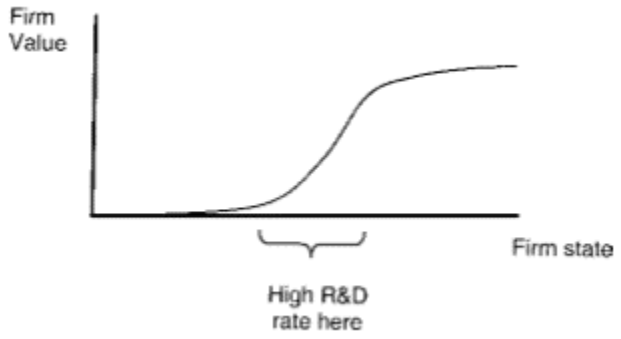
240. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 74 (1942) (arguing that large firm market share enhances innovation but only up to a point). Schumpeter noted, for example: "[What] counts . . . [is] competition from the new commodity, the new technology, the new source of supply, the new type of organization . . . competition [that] . . . strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives." *Id.*

241. Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361, 401 (Josh Lerner & Scott Stern eds., 2012).

242. Michael D. Whinston, *Comment*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED (citing Shapiro, *supra* note 241, at 404–05).

243. Shapiro, *supra* note 241, at 362.

244. Ariel Pakes & Paul McGuire, *Computing Markov-Perfect Nash Equilibria: Numerical Implications of a Dynamic Differentiated Product Model*, 25 RAND J. ECON. 555, 573, 575, 577 (1994).



Recent empirical scholarship has also shown that more competitive markets result in more innovation[245] and that "market power tends to slow innovation and productivity improvements in the affected markets."[246] Carstensen and Lande note that "[i]t is extremely difficult to determine [a theory that offers an] *a priori*" "prediction about the effects of competition on innovation that is robust to all of these

245. BOHANNAN & HOVENKAMP, *supra* note 26, at 8–9.

246. Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH 9 (Mar. 2017), http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today [https://perma.cc/2BX4-S5VV]; *see also id.* (summarizing literature on market power and innovation). Professor Baker explains this new learning:

> The modern Schumpeterian growth literature concludes that greater product-market competition fosters R&D investment by all firms in sectors where the firms operate at the same technological level, and suggests that in the event that product markets were to grow more competitive, the innovation incentives of a dominant firm with a technological lead would remain high.

Id. at 15 n.57. He also notes:

> At one time, empirical economists who studied the question thought that some market power but not extensive market power would be best for innovation, based on cross-industry studies that found an "inverted-U" relationship between market concentration. But those studies did not successfully control for differences in technological opportunity across industries.

Id. at 15 n.58 (citing Wesley M. Cohen, *Fifty Years of Empirical Studies of Innovative Activity and Performance*, *in* 1 HANDBOOK OF THE ECONOMICS OF INNOVATION 129, 146–48, 154–55 (Bronwyn H. Hall & Nathan Rosenberg eds., 2010)); Shapiro, *supra* note 241, at 380; *see also* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 34 (2d ed. 1994) (discussing increases in innovation during periods when there is an increase in the number of mergers).

different market and technological conditions"[247] or predict "which innovation will be successful and which will prove a failure."[248] Thus, it is vital to continue to explore and develop many innovative options at the same time.

Recent literature shows some enforcement authorities, concerned with dynamic competition, have implicitly recognized the need to maintain a larger group of competitors in "innovation markets" because "innovation suffers when . . . companies merge."[249] Similarly, Professor John Kwoka, in his review of the merger literature, concludes that:

> Overall, the careful economic studies in the literature as well as other relevant evidence do not support the proposition that industry consolidation results in more R&D or greater R&D efficiency. In fact, there is evidence in the best of these studies that suggests that these mergers may adversely affect R&D.[250]

Nearly all studies found that increases in competition led to increases in industry productivity.[251] With greater competition, there is greater fear of innovation by competitors, so investment in innovation is more likely. These cases illustrate another reason why monopoly is bad for investment and innovation: if a firm has no competitors, then its input suppliers have a greater incentive to invest in their own market

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247. Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate*, *in* 6 INNOVATION POLICY AND THE ECONOMY 159, 162 (Adam B. Jaffe, Josh Lerner & Scott Stern eds. 2006).

248. Carstensen & Lande, *supra* note 231, at 813. Some argue that the difficulty of making predictions about innovation in individual cases means that these dynamic issues should not be the basis for merger enforcement decisions. *See, e.g.*, Richard T. Rapp, *The Misapplication of the Innovation Market Approach to Merger Analysis*, 64 Antitrust L.J. 19, 20, 24, 26 (1995).

249. *See, e.g.*, Justus Haucap & Joel Stiebale, *Research: Innovation Suffers when Drug Companies Merge*, HARV. BUS. REV. (Aug. 3, 2016), https://hbr.org/2016/08/research-innovation-suffers-when-drug-companies-merge (looking at innovation among drug companies).

250. *See* John Kwoka, *The Effects of Mergers on Innovation: Economic Framework and Empirical Evidence* 29–30 (unpublished manuscript) (on file with the authors).

251. *See, e.g.*, Michele Boldrin & David K. Levine, *Intellectual Property Rights and Economic Growth in the Long Run: A Model of Discovery*, 99 AM. ECON. REV. 337, 341 (2009) (noting that higher quantities of goods are sold under competition); Jan De Loecker & Pinelopi Koujianou Goldberg, *Firm Performance in a Global Market*, 6 ANN. REV. ECON. 201, 202 (2014) (stating that economists have long postulated that competition makes firms more efficient).

power and thereby extract surplus from the monopoly.[252] This indeed appears to be a potent source of monopolistic waste.[253]

2. Effects on international competitiveness

Professor Michael Porter finds that the prevalence of domestic rivals tends to lead to an international advantage stimulates improvement and innovation.[254] He further notes that firms that do not innovate will not succeed.[255]

Porter finds that a key role of the government in advancing the economy is promoting "vigorous domestic rivalry" since the lack of domestic competition tends to hinder international competitiveness.[256] Porter, analyzing a number of countries over time, further notes that firms that do not have to compete at home rarely succeed abroad, and that economies of scale, "the most potent determinants of competitiveness," are best achieved through global sales rather than domestic dominance.[257] According to Porter, the practicalities of politics create bad policy in a market of one or two firms as policymakers tend to accord such firms special treatment that reduces the incentive to compete.[258]

Porter's work is not alone in finding that domestic competition is central to economic growth.[259] In Latin America, where economic growth has been slow, markets are often characterized by highly concentrated industrial sectors, lack of a strong competition policy, large informal economies, and historically close links between business

252. *See, e.g.*, James A. Schmitz Jr., *What Determines Productivity? Lessons from the Dramatic Recovery of the U.S. and Canadian Iron Ore Industries Following Their Early 1980s Crisis*, 113 J. POL. ECON. 582, 591 & n.16 (2005); *see also* Thomas J. Holmes & James A. Schmitz, Jr., *Competition at Work: Railroads vs. Monopoly in the U.S. Shipping Industry*, 25 FED. RES. BANK MINNEAPOLIS Q. REV. 3, 3–4 (2001) (discussing competition in the long-distance transportation industry); Thomas J. Holmes & James A. Schmitz, Jr., *Competition and Productivity: A Review of Evidence*, 2 ANN. REV. ECON. 619, 620–21 (2010) (reviewing literature that examines the link between competition and productivity).

253. Schmitz Jr., *supra* note 252, at 26–27.

254. Michael E. Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV. (1990), https://hbr.org/1990/03/the-competitive-advantage-of-nations.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* This echoes Schumpeter's statements about the effect of monopoly on political structure. Schumpeter, *supra* note 240, at 47.

259. *Id.*; *see, e.g.*, Federico J. Díez et al., *Global Market Power and Its Macroeconomic Implications* 1 (Int'l Monetary Fund, Working Paper No. 18/137, 2018).

and the political community.[260] Stronger competition policy can be part of changes in competition that might help promote economic growth and competition.[261]

Spurred by increasing globalization, there is increasing interest in international cooperation with respect to antitrust.[262] Globally, antitrust law is characterized by a striking mixture of promoting competitiveness on the one hand and protection of favored industries and cartel exemptions on the other.[263] There are clear attempts of nations to slant antitrust in ways that favor the home country at the expense of others.[264] As each country does this, it would seem to result in harm to each country's trade and to lower welfare.[265] A global no-fault approach could help address this collective action problem.

3. Effects on allocative inefficiency & wealth transfers

In 1954, Economist Arnold Harberger estimated that the costs of monopoly that resulted from misallocation of resources across industries were trivial.[266] Harberger's focus was on the deadweight loss ("DWL") from monopoly pricing.[267] This research led to the near consensus in the

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260. *See* R. Shyam Khemani & Ana Carrasco-Martin, *The Investment Climate, Competition Policy, and Economic Development in Latin America*, 83 CHI.-KENT L. REV. 67, 68–70, 74, 78 (2008).

261. *See* OECD, FACTSHEET ON HOW COMPETITION POLICY AFFECTS MACRO-ECONOMIC OUTCOMES 3 (2014), https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf [https://perma.cc/RR88-9QZQ] ("[P]olicies that lead to markets operating more competitively . . . will result in faster economic growth.").

262. *See, e.g.*, INT'L COMPETITION POLICY ADVISORY COMM., ICPAC FINAL REPORT 33–34 (2000) (finding that the increased interest in cooperation between U.S. antitrust authorities and their counterparts across the globe is due to an "increase in the number of international cartel cases prosecuted by the Antitrust Division," barriers to market access from anticompetitive private barriers to trade, and an increased number of mergers).

263. *See* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L. L. 355, 356 (2004) (noting that American law provides an explicit exception for export cartels).

264. *Id.* (providing examples of how countries "slant" their antitrust laws to favor local companies).

265. *See id.* at 357–58 (explaining how a country's antitrust policymaking decisions affect the country's consumers).

266. *See* Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77, 87 (1954) ("[M]onopoly does not seem to affect aggregate welfare very seriously through its effect on resource allocation.").

267. *Id.* at 78 fig.1. *See generally* RICHARD O. ZERBE & DWIGHT D. DIVELY, BENEFIT-COST ANALYSIS IN THEORY AND PRACTICE (1994) (defining deadweight loss from monopoly pricing).

economics profession that monopoly's effects on efficiency are of little significance.[268] Economists Scherer and Ross evaluated several empirical estimates of the relative sizes of the DWL to get somewhat higher values (0.5% to 2.0% of GNP).[269]

In sharp contrast to Harberger's finding, more recent studies show that the allocative inefficiency (deadweight welfare losses) costs associated with monopoly are large, even quite large.[270] Further, since firms can spend resources to convince the government to implement policies that will create or preserve monopoly, there can be competition for these monopoly profits.[271] These costs can be pure waste, or income or wealth transfers[272] without accompanying productive gains: rent-seeking.[273] Professor Gordon Tullock introduced the rent-seeking idea in 1967 and Anne Kreuger expanded and labeled it in 1974.[274] In 1975,

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268. *See, e.g.*, David Schwartzman, *The Burden of Monopoly*, 68 J. POL. ECON. 627, 630 (1960) (agreeing with Harberger's conclusion that the welfare loss from monopoly is small). Other authors have also attempted to measure the costs of monopoly power. *See, e.g.*, Keith Cowling & Dennis C. Mueller, *The Social Costs of Monopoly Power*, 88 ECON. J. 727, 727 (1978) (stating that the "conventional wisdom" is that ""welfare losses from monopoly are insignificant"); Joaquín Maudos & Juan Fernández de Guevara, *The Cost of Market Power in Banking: Social Welfare Loss vs. Cost Inefficiency*, 31 J. BANKING & FIN. 2103, 2106 (2007) (finding that for fifteen EU countries between 1993 and 2002, "the welfare gains associated with a fall in market power may be far larger than the loss of bank cost efficiency . . . . show[ing] the importance of the economic policy measures aimed at removing the barriers . . . [to] outside competition."). *But see* S.C. Littlechild, *Misleading Calculations of the Social Costs of Monopoly Power*, 91 ECON. J. 348 (1981) (criticizing Herberger's and Cowler and Mueller's studies, among others). *See generally* Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561 (2020).

269. *Compare* Harberger, *supra* note 266, at 86 ("[W]e have labored . . . to get a big estimate of the welfare loss, and we have come out in the end with less than a tenth of a per cent of the national income."), *with* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 675–76 (3d ed. 1990).

270. *See, e.g.*, James A. Schmitz, Jr., FED. RESERVE BANK OF MINNEAPOLIS, NEW AND LARGER COSTS OF MONOPOLY AND TARIFFS 5 (2012) ("[T]he historical studies . . . call the Harberger consensus into question. At least in the industries studied thus far, monopoly and tariffs have led to significant welfare losses.").

271. *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 292 (1974) ("[C]ompetition can also occur through allocating resources to influencing the probability, or expected size, of license allocations.").

272. *See, e.g.*, Ronald L. Goettler & Brett R. Gordon, *Does AMD Spur Intel to Innovate More?*, 119 J. POL. ECON. 1141, 1188 (2011) (finding that while Intel would have innovated more as a monopoly, most consumers were better off with slightly less innovation and the stronger price competition of AMD).

273. *See* Krueger, *supra* note 271, at 293.

274. *See generally id.*

Richard Posner argued that competition to engage in rent-seeking could raise costs until all monopoly profits were transformed into costs.[275]

Further development has both attempted to quantify these costs and shown that rent-seeking occurs both *within* a monopoly firm and outside it.[276] These estimates come from examining histories of industries in which a monopoly is destroyed or created.[277] Rent-seeking behavior by different divisions within the firm and between the firm and its unions is quite costly, resulting in: (1) lower productivity at each factory and (2) misallocation of resources between high and low productivity plants.[278]

As economist James Schmitz notes, "[w]hen a monopoly is created, 'rents' are created."[279] Schmitz states that "[c]onflict emerges among shareholders, managers, and employees of the monopoly as they negotiate how to divide these rents."[280] Stakeholders establish new mechanisms to split these rents in order to reduce competition among members of the monopoly.[281] But mechanisms can destroy rents as well—they can reduce productivity and result in misallocation.[282] The costs due to low productivity alone are large.[283] In fact, factory productivity raised significantly when monopolies were broken up in each industry.[284] Schmitz noted that it was common for factory productivity to double within a few years.[285] Schmitz calculated that as much as 20% to 30% of industry value to be wasted inputs.[286]

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275. *See* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 824 (1975).

276. *See, e.g.*, Schmitz, *supra* note 270, at 1 ("In standard economic theory, monopoly leads to a welfare loss . . . . stem[ming] from a misallocation of resources *across* industries . . . . Recently, a new literature has taken a different approach . . . . [l]ooking *within* industries . . . .").

277. *Id.*

278. *Id.* at 1–2.

279. *Id.* at 2; *see also id.* at 2 n.1 (defining rent as "the difference between what a factor of production is *actually* paid and what it would *need* to be paid to remain in use").

280. *Id.* at 2.

281. *See id.* at 16 ("Rules to reduce competition (such as quotas and work rules) were an indirect means to split rents between groups.").

282. *Id.* at 2.

283. *See id.* ("In sharp contrast to Harberger's finding, these studies show that welfare costs associated with monopoly and tariffs are not small.").

284. *Id.*

285. *Id.*

286. *Id.*

4. Effects on income equity & equality[287]

In *Capital in the Twenty-First Century*, Professor Thomas Piketty notes that between 1980 and the present, there has been an unprecedented increase in income inequality in the United States and Europe, and that it is likely to become much more unequal unless new remedies are applied.[288]

Research associates higher levels of inequality with social instability and lower growth rates.[289] Piketty sees inequality challenging democracy and leading to oligarchy, if left unabated.[290] He predicts dire consequences in the absence of remedies.[291] Similarly, Professors Jonathan Baker and Steven Salop show how inequality can undermine the legitimacy of our social order, given the wealthiest have a disproportionate influence on public policy and reduce economic growth.[292]

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287. We also note a cultural argument for breaking up large firms—an argument that stems from existence values. Existence values occur when there is a willingness to pay for existence of a good, apart from its market value, which can arise when the market does not exist. *See* Note, *Existence-Value Standing*, 129 HARV. L. REV. 775, 775–76 (2016). Consider that large firms drive out small firms when in fact people would rather have smaller firms, but because of collective action costs, larger firms win. Suppose for example, that people favor small local stores as part of their culture. They tend, however, to buy from large price cutters as their prices are lower. The result is the loss of local stores which they did not want and if acting collectively would pay to avoid. Each person, however, buying from the large stores fails to account for the effects of their action on the structure of businesses as a whole. Krutilla published the original article on existence values. *See* John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 779–80 (1967).

288. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 294 (Arthur Goldhammer trans., Harvard Univ. Press 2013) (2014) ("Since 1980, however, income inequality has exploded in the United States . . . . The shape of the curve is rather impressively steep[;] . . . if change continues at the same pace, for example, the upper decile will be raking in [sixty] percent of national income by 2030."); *see also* RICHARD O. ZERBE, THE PATH OF HUMAN PROGRESS 141 (2017) (estimating that while in 2015 the top 1% had about seven times the per capita wealth of the bottom 50%, by 2065 this will grow to a factor of 185 if the present trend continues).

289. *See* RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER 23 (2010) (noting that health and social problems are strongly correlated to income inequality).

290. *See* PIKETTY, *supra* note 288, at 463 ("[A] threat [that] . . . seems [ ]credible and dangerous [is] an oligarchic type of divergence, that is, a process in where the rich countries would come to be owned by their own billionaires.").

291. *See id.* at 571.

292. *See* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 8 (2015).

Part of the cause for rising inequality lies in competition policy. An Organisation for Economic Cooperation and Development ("OECD") paper covering eight OECD countries—Canada, France, Germany, Korea, Japan, Spain, the United Kingdom, and the United States—finds that for the average country in the sample, market power increased the wealth of the richest 10% and by between 12% and 21% for a range of reasonable assumptions about savings behavior, while it reduces the income of the poorest 20% by 11% or more.[293] The paper suggests that lack of competition is an important source of economic inequality.[294] Greater equality may then be a byproduct of a strong competition policy.[295]

5. Effects on consumer and user privacy

Monopolies are less likely to protect the privacy of consumers, users, and affected friends and associates. A recent article by Professors Gregory Day and Abbey Stemler provides several reasons why monopolies are likely to protect privacy suboptimally[296]: (1) it will be difficult for users, consumers, or third parties to punish monopolies that violate their privacy by switching to other firms; (2) because of the nature of privacy, it will be more difficult for people even to ascertain whether a breach occurred, from where it occurred, or the true costs of preserving their privacy; and (3) other firms will be less likely to compete on the basis of privacy with incumbent monopolists that appear to offer "free" goods or services,[297] such as the use of Google,

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293. Sean Ennis et al., *Inequality: A Hidden Cost of Market Power*, OECD 1, 21 (2017), https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf [https://perma.cc/4F6N-4NPR].

294. *See id.* at 23 ("Policies that enhance competition—by reducing anti-competitive regulation or trade barriers, empowering consumer choice, fighting illegal cartels, empowering consumers through market studies, preventing mergers that create market power, or the abuse of market power—can therefore help reduce inequality."); *see also* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 140–41 (3d ed. 1950) (stating that a nation is "profoundly affected by the elimination of a host of small and medium sized firms" and that monopolies can give rise to substantial political and welfare effects).

295. *See* Ennis et al., *supra* note 293, at 23.

296. *See* Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 92 (2019) (presenting the implications of recent technology for privacy and how this, in turn, can affect competition and become an antitrust concern).

297. Products like Google and Facebook are not really free if the user is providing valuable data on themselves and on the users' friends and business associates. *Id.* at 63–64.

Facebook, etc. It is especially difficult to enter a market for apparently free products, so monopolies of these products are likely to persist.

The amount of privacy protection a monopoly is likely to provide for consumers and users will often be suboptimal because the technology that collects valuable data can impose more costs on society—in the form of necessary privacy protections and the costs of security breaches and unconsented-to sales of data—than efficiencies.[298] These costs are often relatively hidden, so consumers, users and affected third parties often will have a hard time valuing them, and the market often will have a difficult time curing any problems optimally.[299] Antitrust, with its traditional focus on consumer prices, will not be as cognizant of the true costs of privacy breaches and misuse as it should be.[300]

A deeper privacy problem is that firms with a large online presence, such as Google, Amazon, Apple, and Microsoft, gain from collecting customer or user data mainly in order to discover and create preferences.[301] Moreover, collecting consumer data is most useful for larger firms than for their smaller counterparts. However, often in doing so, these larger firms potentially implicate consumer privacy.[302]

C. Overview of Economic Arguments That Mostly Weigh Against No-Fault

1. Incentives to compete less vigorously

The effects of incentives on business behavior are complex and sometimes counter-intuitive, so prediction in the case of no-fault is difficult.[303] One would think, however, that the possibility of an antitrust

298. *See id.* at 64 ("The issue is that platforms enjoy data's economic potential without bearing the full costs of protecting privacy.").

299. *See id.* at 93 ("[C]oncentrated markets have enabled tech firms to ignore privacy concerns as few rivals exist to shed light on the problems borne from their treatment of personal information.").

300. *See id.* at 66–67 (discussing the growing momentum to expand the scope of the Sherman Act to promote more than competitive prices).

301. *See id.* at 68–72 (describing how companies with an online presence use personal data to create individualized experiences).

302. *Id.*

303. *See, e.g.*, Soledad Artiz Prillaman & Kenneth J. Meier, *Taxes, Incentives, and Economic Growth: Assessing the Impact of Pro-Business Taxes on U.S. State Economies*, 76 J. POL. 364, 376–77 (2014) (finding that state tax decreases have little effect on business location or behavior); *see also* Susanna Gallani, *Incentives, Peer Pressure, and Behavior Persistence* 22–23 (Harvard Bus. Sch., Working Paper No. 17-070, 2017) (finding that explicit monetary incentives for workers are less successful in achieving persistent

action against a firm achieving monopoly without engaging in anticompetitive behavior would have some deterrent effect on monopoly formation.[304] This deterrent effect could send a confusing or perverse signal to firms engaging in hard but fair competition, especially when a firm's market share nears the minimum required for a Section 2 violation.[305] Economist George Bittlingmayer, for example, believes that "whatever the ability of antitrust to lower prices and increase output in theory or in isolated circumstances, one actual effect of antitrust in practice may have been to curtail investment."[306]

However, when a monopolist is shielded from hard competition, it may be able to relax and enjoy a quiet life.[307] Professor Jonathan Baker,

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performance improvement when compared to implicit incentives, such as horizontal monitoring and peer pressure).

304. *See* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices . . . is an important element of the free-market system.").

305. *See infra* Part VI and notes 358, 425 (discussing the minimum market share levels usually required for a Section 2 violation).

306. George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement* 20 CATO J. 295, 322 (2001).

307. *See* J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935) ("[Monopolists] are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life."). Economists have written about the inefficiencies that result when a monopolist is shielded from hard competition. *See, e.g.*, Harvey Leibenstein, *Allocative Efficiency vs. "X-Efficiency,"* 56 AM. ECON. REV. 392, 408–09 (1966) (arguing that the motivations and incentives of workers and managers are different when their firm does not have to face competition). Professor Leibenstein explains:

> In situations where competitive pressure is light, many people will trade the disutility of greater effort, of search, and the control of other peoples' activities for the utility of feeling less pressure and of better interpersonal relations. But in situations where competitive pressures are high, and hence the costs of such trades are also high, they will exchange less of the disutility of effort for the utility of freedom from pressure, etc.

Id. at 413.

Similarly, some economists believe that it is "eminently plausible" that inefficiencies resulting from weak competitive pressures "are at least as large as the welfare losses from [allocative inefficiency]." *See* SCHERER & ROSS, *supra* note 269, at 672. This is because monopolies can create organizational slack by tolerating inefficiency and waste. *Id.* at 667. Without competition, monopolies have less incentive to cut waste or to search for ways to reduce costs. Monopolies may, instead, have the discretion to

for example, believes there is a positive and large welfare effect from the antitrust deterrence of anticompetitive activity.[308] Baker examines the implications of socially beneficial federal antitrust challenges against collusive behaviors like price fixing, mergers likely to adversely affect competition, and monopolists who use anticompetitive exclusionary practices to obtain and maintain their market power.[309] He then reviews systematic empirical evidence on the value of antitrust derived from informal experiments involving the behavior of U.S. firms during periods without effective antitrust enforcement, and the behavior of firms across different national antitrust regimes.[310] Overall, he finds benefits of antitrust enforcement to consumers and social welfare appear to be far larger than what the government spends on antitrust enforcement and firms spend directly or indirectly on antitrust compliance.[311]

Of course, reduced incentives to compete vigorously are far from no incentives. Even if a monopolist or would-be monopolist's incentives to compete are reduced, no-fault could also increase incentives for rivals and potential rivals to compete harder as the monopolist is somewhat constrained by no-fault. Similarly, it could serve to reduce the presence of monopoly less expensively than conventional antitrust actions.[312] This would be similar to a firm refraining from establishing a monopoly in the expectation that the rents would all go to elsewhere, e.g., to a union.

2. Incentives to engage in sham litigation

Sham litigation is non-legitimate litigation whose purpose is to raise rivals' costs relative to those of the firm filing the lawsuit.[313] It is a type

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make a comfortable profit while tolerating a substantial amount of "fat" in their organizations and further wasting of society's resources. *Id.*

308. Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP., Fall 2003, at 27, 27 ("Overall, the benefits of antitrust enforcement to consumers and social welfare . . . seem likely to be far larger than what the government spends on antitrust enforcement and firms spend directly or indirectly on antitrust compliance.").

309. *Id.* at 28–35.

310. *See id.* at 36–40 ("In sum, studies of firm behavior during these four periods demonstrate that without antitrust, firms can and do exercise market power, to the detriment of consumers and other buyers.").

311. *Id.* at 27.

312. *See infra* note 319 and accompanying text (discussing transaction costs of antitrust suits).

313. *See, e.g.*, William J. Baumol and Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 247–48 (1985) (discussing how firms bring private

of non-price predatory behavior.[314] A study by economist Christopher Klein suggested economic criteria for determining whether such litigation is sham or legitimate.[315] He examined 117 Sherman Act countersuits alleging sham litigation.[316] He found that while fewer countersuits were litigated than had been expected according to his criteria, more of the countersuits were allowed to pass summary judgment than his criteria predicted.[317] The implication for no-fault is that developing and applying economic criteria in rejecting no-fault cases may not result in significant untoward legal costs associated with sham litigation.

3. Increased transaction costs

Another argument against no-fault is the transaction costs that would necessarily be involved in the resulting cases. The cases' relief could entail significant transaction costs, regardless whether it is structural or

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sham litigation but also attempt to induce the government to pursue enforcement action against their competitors); *see also* R. Preston McAfee et al., *Private Antitrust Litigation: Procompetitive or Anticompetitive?*, 282 CONTRIBUTIONS TO ECON. ANALYSIS 453, 453–55 ("Firms may have incentive to use the antitrust laws strategically, which may hinder rather than promote competition."). Despite the clear costs of sham litigation, legislative safeguards against it present challenges. *See* 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 248 (4th ed. Supp. 2015) (noting that protections against sham litigation run the risk of chilling access to one's First Amendment right to free speech).

314. *See* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 267 (1983) ("To a predator, raising rivals' costs has obvious advantages over predatory pricing . . . . In contrast to pricing conduct, where the large predator loses money in the short run faster than its smaller 'victim,' it may be relatively inexpensive for a dominant firm to raise rivals' costs substantially.").

315. *See* CHRISTOPHER C. KLEIN, FED. TRADE COMM'N, THE ECONOMICS OF SHAM LITIGATION: THEORY, CASES, AND POLICY 1 (1989) [hereinafter THE ECONOMICS OF SHAM LITIGATION] ("A definition of sham litigation that is more in keeping with economic reasoning would identify sham litigation as predatory or fraudulent litigation with anticompetitive effect . . . against rivals to achieve anticompetitive ends."); *see also* Christopher C. Klein, *Strategic Sham Litigation: Economic Incentives in the Context of the Case Law*, 6 INT'L. REV. L. & ECON. 241, 243 (1986) ("An economic approach to sham litigation must treat this strategy as it would any scheme to deter entry or to reduce competition.").

316. *See* THE ECONOMICS OF SHAM LITIGATION, *supra* note 315, at 48.

317. *See id.* at 69–70 (explaining that finding fewer countersuits as legitimate was more likely attributable to the study's predation criteria as opposed to inconsistency between the case law and economic reasoning).

conduct-oriented.[318] Moreover, virtually every antitrust case is expensive for both sides.[319] No-fault would surely increase the number of Section 2 cases filed. Yet, each case would be simpler, because there would be no need to litigate whether the case involved anticompetitive conduct. Moreover, a major component of how many cases are brought, settled, or move to trial is the clarity of the law.[320] Thus, a major determinant of the transaction costs involved would be the care with which a violation of the Sherman Act under no-fault would be crafted. The brighter the line, the fewer the cases that would be brought or go to trial.

D. Special Issues Involving Natural Monopolies and Patents

Non-structural relief is the traditional kind of relief ordered in monopolization cases, even in cases not involving natural monopolies or patents.[321] This is because the Supreme Court observed that structural remedies are "more drastic" than injunctive relief.[322] For example, in *United States v. Microsoft Corp.*,[323] the D.C. Circuit said that "structural relief, which is 'designed to eliminate the monopoly altogether . . .

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318. *See* Diana L. Moss, *Breaking up Is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets*, ANTITRUST SOURCE (Oct. 2019), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-october2019/oct19_mossc.pdf [https://perma.cc/CQ3G-EDY8] (considering possible transaction costs that would stem from breaking up tech companies). *But see* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, CORNELL L. REV. (forthcoming 2020) (manuscript at 1) (arguing that structural remedies are not "unadministrable").

319. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1276–78 (2013) (discussing the high costs of antitrust litigation).

320. *See* Fisher & Lande, *supra* note 232, at 1654–55 ("Uncertainty entails several costs: it can increase firms' costs of finding desirable mergers and may even deter firms from attempting some potentially desirable mergers.").

321. United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

322. *Id.* (describing divestiture as a "most drastic" remedy); *see* 4A PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 990c (3d ed. 2009) (stating that an injunction "prior to consummation of [a] merger transaction is the least disruptive" remedy for all involved parties); *see also* 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 325 (4th ed. 2014) ("Because [the equity suit under antitrust law] controls future behavior rather than punishing past acts . . . . [i]ts main purpose is to restore competitive conditions rather than to penalize conduct or compensate injured parties.").

323. 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), *aff'd*, 373 F.3d 1199 (D.C. Cir. 2004).

require[s] a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power.'"[324] In other words, the standards for a court ordering a structural remedy are higher than they are for conduct-oriented remedies.[325]

Indeed, in the monopolization case against it, Microsoft asserted, "[l]eaving aside negotiated consent decrees, no court has ever split apart a unitary company not formed by mergers."[326] "The fact that no court has ever ordered the breakup of a unitary company like Microsoft demonstrates the extreme nature of the district court's decree."[327] Even if Microsoft's absolutist assertion is, as Professor Kovacic demonstrates, a significant exaggeration,[328] there is no doubt that divestiture is an unusual remedy in a monopolization case.

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324. *See id.* at 106 (alteration in original) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 653b (1996)); *see also* United States v. Am. Can Co., 230 F. 859, 903 (D. Md. 1916) ("I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows the defendant to be.").

325. Franklin Fisher, Professor Emeritus, MIT, Remarks at the Section 2 of the Sherman Act Hearings of the Federal Trade Commission 110 (Mar. 28, 2007), https://www.ftc.gov/sites/default/files/documents/public_events/section-2-sherman-act-single-firm-conduct-related-competition/070328.pdf [https://perma.cc/PK9V-VXSY] ("[C]ourts are traditionally reluctant to grant structural relief . . . . [C]rafting [a structural remedy] is not easy and may sometimes be impossible.").

326. Brief for Petitioner-Appellant at 128, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (No. 00-5212).

327. *See id.*

328. *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1111–12 (1989) (classifying deconcentration suits by significance of resultant divestiture and finding thirty-four cases in which the government "secured substantial divestiture"). For example, Professor William E. Kovacic derived statistics for the success of relief efforts in government monopolization cases:

> When classified by outcomes, these deconcentration suits fall into three categories. The first category consists of thirty-four cases in which the government secured substantial divestiture. This set contains such landmark decisions as *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.* A second category of prosecutions consists of cases such as *United States v. Aluminum Co. of America*, in which the government prevailed on liability but failed to gain significant divestiture. The final category includes cases such as *United States v. United States Steel Corp.* (U.S. Steel) in which the government failed to establish the defendant's liability under the Sherman Act. This Section identifies and analyzes the historical patterns in which these deconcentration measures have emerged.

Id. (footnotes omitted).

This would surely mean that if Section 2 of the Sherman Act is interpreted to be a no-fault statute, monopolies convicted under this approach would rarely, if ever, be broken up. No-fault cases surely should not qualify as the highly exceptional cases in which a monopoly should be broken up. Rather, we would expect remedies in no-fault cases to be similar to those under consideration in Europe, which is considering conduct proposals forbidding technology firms, such as Google, to benefit in certain circumstances from using information they collect as part of their normal business.[329] There are in fact a number of suggested remedies short of breakup, such as data sharing, open platforms, and other solutions.[330]

1. Natural monopoly

Natural monopolies are those for which economies of scale or scope exceed sustainable market size.[331] A major modern concern relating to

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329. *See* JACQUES CRÉMER ET AL., EUROPEAN COMM'N, COMPETITION POLICY FOR THE DIGITAL ERA 92–93 (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [https://perma.cc/JB49-2Y5Z] (advocating for the pro-competitive outcomes resulting from data holders granting access to their competitors).

330. *See* Moss, *supra* note 318, at 10 ("[O]ther policy tools should be added to the mix to achieve well-defined goals for addressing identified problems in the digital technology sector. Those policies can be framed to complement antitrust."); Van Loo, *supra* note 318, at 39 ("Access remedies have the potential to improve consumer welfare, particularly in the context of financial and technology platforms or when a breakup would destroy what consumers value most in a company.").

331. *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969) ("If the entire demand within a relevant market can be satisfied at lowest cost by one firm . . . the market is a natural monopoly, whatever the actual number of firms in it."). The costs of natural monopolies are those whose costs decline with volume so that competition tends to be unviable. *Id.* at 587 ("Suppose that, due to economies of scale, a particular market will accommodate only three firms . . . . If one of those firms drives out the others, it may be able to raise its price [ ] without attracting entry by a new firm, because of the difficulty involved in large-scale entry."). Although network effects can be due to economies of scale, they similarly arise when there are economies in the production of a variety of related products, called "economies of scope." *See* Joel D. Goldhar & Mariann Jelinek, *Plan for Economies of Scope*, HARV. BUS. REV. (1983), https://hbr.org/1983/11/plan-for-economies-of-scope ("[N]ew technical capabilities rest on economies of scope—that is, efficiencies wrought by variety, not volume."). In this sense, the no-fault rule can legitimately apply to the case of a natural monopoly short of breakup, suggesting restraints on the use of monopoly positions. *See generally* WILLIAM J. BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 169 (1982) (pioneering a definition of natural monopoly based on the concept of subadditivity). A cost function is "subadditive" when any given total

natural monopoly is network externalities, which include both scale and scope economies.[332] A classic example of a natural monopoly is the type of networks that exist in the telecommunications field.[333] The more people sign up, the cheaper it is for the provider per unit of service.[334] What would happen if no-fault were applied to natural monopolies?

We address this only to note that there are several possible remedies short of break up for monopolies, both in general and especially for monopolies involving natural monopolies or patents. Natural monopolies strengthen their power by their ability to collect and use information, and can themselves reasonably be tempered by requiring them to share data acquired from customers.[335] Moreover, if plaintiffs were so unwise as to seek the break-up of a natural monopoly under a no-fault theory, it seems likely that the reaction of the court would be to dismiss the case entirely.[336]

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output can be produced more cheaply by a single firm than by two or more firms. An industry in which the cost function is subadditive is therefore regarded as a natural monopoly. *See id.*

332. *See, e.g.*, Allison Schrager, *A Nobel-Winning Economist's Guide to Taming Tech Monopolies*, QUARTZ (June 27, 2018), https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies [https://perma.cc/7224-UF56] ("[A]t the platform level [of tech companies], competition confronts the existence of large returns to scale and/or network externalities, leading to natural monopoly situations and a winner-take-all scenario.").

333. *See, e.g.*, Emily Stewart, *America's Monopoly Problem, Explained by Your Internet Bill*, VOX (Feb. 18, 2020, 7:00 AM), https://www.vox.com/the-goods/2020/2/18/21126347/antitrust-monopolies-internet-telecommunications-cheerleading ("[T]elecommunications companies . . . are a sort of natural monopoly, meaning . . . costs and other barriers to entry give early entrants a significant advantage. It costs money to install a cable system . . . and once one company does that, there's not a ton of incentive to do it all over again.").

334. *See* John Cirace, *An Economic Analysis of Antitrust Law's Natural Monopoly Cases*, 88 W. VA. L. REV. 677, 684 n.52 (1986) ("The rise in the exchange cost *per subscriber* as their number increases is the counterpart of an improvement in the quality of service rendered: each telephone is thereby enabled to reach more and more customers . . . . at zero additional costs.").

335. *See, e.g.*, Natalia Drozdiak, *EU Asks: Does Control of 'Big Data' Kill Competition?*, WALL ST. J. (Jan. 2, 2018, 9:34 AM), https://www.wsj.com/articles/eu-competition-chief-tracks-how-companies-use-big-data-1514889000 ("In cases where data is found to be unique or essential, European regulators have considered requiring dominant companies to share information with rivals—an approach that U.S. regulators have rejected.").

336. *See* William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, *in* 2 CURRENT COMPETITION LAW 167, 176 (Mads Andenas, Michael Hutchings & Philip Marsden eds., 2004) ("My intuition is that courts . . . were ill at ease with the

2. Patents

A no-fault Sherman Act implies that a monopoly legally gained through patents could face prosecution upon expiration of the crucial patent. However, this would mean that the firm had already enjoyed twenty years in which to earn monopoly returns. The monopolist could, moreover, avoid private damages suits by lowering its price to some negotiated level or a level its potential prosecutors or judges are likely to deem competitive. Thus, there would be significant incentives for firms having patent monopoly status to quickly lower their prices. Moreover, Economists Michele Boldrin and David K. Levine find little evidence that patents spur innovation.[337] If they are correct, and we are by no means certain that they are, the current patent system may be misguided.[338] If they are correct, no-fault would not cause any patent-related harms.

E. Micro-Studies of Two Huge Monopolization Cases: AT&T and IBM

One approach to predicting the probable effects of no-fault monopoly would be to systematically study the results of a large number of cases where a defendant had been subjected to a remedy in a Section 2 case. Although this would not address, let alone answer, all the economic questions involved, it would further the analysis considerably. We present two microanalyses of Section 2 remedies only to suggest what type of analysis a court could perform on a much more detailed level and for a much larger number of cases.

The Justice Department filed possibly the two largest Section 2 cases in history against IBM and AT&T.[339] In 1982, the Justice Department

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possibility that a finding of illegal monopolization would trigger the imposition of massive damage[s] . . . . The courts in these matters could not refuse to treble damages . . . , but they could interpret the law in ways that resulted in . . . no liability.").

337. Michele Boldrin & David K. Levine, *The Case Against Patents*, 27 J. ECON. PERSP., Winter 2013, at 3, 20 (concluding patents "block innovation and inhibit competition").

338. *Id.* ("In general, public policy should aim to decrease patent monopolies gradually but surely, and the ultimate goal should be the abolition of patents.").

339. *See* James B. Stewart, *Whales and Sharks*, NEW YORKER, Feb. 15, 1993, at 38 (stating that the I.B.M. and AT&T cases were "the largest antitrust cases in living memory.").

announced that they were abandoning the IBM case and that AT&T had capitulated.[340] AT&T lost their case.[341] IBM won theirs.[342]

Yet, eleven years later on January 28th, 1993, four days after IBM posted a quarterly loss of $5.46 billion, AT&T reported record quarterly earnings of $1 billion and a yearly profit of $3.8 billion on sales of $65 billion.[343] Robert Morris, a telecommunications analyst at Goldman Sachs, correctly predicted that AT&T will be "an awesome multimedia communications giant by the turn of the century."[344] Robert Allen, the chairman of AT&T, noted, "We were forced by the divestiture to make changes that probably were good for us . . . . We went through some tough years, but it paid off. We may have been more fortunate than I.B.M. in that change was forced on us."[345]

Although the decision to break up AT&T was controversial at the time,[346] the facts "don't lie."[347] Since the break-up, the telecommunications field has gone from high-cost, long-distance phone calls and rotary dial phones to smart phones, wireless technology, and the development of the Internet.[348] As one account notes of the break-up: "In the aftermath, AT&T reduced long distance rates by 40% over six years, though local carriers added access charges that prevented consumers from seeing all of the cost reduction. The local operating companies . . . also began

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340. *Id.*

341. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (entering a consent decree requiring AT&T to divest from its regional Baby Bells).

342. *In re* IBM Corp., 687 F.2d 591 (2d Cir. 1982) (directing the district court to allow the parties' stipulation of dismissal to move forward).

343. Stewart, *supra* note 339, at 38. Note that these effects were before the impact of the Telecommunication Act of 1996.

344. *Id.*

345. *Id.*

346. OECD, SUPPORTING INVESTMENT IN KNOWLEDGE CAPITAL, GROWTH AND INNOVATION 161 (2013) (noting that the decision to break up AT&T was highly controversial, with critics arguing that "quality of service would decline, national security would be endangered, . . . and shareholders would suffer").

347. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 96–97 (2018) ("Some economists point to lower prices in the wake of the dissolution [of AT&T], but the real impact[,] [increased innovation,] was . . . far more important.").

348. *See* Jay L. Zagorsky, *Rise and Fall of the Landline: 143 Years of Telephones Becoming More Accessible—and Smart*, CONVERSATION (Mar. 14, 2019, 6:39 AM) ("Phone call prices plummeted after the breakup of the U.S. telephone monopoly in the 1980s. And the invention of technologies like 'voice over IP'—popularized by Skype—pushed prices down even further.").

offering mobile service in the 1980s after it had been developed by Bell Labs."[349]

As Professor Wu has noted, "It became apparent, in retrospect, just how much innovation the Bell system monopoly had been holding back. For out of the carcass of AT&T emerged entirely new types of industries unimagined or unimaginable during the reign of AT&T."[350] Michael Porter also concluded that telecommunications services became a hotbed of innovation after that breakup of AT&T.[351]

Would it have been better for IBM to also have capitulated? Probably! John Shenefield, President Carter's Assistant Attorney General in charge of antitrust from 1977 to 1979, presided over both cases:

> [I]f I.B.M. had gone through the divestiture it would have had to develop new entrepreneurial opportunities. With real competition, who knows what imagination and creativity that process might have invited? Competition theorists think the industry as a whole would have been better off if I.B.M. had been broken up, and if it would have been better for the public I think it would have been better for the shareholders, too.[352]

F. Economic Conclusions: Summary of Probable Gains and Losses

Any summary of probable gains and losses from no-fault or no-action is problematic. It depends upon empirical data that—because no-fault has never before been tried—simply does not exist. The best we can do is to present conclusions from roughly comparable areas and to make inferences from them that might hold true to some extent. This uncertainty is true both in general and especially for the effects of no-fault on particular industries. Thus, the table below is meant as a guide for further discussion—not to provide a definitive answer.

The following Table shows the costs and benefits of three possible policy options: (1) The "Present Status Base Case Costs" column gives the positives and negatives of the current Section 2 regime (which requires anticompetitive conduct for a violation); (2) The "Costs of No Action on Antitrust" column considers what would be likely to happen

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349. JOHN M. JORDAN, INFORMATION, TECHNOLOGY, AND INNOVATION: RESOURCES FOR GROWTH IN A CONNECTED WORLD 173 (2012).

350. WU, *supra* note 347, at 96–97.

351. *See* MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 531 (2011) ("The breakup of AT&T . . . has led to dramatic improvements in service and a rapid rate of innovation . . . .").

352. Stewart, *supra* note 339, at 38–39.

if no Section 2 cases were brought; (3) The "Costs of No-Fault" column refers to the results if a no-fault policy was implemented. The terms "smaller" and "larger" refer to costs and benefits of no-fault or no action compared to the current situation (the "Base Case").

For example, the first item is "Allocative Loss Due to DWL." "No action" would be likely to produce larger allocative losses, and "no-fault" would be likely to reduce allocative losses substantially. Of course, as we have indicated, a summary such as contained in the table below is speculative. Our goal has been to suggest that a no-fault policy could well be positive and that it certainly would be worthwhile for the antitrust field to consider it seriously, not that it is the obvious choice.

Summary Table of Costs of Present Status, No-Action, and No-Fault Policies

	Present Status Base Case Costs	Costs of No Action on Antitrust	Costs of No-Fault
Allocative Loss Due to DWL	Small	Larger	Smaller
Allocative Costs Due to Rent-seeking and Higher Production Costs	Substantial	Larger	Smaller
Loss Due to less Innovation	Medium	Larger	Smaller
Cost of Cases to Firms	Substantial	Small	Unclear
Cost of Cases to Prosecutors	Substantial	Smaller	Larger
International Competitiveness	Medium	Larger	Smaller
Income Inequality	Substantial	Larger	Smaller
Wealth Transfers to Monopolists	Substantial	Larger	Smaller
Privacy Costs	Substantial	Larger	Smaller

NET GAINS COMPARED TO BASE CASE	ZERO	NEGATIVE	POSITIVE

VI. SPECIFIC EFFECTS OF TEXTUALIST ANALYSIS ON ANTITRUST LAW

A. Effects on Monopolization Law

Every circa-1890 dictionary and legal treatise cited earlier defined "monopolize" as simply to acquire a monopoly position, and all of the earliest Supreme Court Sherman Act cases that used the terms "monopolize" and "monopoly" equated them.[353] None of the early Supreme Court jurisprudence interpreting the Sherman Act required that a "monopoly" or a firm that "monopolized" must have engaged in anticompetitive conduct.[354] Thus, a textualist interpretation of Section 2 is in most respects simple and straightforward.

Nevertheless, a complete analysis of the issue should consider three issues: (1) Must markets be defined and, if so, could less than a 100% market share suffice to make a "monopoly" illegal; (2) Does the possibility of treble damages mean Section 2 is not actually a no-fault statute, and (3) Do the statute's criminal penalties mean that Section 2 is really not a no-fault statute? All three of these questions should, moreover, be considered in light of textualism's "absurdity" doctrine, which prevents statutes from being interpreted irrationally.[355]

1. Could less than a 100% market share suffice to make a monopoly illegal? Applying textualism's "literalness" doctrine

Would a textualist interpretation of Section 2 require a firm to have captured a 100% share of its relevant market to "monopolize" the market? Or could a lower market share suffice, because a textualist would interpret the term "monopoly" fairly and reasonably, but not literally?

Courts today sometimes find the "monopoly power" required for the offense of "monopolization" when a firm has significantly less than 100%

353. *See supra* Section III.A.3 and note 151.

354. *See supra* Section III.A.3.

355. *See supra* note 80 (explaining Justice Scalia's narrow application of the absurdity doctrine); *see also infra* Section VI.A.3 (discussing the finer contours of the absurdity doctrine in textualist interpretation).

of a market.[356] This is because the current requirement is not that the firm have a 100% complete "monopoly," but rather that the firm have the power to "control prices or exclude competition."[357] This ability can be found in some situations when a firm's market share is as low as 70%, and possibly even lower.[358] Indeed, the vast majority of firms found to have engaged in illegal monopolization had market shares significantly less than 100%.[359] If a textualist approach to a "monopolization" violation required a 100% market share, this would dramatically limit Section 2's reach.

It is likely, however, that a textualist interpretation of Section 2 would not require a "monopolizing" firm to have 100% of the relevant market. As noted earlier, textualism does not call for literalism or for

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356. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO STATE L.J. 115, 150–51 (1993) ("These results imply an 'average' monopolist market share of between seventy-five and eighty-five percent.").

Moreover, "monopoly" might have been used colloquially the same way—to only apply to firms with 100% of a market. *See, e.g.*, 1 IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY 236 (1904) (emphasis added) ("The extent of their (the Standard's) business and control over pipe-lines and refineries . . . . by virtue of their monopoly of the business of refining and transportation of oil[] . . . [made them] *at times almost* the only buyers in the market.") (emphasis added). In referring to the Standard Oil Company's beginnings, Tarbell states that after John Rockefeller secured a lower shipping rate for his company's oil in 1870, he had achieved a complete monopoly just a few years later. *Id.* at 217 ("[I]n December, 1877, *after* the monopoly was completed . . . .") (emphasis added). In 1872, Rockefeller created the South Improvement Company with the goal of buying and controlling Cleveland oil refineries to the advantage of the Standard Oil Company. *Id.* at 57.

The owner of a competing refinery, in explaining why he chose to sell his business to the South Improvement Company, said it was easier to sell "than fight such a monopoly." *Id.* at 65. As the South Improvement Company grew, the press and the public heard rumors of its advantageous deals with railroads. *Id.* at 83–84 ("It was evident to everybody that if the railroads had made the contracts as charged . . . nothing but an absolute monopoly of the whole oil business by this combination could result."). Finally, Tarbell notes that the Standard Oil Company's competitors, like the Pennsylvania Railroad, "raised a cry of monopoly." *Id.* at 149.

357. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

358. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 230–31 (8th ed. 2017) (footnotes omitted) ("A market share in excess of 70 percent generally establishes a prima facie case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output. In contrast, courts rarely find monopoly power when market share is less than about 50 percent. The greatest uncertainty exists when market shares are between 50 percent and 70 percent.").

359. *See* Lande, *supra* note 356, at 148–50 (surveying the market shares of firms held to be monopolies).

construing words and phrases strictly.[360] Rather, textualists interpret statutes "fairly," the way a "reasonable person" would at the time a law was enacted, and give a statute's words and phrases their "ordinary" meaning.[361]

Thus, a textualist would ask how a reasonable person in 1890 would fairly or ordinarily interpret the word "monopolize." Would interpreting Section 2 as only encompassing firms with a 100% market share be the type of "strict constructionism" or "straightjacketing" that Justice Scalia denounced?[362] After all, a firm with a 98% market share as a practical matter is usually as likely to have monopoly power as a firm with a 100% share.[363] Indeed, the 1895 Supreme Court *E.C. Knight* case referred to a firm with a 98% market share as a "monopoly."[364] *Standard Oil* in 1911 held that something could be deemed a monopoly if it produced

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360. *See supra* Section II.A.

361. *See supra* notes 75–78 and accompanying text. Professor May, in one of his many helpful comments to the authors, noted that:

> Charles Whiting Baker's 1889 Monopolies and the People, at pages 71–72, declared that 'in dealing with the question of monopolies we must not conclude that the absolute control of supply is at all necessary to the existence of a monopoly.' Similarly, in 1893, in A Treatise on the Law of Monopolies and Industrial Trusts, as Administered in England and in the United States of America, in discussing continuing common law condemnation of the creation of a monopoly even after an English statute sought to relax statutory prohibitions against monopolies, Charles Fisk Beach, Sr., declared that the courts put their own construction upon the enactment and continued to hold that the creation of a monopoly was an offense at common law. It was held that in order to create a monopoly, in the legal sense of that term, it was not necessary to obtain possession of the whole of any product, or even of any large part of it. It was sufficient that the[re] was engrossing to such an extent as to enable the holders to increase the price at a specified time and place.

362. *See* Scalia & Garner, *supra* note 38, at 355–56.

> Textualism does not purport to exclude all consideration of purpose or policy from statutory interpretation. To the contrary, because all statutory language is at least somewhat open-textured, textualists acknowledge that a "certain degree of discretion" is inevitable in "most" judicial decisionmaking. When statutory ambiguity leaves room for the exercise of such discretion, textualists believe it is appropriate, if not necessary, for an interpreter to consider a statute's apparent background purpose or policy implications in choosing among competing interpretations.

John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) (footnote omitted).

363. *See* United States v. E.C. Knight Co., 156 U.S. 1, 5, 16 (1895) (acknowledging that a firm need not control all of a market to be a monopoly); *see also id.* at 44 (Harlan, J., dissenting) (noting that the defendant "controls the price of [sugar] everywhere" by virtue of controlling 98% of the market).

364. *Id.* at 11, 16.

"some of its baneful effects," even if the defendant did not possess a 100% monopoly.[365]

A "fair reading" of Section 2 should mean that a firm with somewhat less than 100% of a market that otherwise exhibits the characteristics of a monopoly should be included within Section 2's prohibitions. This is especially true because otherwise a potential defendant usually could render the monopolization offense a nullity by deliberately leaving 2% of a market to others.[366] As Justice Scalia noted, "Some outcome-pertinent consequences . . . are relevant to a sound textual decision—specifically, those that: [] cause a private instrument or governmental prescription to[] be ineffective."[367]

Moreover, to construe the "monopoly" requirement in a manner that neutralizes the statute would be an arguably absurd result. As Justice Scalia[368] and Justice Kavanaugh noted, the absurdity doctrine[369] can, in truly extreme situations, prevent statutes from being interpreted irrationally.

Even though the Supreme Court in 1895 was correct to characterize a firm with a 98% market share as a "monopoly," it is a difficult judgment call as to when a reasonable person in 1890 (or today!) would consider a firm's market share to be too low to be one. Could a monopolist only

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365. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 54–55 (1911) (emphasis added) (citing Mitchel v. Reynolds (1711) 24 Eng. Rep. 347; 1 P. Wms. 181) ("[B]y operation of the mental process *which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects* so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade . . . . [B]y the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public . . . . And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly, and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade."). We are indebted to Prof. Meese for directing us to this and many other relevant references. Of course, *Standard Oil* was issued twenty-one years after the Sherman Act was passed, so it should carry less weight than a more contemporaneous opinion.

366. *See* Diane Capri, *John D. Rockefeller: Creative or Killer?*, DIANE CAPRI (Dec. 1, 2016), https://dianecapri.com/2016/12/john-rockefeller-creative-or-criminal (quoting John D. Rockefeller as saying "the only reason he didn't take over 100% of the world's oil refining market was because he didn't want public sentiment to be 100% negative against him").

367. Scalia & Garner, *supra* note 38, at 352.

368. *Id.* at 234.

369. *See* Kavanaugh, *supra* note 174, at 2156–57.

have a market share of 88%, the percent of the U.S. oil market possessed by the Standard Oil Trust in 1890?[370]

Should the 70% minimum that usually suffices today continue to be the benchmark? A minimum or virtually-always minimum line should be drawn, but where? Indeed, would a reasonable person instead just conclude that if a firm had the power to "control prices or exclude competition,"[371] then it is for all practical purposes a monopoly? Perhaps the monopoly power standard for Section 2 should not change.

2. Treble damages for a no-fault violation: absurd or appropriate?

Would it be "absurd" to impose treble damages on a firm that was not found to have engaged in anticompetitive conduct? Does the possibility of a private treble damages action mean that Section 2 could not have been intended to be a no-fault statute? Would this be the type of "absurd" result that Justice Scalia cautions should not result from textualism?[372]

Reasonable people certainly can disagree over whether treble damages would be too large for a no-fault violation. It often is believed that treble damages were necessary to give victims the requisite incentive to bring and litigate cases against large and powerful defendants, as well as to deter violations optimally.[373] This is especially true because Section 2 antitrust violations and damages often are so difficult to detect and prove.[374] Regardless whether a contemporary judge or justice thought this policy position was wise, should they find it to be absurd?

The "treble damages" remedy should be considered an approach that reasonable policy makers might implement, regardless whether it is considered from a deterrence or a compensation perspective. This is especially true because if antitrust law's so-called "treble damages" remedy is analyzed empirically, with consideration given to its lack of

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370. Mark V. Siegler, An Economic History of the United States: Connecting the Present with the Past 207 (2017). One might even ask whether Congress would have considered it "absurd" if Rockefeller were *not* found to have "monopolized" the oil industry as this term was used in Section 2 of the Sherman Act.

371. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (stating that monopoly power is the power to "control prices or exclude competition").

372. *See supra* notes 79–80 and accompanying text (describing Justice Scalia's narrow approach to the absurdity doctrine).

373. Lande, *supra* note 356, at 124 (summarizing the prevailing "Optimal Deterrence Framework" theory of antitrust damages).

374. *See id.* at 129 nn.54–55 (noting the reasons for disparities between damages caused and damages awarded in antitrust cases).

prejudgment interest, lack of payments for the allocative inefficiency effects or umbrella effects of monopoly pricing, and other factors, even a "treble damages" award is probably on average really only around single damages.[375] In other words, a monopolist paying nominal damages of three times its overcharges would probably only be paying one times the actual damages it caused.

Moreover, private antitrust cases rarely produce even nominal treble damages for victims of anticompetitive behavior.[376] Even in cartel cases, as a practical matter most private cases settle, and the settlements average only 37% to 66% of single damages.[377] Only 20% settled for single damages or more.[378]

If a court did believe that the prospect of awarding treble damages in a no-fault case was absurd, it could do what courts often do even in routine cases where fault has been established but the court believed it would be unjust to order "excessive" damages. Professor William Kovacic pointed out that in many circumstances,

> [A] court might fear that the US statutory requirement that successful private plaintiffs receive treble damages runs a risk of over-deterrence. A court might seek to correct such perceived infirmities in the antitrust system by recourse to means directly within its control—namely by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims.[379]

Using these same techniques, as a practical matter, courts would be extremely unlikely to award even nominal treble damages in a no-fault monopolization case.[380] A court which believed this result to be absurd easily could avoid this outcome.

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375. *See id.* at 162 tbl.2.

376. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 IOWA L. REV. 1997, 1998 (2015) (noting that almost every successful antitrust damages action settles for less than treble damages).

377. *Id.*

378. *Id.*

379. Kovacic, *supra* note 336, at 173–74; *see also* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 S.F. L. REV. 651, 663, n.49 (2006) (analyzing this and other sources making similar points).

380. If a no-fault case reached the damages stage, the measurement issues might be simpler than in other Section 2 cases. In a fault-based Section 2 case, courts have to determine the overall monopoly profits, but award only those monopoly profits attributed to the anticompetitive conduct. This parsing is extremely difficult. Under no-fault, the court would just have to determine the total monopoly overcharges.

Moreover, for similar reasons, structural remedies have been relatively unusual in Section 2 cases and have traditionally been saved for the most egregious violations. *See*

3. Criminal sanctions for a no-fault case? Applying the absurdity doctrine

The Sherman Act of 1890 contained criminal penalties. A violation of Section 1 or 2 could result in a $5,000 fine and a year in prison (a misdemeanor at the time).[381] A reasonable person might ask whether the inclusion of possible criminal penalties for a Section 2 violation meant that Congress did not intend for it to be a no-fault statute and thus argue that a no-fault interpretation of Section 2 is "absurd."

This is incorrect for three reasons: (1) While Congress would have thought it "absurd" to imprison a tiny monopolist that was not believed to affect interstate commerce, Congress might not have thought it absurd to imprison a "robber baron" like John D. Rockefeller; (2) There are many other plausible reasons why Congress could have included criminal penalties in a no-fault statute; and (3) Other antitrust laws could be applied criminally in ways that could lead to absurd results, but this does not mean these laws were not meant to apply at all to the types of conduct in question.

First, one might ask what would have happened during the floor debates if a senator had asked whether a manufacturer achieving a monopoly in a small market by making a better product could be put in prison under Section 2.[382] Similarly, suppose there were a small town

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supra notes 321–25 and accompanying text. Surely structural relief would not be the norm in no-fault cases.

381. *See* Sherman Antitrust Act of 1890, Pub. L. No. 51–647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2018)). For the history of the Sherman Act, see D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545, 1554–55 (2019).

382. One might ask: "Does the language of Section 2 suggest that Congress meant for the Department of Justice to prosecute, and for juries to convict, executives of all companies that achieved monopoly positions? And of course, what about the companies themselves? If Congress did not intend for there to be an 'efficiency' defense, doesn't it follow that criminal prosecutions of individual executives in charge of monopolists (however the monopoly was attained) would be fair game for criminal sanctions?

"Alternatively, wasn't the judicial interpretation of the statute to require 'bad acts' inevitable in light of the criminal nature of the Sherman Act? A textualist interpretation of the 1890 legislation would mean that criminal remedies would be available to prosecute firms and individuals who achieved their preeminence without fault.

"Imagine an extension to the floor debates in 1890: Question for Senator Edmunds: 'Suppose I make the best buggy whip you ever saw. Nobody else comes close. I am a monopolist. Have I violated Section 2 of the draft statute, and can I be sent to jail for the offense?' What would Edmonds have said in reply?"

The authors are grateful to Professor Kovacic for suggesting this hypothetical and many other insights.

with only two barbers, and one of them died. The surviving barber would be a monopolist. Could this barber have been prosecuted criminally?[383] Do these possibilities mean that Section 2 was never intended to be a no-fault statute?

Recall that a textualist analysis should ignore the legislative debates, but that they should consider the "history of the times."[384] A textualist should use the history of the period producing the antitrust laws to help ascertain what Congress meant when it used a term like "monopolize" and decided to impose sanctions on firms that monopolized.

The absurdity doctrine could be appropriate if either of these two hypotheticals (involving the small innovative company or the last barber in town) actually occurred. A textualist could reason that the types of monopolies that were the target of the Sherman Act were extremely large firms like the Standard Oil Trust.[385] This is especially true because the very definition of "interstate commerce" was so restricted in 1890 that the Sherman Act would not have governed the activities of a monopoly-barber in a small town.[386]

A textualist might also ask whether ordinary Americans in 1890 fairly could have assumed the law could have been used to impose criminal sanctions on small town barbers or small firms that succeeded through innovation. This is especially true due to the belief by Scalia and others that ambiguous statutes should be read in a manner that does not result in a criminal sanction.[387]

But the absurdity doctrine should not rescue the CEOs of companies like the Standard Oil Trust even if Section 2 was being used on a no-fault basis. During the late 19th and early 20th Centuries many called

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383. The authors are grateful to James May for suggesting this hypothetical and many other insights.

384. *See supra* note 72.

385. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2280, 2334 (2013) (noting that calls to break up trusts in the 1880s were the result of shifts in income distribution that "accompanied the rapid industrialization of the decade"); Lande, *supra* note 37, at 96–105 (discussing the relevant history of the time when Congress enacted the Sherman Act).

386. *See* Kidd v. Pearson, 128 U.S. 1, 20, 23 (1888) (distinguishing commerce and manufacturing within the regulation of "interstate commerce" and ruling that manufacturing was not considered a part of "interstate commerce"). The incredibly restrictive application of the term "interstate commerce" in 1890, when Congress passed the Sherman Act, surely meant that the Sherman Act similarly would not have been intended to include the only barber in a small town.

387. *See* Scalia & Garner, *supra* note 38, at 296 ("Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.").

not just for an investigation into the activities of John D. Rockefeller, in 1890 the head of the Standard Oil Trust, but his imprisonment.[388] Would imprisoning Rockefeller even on a no-fault theory really have been "absurd" in the minds of these people, any more "absurd" than what some politicians have called for recently? Some contemporary politicians have not just called for an investigation into whether certain large and powerful high-tech companies engaged in anticompetitive

388. Keith Poole, *Biography: John D. Rockefeller, Senior*, PBS, https://www.pbs.org/wgbh/americanexperience/features/rockefellers-john [https://perma.cc/S8DC-B9DZ]. For example, in 1894 the Governor of Texas wanted to arrest John D. Rockefeller for violating the Texas Antitrust laws. *See Condensed Dispatches*, WASH. POST, Dec. 1, 1894, at 7 ("A requisition has been made by the Governor of Texas upon Gov. Flower, of New York, for the arrest of John D. Rockefeller . . . for violation of the Texas anti-trust law."); *see also Called Rockefeller Names*, CAMAS PRAIRIE CHRONICLE, Aug. 4, 1905 (quoting the then-governor of Wisconsin as saying "John D. Rockefeller is the greatest criminal of the age," a declaration that was met with cheers); *Fearful of Arrest*, DAILY LEADER, Apr. 10, 1895 ("John D. Rockefeller does not dare to leave New York for fear of arrest on warrants already issued in the various states"); *Jail Rockefeller and Other Trust Magnates, Says Bryan*, LANCASTER NEWS, July 10, 1907 (quoting William J. Bryan, the Democratic nominee for President in 1896 and 1900, as saying "Send John D. Rockefeller and a dozen other trust magnates to prison for a long term of years and one of the most vital questions before the people will have been solved"); *Rockefeller a Highwayman*, EVENING STATESMAN, Dec. 19, 1903 ("Ther[e] is no difference in principle between holding up a nation for $1,000,000 at the mouth of a pipe line and holding up an individual at the muzzle of a gun for what he has on his person. The man who is looked on as the most successful man in the country is, in the last analysis, a gambler or highway robber. He is not even a creator of money, much less of manhood, but a highway bandit who has held up producers and public for millions. . . . John D. Rockefeller and J. Pierpont Morgan and men of their class in the financial world are really responsible for such a reign of crime as now exists in Chicago . . . ."); *Sage and Rockefeller*, EVENING STATESMAN, Aug. 26, 1905, at 4 ("Rockefeller in his business lifetime has destroyed the old way of doing business. He has substituted combination for competition; secrecy for publicity; mendacity for truth; bribery for brains. He buys lawyers who buy for him laws: he crushes rivals relentlessly or kills them by the slower torture of starvation. The mere fact that a rival exists is reason enough for killing him. Mr. Rockefeller is a law unto himself. Is it a wonder that he is hated, feared and admired? . . . [Rockefeller is like a] boa constrictor."); *Try the Criminal Law*, TIMES & DEMOCRAT, Jan. 14, 1908, at 2 ("If the government in its pretended war on the Standard Oil and other trusts would invoke the aid of the criminal law[] . . . it would accomplish something. If old John D. Rockefeller, for instance, was sent to prison for twenty-four hours for violating the trust law, you would soon see a change, and the trusts would soon be all good."); *Walsh Urges Prison for Rockefellers*, SUN, July 12, 1915, at 3 ("If the next Congress represents the people of the United States, its first act will be to cite before it John D. Rockefeller . . . and if these men continue to defy the nation they should be indicted for crime against the Government and sent to jail.").

conduct: Bernie Sanders declared he would use the Sherman Act to "jail" CEOs of "monopolistic companies."[389]

Some may denounce Senator Sanders's plan as foolish on policy grounds. And we could speculate about what a politician like Senator Sanders actually would do if he were elected president and could enact legislation he favored. However, his harsh rhetoric reminds us that political views of many Americans towards alleged monopolies at times have been extremely antagonistic.[390]

Second, Congress might have enacted a law containing criminal penalties with full knowledge that they would be unlikely to be applied vigorously or at all. During the early years of the Sherman Act, corporate executives were not sent to prison for any antitrust offenses. No corporate official was imprisoned, even for price fixing, until more than thirty years after the Sherman Act was passed.[391] No corporate official has ever been imprisoned for any Section 2 offense,[392] and during its early years Section 2 seldom was enforced, even civilly.[393] Section 2's framers might well have included criminal provisions

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389. Ryan Grim, *Bernie Sanders Vows to Revive Criminal Prosecutions of CEOs for Unfair Trade Practices*, INTERCEPT (Oct. 23, 2019, 4:18 PM), https://theintercept.com/2019/10/23/bernie-sanders-sherman-antitrust-act-monopolies/ [https://perma.cc/8VJR-KMUL].

> In a statement to The Intercept, Sen[ator] Elizabeth Warren's campaign said she would also pursue criminal prosecutions of monopolists under the Sherman Act. "When she's president, Elizabeth will enforce our antitrust laws to their fullest extent including their criminal provisions. She will also break up Big Tech, break up Big Ag[riculture], and break up Big Banks," said spokesperson Saloni Sharma.

Id.; *see also* Hirsch, *supra* note 16.

390. Lydia Saad, *Do Americans Like or Dislike 'Big Business'?*, GALLUP (Dec. 13, 2019), https://news.gallup.com/poll/270296/americans-dislike-big-business.aspx?version=print [https://perma.cc/6TWW-Y9S5] (reporting that roughly half of the country has negative views of big business); *see also supra* note 385 (showing Rockefeller's opinions).

391. *See* Sokol, *supra* note 381, at 1555 (footnote omitted) ("Members of cartels were incarcerated once in 1921, but not again until 1959."). One necessary element for a criminal conviction is mens rea: "The general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind." A.M. WILSHERE, THE ELEMENTS OF CRIMINAL LAW AND PROCEDURE 6–7 (2d ed. 1911). This requirement would, however, be met in Section 2 cases because only "competent age, sanity, freedom from some kinds of coercion[,] and to some extent knowledge of fact are essential to criminality." *Id.* at 7.

392. *See* Sokol, *supra* note 381, at 1570.

393. *Id.* at 1571.

without giving them much thought, or perhaps only as a threat,[394] or only for political reasons.

It certainly is possible that Congress did not give much thought to whether, on policy grounds, Section 2 should contain criminal sanctions. Regardless, all this is speculation that a textualist should not engage in.[395] If a judge re-interpreted the words of a statute because they believed it was unwise policy to impose criminal penalties in a no-fault case, this would not be textualism.[396]

Third, the possibility that a prosecutor would attempt to secure criminal penalties in a no-fault case against a major U.S. corporation

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394. For a recent example of the seriousness with which Big Tech leaders take these threats, Mark Zuckerberg, Facebook's CEO, called Warren's presidential campaign and her desire to break up Big Tech an "existential threat." Lauren Feiner, *Zuckerberg Blasts Elizabeth Warren's Plan to Break up Facebook and Says It's an 'Existential' Threat*, CNBC (Oct. 1, 2019, 12:30 PM), https://www.cnbc.com/2019/10/01/audio-from-zuckerberg-meeting-with-facebook-employees-leaked.html [https://perma.cc/Z4HM-URV5].

Zuckerberg and Warren traded blows in discussing a potential antitrust suit:

> "I would bet that we will win the legal challenge," [Zuckerberg] said. "Does that still suck for us? Yeah. I mean, I don't want to have a major lawsuit against our own government . . . . But . . . if someone's going to try to threaten something that existential, you go to the mat and you fight." Warren hit back on Twitter. "What would really 'suck' is if we don't fix a corrupt system that lets giant companies like Facebook engage in illegal anticompetitive practices, stomp on consumer privacy rights, and repeatedly fumble their responsibility to protect our democracy," she wrote.

Adrian Carrasquillo, *Why Elizabeth Warren Is the VP Pick Facebook Doesn't Want to See*, NEWSWEEK (June 26, 2020, 5:02 PM), https://www.newsweek.com/why-elizabeth-warren-vp-pick-facebook-doesnt-want-see-1513754 [https://perma.cc/3Z6R-2ZFR].

395. Even if the above hypothetical dialogue had occurred, and one of the bill's sponsors had said, "Do you realize this bill could put a monopolist in prison even though he did nothing wrong," the dialogue would be irrelevant because a textualist ignores legislative history. Perhaps if this hypothetical has been considered by Congress it would have resulted in the law being changed. But this is the kind of speculation a textualist should not engage in. Similarly, a textualist does not attempt to put themselves in the hypothetical "mind of Congress" and determine what would have been logical to a reasonable congressperson, other than by a fair and straightforward reading of a statute's language. As Justice Scalia noted, it is a "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue." SCALIA & GARNER, *supra* note 38, at 349. A textualist would not ask how a hypothetical member of Congress would have responded if someone had asked them, "Are you sure you want to put people in prison for violating every part of the statute? Maybe instead you should only impose criminal penalties for Section 1 violations." A textualist would deal with the statute that is in front of them.

396. *Id.*

like Amazon, Facebook, or Google would be no more "absurd" than three other types of criminal antitrust cases that have been or could be brought under the Sherman Act or Clayton Act[397]: in tiny collusion cases, RPM cases, and Robinson-Patman Act cases.

First, suppose two tiny businesses sell the same products (such as bicycles) and they are on the opposite ends of a large metropolitan area. Assume they fixed prices. Assume interstate commerce was impacted and their agreement did not result in significant efficiencies. If the government charged them with a criminal Section 1 violation, they would not be able to defend on the basis that no prices actually increased, that they competed with internet sales, that entry was easy, etc.[398] They would be guilty of a felony.[399] Apparently no criminal prosecution of this nature ever has taken place. But if it did, would a court conclude that Section 1 of the Sherman Act does not cover price fixing? Or would it instead act as Professor Kovacic noted, that courts sometimes find a way to exonerate defendants, or at least to subject them to no more than a nominal penalty, in situations where they believe that harsh remedies are inappropriate.[400]

Second, in 1980, the Department of Justice, followed by fifteen state Attorneys General, prosecuted RPM criminally in *United States v. Cuisinarts, Inc.*,[401] and succeeded in obtaining a nolo contendere plea and a $250,000 fine.[402] At the time RPM was per se illegal, but today it is judged under the rule of reason,[403] and many respected scholars believe it should be taken off the list of antitrust offenses entirely.[404] Nevertheless, in theory, RPM could today be prosecuted criminally. If this were to happen, surely the court handling the case would do as Professor Kovacic described and find some way to exonerate the defendant or treat them leniently.[405] This is precisely what would

397. 15 U.S.C. § 12–27 (2018).
398. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 358, at 224, 233, 235, 243–45.
399. 15 U.S.C. § 2 (2018).
400. *See* Kovacic, *supra* note 336, at 173–74.
401. No. H80-559, 1981 WL 2062 (D. Conn. Mar. 27, 1981).
402. *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1009–10 (D. Conn. 1981), *aff'd*, 665 F.2d 24 (2d Cir. 1981).
403. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).
404. *See id.*
405. *See* Kovacic, *supra* note 336, at 173–74 (noting how courts have interpreted antitrust laws in ways resulting in no liability when uneasy with the imposed penalties).

happen if the Department of Justice tried to prosecute a monopolist criminally under a no-fault theory.[406]

In addition, the Robinson-Patman Act, which prevents certain instances of price discrimination, contains criminal penalties[407] which were last imposed in the 1950s.[408] This statute has fallen into severe bipartisan disrepute today, and the government has barely enforced it civilly for a generation.[409] Nevertheless, like tiny collusion cases and RPM cases, the federal government could today pursue criminal enforcement under the Robinson-Patman Act.

If any of these violations were prosecuted criminally today, not only could the courts do as Professor Kovacic suggested and find some way to exonerate the defendant—there are other methods courts could use to achieve justice. Professor Sokol persuasively argues that any attempt to impose criminal penalties on an alleged antitrust violation after an unduly long period of non-criminal enforcement could result in a successful defense of the doctrine of desuetude (void due to non-use),[410] or in a due process violation of the U.S. Constitution where the provision would be held void for vagueness and a lack of notice.[411]

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406. One might also ask: "Suppose DOJ tried to prosecute individuals criminally for no-fault offenses. Would this destroy the statute by creating massive political backlash?" This certainly is a possibility. At a minimum it would ruin the reputation of the enforcer who attempted it. But it is not relevant to the textualist interpretation of Section 2. Similarly, a Supreme Court interpretation of Section 2 as a no-fault statute similarly might spur congress to amend the Sherman Act, in ways that might or might not be confined to a narrow change in Section 2, with uncertain results.

The authors are grateful to Professors Kovacic and May for these and many other thoughtful insights.

407. 15 U.S.C. § 13a (2018); *see also* Sokol, *supra* note 381, at 1573 (reviewing the history of Robinson-Patman Act enforcement).

408. *See* Sokol, *supra* note 381, at 1573.

409. *Id.* ("There has been only a single government enforcement action of Robinson-Patman since the George H.W. Bush administration.").

410. *Id.* at 1564 (footnotes omitted) ("Desuetude is a concept where a practice that has been fixed by law loses its authority due to a lack of usage. When this lack of usage has been long enough, a 'negative custom' of nonusage replaces the usage of the law. Nonusage for a lengthy period of time suggests either that the legal practice is obsolete or was never legitimate in the first place."); *see id.* at 1564–76 (providing an insightful analysis of desuetude in an antitrust context).

411. *Id.* at 1576 (alteration in original) (footnotes omitted) ("Void for vagueness is a doctrine where the law in question is too vague to provide notice of the type of conduct that is to be deemed illegal. The linkage between desuetude and vagueness is that '[a] penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more fair notice of its proscriptions than a statute which is phrased in vague

Under either doctrine, a firm prosecuted by the Department of Justice for a no-fault violation today could argue that it lacked the intent necessary for a criminal violation. Professor Sokol also argues that an "accidental" monopolist (assuming, consistent with Professor Turner, that accidental monopolists exist), would lack the intent necessary for a criminal or even a civil law monopolization violation.[412]

Even the theoretical possibility of criminal sanctions resulting from a no-fault case is an undesirable feature of Section 2. But as Justice Scalia noted concerning the interpretation of statutes, "[w]hen once the meaning is plain, it is not the province of a court to scan its wisdom or its policy."[413]

In summary, a textualist interpretation of Section 2 shows that a violation does not require anticompetitive conduct. Nor should the "monopolization" offense be limited to firms with 100% market shares. This is true even though in theory—although not as a practical matter—a no-fault case could result in treble damages or criminal penalties.

B. Effects on "Attempt to Monopolize" Law

A textualist interpretation of the "attempt to monopolize" language in Section 2 should greatly restore the statute's vigor. Defendants would

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terms.'"); *see also id.* at 1576–96 (analyzing persuasively the void for vagueness doctrine and the fair warning requirement as applied to antitrust laws). Professor Sokol elaborates further that:

> In *Lanier*, the U.S. Supreme Court offered guidance as to the 'three related manifestations of the fair warning requirement' that are required whether or not a criminal statute may be unconstitutionally vague. These include: (1) the vagueness doctrine, (2) the rule of lenity, and (3) retroactive application of a new construction of the statute. The purpose of the fair warning requirements is to ensure that the 'statute, either standing alone or as construed, ma[k]e[s] it reasonably clear at the relevant time that the defendant's conduct was criminal.

Id. at 1580 (first alteration in original) (footnotes omitted).

412. Email from D. Daniel Sokol, Professor, U. of Fla. Levin Coll. of Law, to Robert H. Lande, Professor, U. of Baltimore Sch. of Law (Nov. 5, 2020) (on file with author).

413. SCALIA & GARNER, *supra* note 38, at 353 (quoting G. GRANVILLE SHARP & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 5 (10th ed. 1953)); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1827 (2020) (Kavanaugh, J., dissenting) ("Justice Scalia explained the extraordinary importance of hewing to the ordinary meaning of a phrase: Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees.'") (internal quotations omitted).

only be required to engage in a serious and concrete "attempt" to gain a monopoly,[414] a requirement that should be construed as requiring only the intent to take over a market, planning and preparation, and one concrete, significant act in furtherance of this intent. The act could be required to be "sufficient, both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small."[415]

What type of act would be required in which market contexts? This would be as difficult to define precisely as the current requirements for the offense. And the necessary lines would be as difficult to draw.

Would market definition and a "dangerous probability of success" be required under a textualist approach to the attempt to monopolize portion of Section 2? The statute makes it unlawful for any person to "attempt to monopolize . . . *any part* of the trade or commerce among the several States."[416] A straightforward textualist reading of the statute therefore could be very similar to *Lessig v. Tidewater Oil Co.*'s[417] reading of Section 2 in a way that eliminated both the dangerous probability[418] and the market definition requirements[419] in attempted monopolization cases. Alternatively, a court could reason that defendants are only prohibited from attempting to monopolize *something*, so market definition is required.

Moreover, the attempted monopolization doctrine could be applied only to firms attempting to take over an entire market—or, since a textualist should not construe the word "monopoly" literally or strictly,[420] perhaps a firm attempting to take over virtually all of a market. Suppose, for example, a firm with 50% of a relevant market conceived of and attempted to implement a serious plan that would, if

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414. *See* SCALIA & GARNER, *supra* note 38, at 353.

415. *See* BISHOP, *supra* note 163, § 728; *supra* Section III.B; *see also* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir. 1964), *abrogated by*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) (stating that "probability of actual monopolization" is not an "essential element of proof of attempt to monopolize).

416. 15 U.S.C. § 2 (2018) (emphasis added).

417. 327 F.2d 459 (9th Cir. 1964).

418. *Id.* at 474 (rejecting the notion that a "[dangerous] probability of actual monopolization is an essential element of proof of attempt to monopolize").

419. *Id.* at 474 (footnote omitted) (citation omitted) ("When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' Section 2 prohibits attempts to monopolize 'any part' of commerce . . . .").

420. *See supra* note 360 and accompanying text.

successful, give it 70% of that market.[421] This is far short of a 100% market share, and this defendant arguably should not be convicted of attempted monopolization.[422] Alternatively, since a 70% market share is the minimum that usually suffices today to meet the "monopoly power" prong of monopolization cases,[423] perhaps a firm should be guilty of attempted monopolization if its implemented plan would, if successful, give it 70% of a market? Or 90%?

Although the courts would of course have to draw a line, this line should be different from the line courts draw today, which requires defendants to have a "dangerous probability"[424] of acquiring monopoly power. Today, a firm with only 50% of the market could only rarely meet the "dangerous probability" threshold, and a firm with only a 30% market share could never or almost never meet the threshold.[425] Today, very few attempted monopolization suits are successful.[426] But under a textualist analysis a firm with a 50% market share often should

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421. Although firms' plans to expand market share significantly (but remain far short of a 100% share) may be common, courts should of course be skeptical of manufactured self-serving evidence that a defendant was not actually trying to achieve complete control of a market. As an example of a plan not to gain complete control of a market, in the FTC case against DuPont involving the titanium dioxide market, the defendant had approximately a 40% market share and engaged in conduct designed to give it approximately 60% of the relevant market. It never had an actionable plan to reach a 100% market share. *See F.T.C. Case on Du Pont Dismissed*, N.Y. TIMES (Sept. 18, 1979) https://www.nytimes.com/1979/09/18/archives/ftc-case-on-du-pont-dismissed-judge-finds-no-monopoly-bid-largest.html?auth=link-dismiss-google1tap, at D5.

422. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 358, at 230–31.

423. *Id.*

424. *Id.* at 336. The "dangerous probability" requirement comes from *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905), where Justice Holmes noted the common law origin of the attempt to monopolize offense: "The distinction between mere preparation and attempt is well known in the criminal law." *Id.* at 402. His "dangerous probability [of success]" formulation is of only limited help in ascertaining which conduct should suffice.

425. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 298–99 (4th ed. 1997) (footnotes omitted) ("Although there are no precise market share boundaries, and while [defendant's ability to lessen or destroy competition in that market, intent, etc.] affect the analysis, courts often find a dangerous probability [of monopolization] where the defendant starts with a market share of more than 50 percent; they rarely find market shares between 30 percent and 50 percent sufficient; and they virtually never find shares of less than 30 percent sufficient.").

426. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 2010–2019, https://www.justice.gov/atr/file/788426/download [https://perma.cc/3RCN-V5PU].

be found to engage in a serious "attempt to monopolize" a market, given certain assumptions like barriers to entry.

In sum, a textualist approach to the "attempt to monopolize" portion of Section 2 should not require defendant to have undertaken anticompetitive conduct. The statute should only require that defendant had the intent to acquire a monopoly (or a near-monopoly) and had taken a serious, significant and concrete step in this direction. A defendant's market share as low as 50%, and perhaps even 30%, assuming barriers to entry, etc., should sometimes suffice.

The line of illegality would, as a practical matter, be as uncertain as the current "dangerous probability" requirement.[427] But the textualist version of the "dangerous probability" requirement should allow more successful cases. And the lack of an anticompetitive conduct element should permit many more successful cases.

C. No-Fault Monopolization as a Violation of Section 5 of the FTC Act

Despite the existence of the Sherman Act, Congress in 1914 decided that additional, more encompassing, legislation was needed, so it enacted Section 5 of the FTC Act, which prohibits "unfair methods of competition."[428] A traditionalist analysis of Section 5 of the FTC Act demonstrates that the statute was intended to prohibit not only every violation of the Sherman Act, but also (1) incipient violations of this law, (2) conduct violating the spirit of the Sherman Act, and (3) conduct violating recognized standards of business behavior.[429] The

427. As Oliver Wendall Holmes noted in his discussion of attempts:

> Eminent judges have been puzzled where to draw the line . . . . the considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man buys matches to fire a haystack . . . there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match . . . there is very little chance that he will not persist to the end . . . .

HOLMES, JR., *supra* note 165, at 68–69.

428. 15 U.S.C. § 45 (2018).

429. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 299–300 (1980).

Supreme Court has explicitly adopted this interpretation of the FTC Act,[430] although the relevant precedent is more than a generation old.[431]

Although the task is beyond the scope of this article, the FTC Act should be analyzed in a textualist manner to determine whether the statute would still produce these interpretations of the phrase "unfair methods of competition." If so, the FTC Act might be an optimal vehicle for no-fault monopolization for several reasons.

Section 5 is a civil statute—its violation cannot result in criminal penalties.[432] Section 5 actions cannot be brought by private parties, and do not constitute Sherman Act precedent that gives rise to treble damages liability unless the court specifically finds that the practices at issue also violate the Sherman Act.[433]

Section 5 could be used as a way to implement no-fault if the Court is willing to undertake a textualist analysis of Section 2 but is reluctant to overturn *Trinko* and other Section 2 precedent. Another reason for the use of Section 5 to impose sanctions on monopolies would arise if the Court is willing to re-think Section 2 using a textualist approach, but decides to do so in a relatively non-expansive manner because it does not want no-fault cases to be brought by private parties, or for there to be even a theoretical fear that no-fault could lead to criminal penalties.

The FTC Act could be a perfect vehicle for a textualist court that is reluctant for any of these reasons to find that a firm violated Section 2 of the Sherman Act under a no-fault theory. Instead, the Court might hold that defendant had committed an incipient violation of Section 2, or a violation of the spirit of Section 2, and thus that the firm had violated Section 5 of the FTC Act using a no-fault approach. A textualist Court might well find that Section 5, but not Section 2, imposes sanctions on all monopolies and attempts to monopolize.

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430. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239–40 (1972) (stating that Congress intended for the FTC to have broad power to proscribe business practices even if such practices are not anticompetitive but instead "unfair or deceptive").

431. The Supreme Court's most recent expansive interpretation of Section 5 was in *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986). *Id.* at 454 (characterizing section 5 as including traditional antitrust violations and also "practices that the Commission determines are against public policy for other reasons").

432. *See* Averitt, *supra* note 429, at 251 n.112.

433. *Id.*

CONCLUSION: AN INCREASINGLY TEXTUALIST SUPREME COURT SHOULD IMPLEMENT NO-FAULT MONOPOLIZATION

For many years, textualism was only the concern of Justice Scalia and academics not within the antitrust mainstream. Even conservative members of the antitrust community rejected or ignored this method of statutory analysis. But in recent years, textualism increasingly has emerged from the shadows. Indeed, in 2020, all nine justices, in all three opinions in an important Supreme Court case, employed textualism.[434] *Bostock* certainly increases the hope of the possibility that the Court also will analyze Section 2 of the Sherman Act using textualist principles.[435]

This possibility is especially true because a textualist approach might even appeal to those justices who normally are not textualists. This is because a traditional or purposivist approach to Section 2 is ambiguous on the no-fault issue.[436] If a traditional analysis of Section 2 had found that anticompetitive conduct was required for a violation, but a textual

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434. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737, 1754, 1822 (2020).

435. *See* Krishnakumar, *supra* note 58, at 228–33 (providing a pre-Bostock chart with a breakdown of judicial decisions involving a textualist approach and which Justice authored each one). Krishakumar considers Justice Thomas a "textualist" and Justices Roberts and Alito as "textualist-leaning." *Id.* at 163 n.18. If Justices Gorsuch and Kavanaugh are additionally considered textualists, it appears that the Supreme Court has 5 textualist or "textualist-leaning" Justices. *See* Lovelace, *supra* note 6 (quoting Justice Elena Kagan as saying, "[W]e are a generally, fairly textualist court."). Similarly, Bryan Garner's 2019 pre-*Bostock* ABA Journal posting characterized the approach of two Justices not usually considered textualists, Justice Breyer and the late Justice Ginsburg, as looking primarily to text. Bryan A. Garner, *Old-Fashioned Textualism Is All About Interpretation, Not Legislating from the Bench*, ABA J. (Apr. 1, 2019, 1:15 AM), https://www.abajournal.com/magazine/article/textualism-means-what-it-says [https://perma.cc/XCJ4-LE6T]. Garner asserted that they typically analyze interpretive questions by focusing on four elements in this order: (1) text, (2) structure, (3) purpose, and (4) legislative history. *Id.*

436. *See supra* notes 48–55 and accompanying text. A no-fault analysis of Section 2 would, moreover, be consistent with the thoughts of Justice Brandeis:

> [N]o monopoly in private industry in America has yet been attained by efficiency alone . . . . It will be found that wherever competition has been suppressed it has been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with the natural law of business. It is an endeavor to restore health by removing a cancer from the body industrial.

LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS BRANDEIS 114–16 (Osmond K. Fraenkel, ed. 1965).

analysis did not, the traditionalists on the court would of course be less likely to embrace textualism. But this tradeoff is not present.

There is an old saying that "th[e] [S]upreme [Cou]rt follows th[e] [ele]ction returns."[437] Is there even a small chance the current conservative—but increasingly textualist—Supreme Court would hold that Section 2 of the Sherman Act does not require anticompetitive conduct? If in the future an election gives our country a President and a Congress that, like some politicians today,[438] believe in imposing sanctions on all monopolies, is there even a small chance the Supreme Court (or a future, changed Supreme Court) might be open to the possibility that the Sherman Act (or perhaps the FTC Act[439]) is a no-fault statute?

Everyone agrees that courts should faithfully interpret and implement the words of statutes when they are clear.[440] But whether a statute is "clear" often is in the mind of the judge.[441] As a practical matter, the Court's view regarding whether the Sherman Act is a no-fault statute could depend in part upon what particular justices think about the net economic effects of sanctioning all monopolies. As Justice Kavanaugh noted, the "absurdity doctrine"[442] prevents statutes from being interpreted irrationally. If a majority of Supreme Court justices believe that no-fault is, from an economic perspective, "absurd," they surely won't find that the Sherman Act embodies a congressional intent to impose sanctions on all monopolies. Although the Court surely would not convict a tiny local monopoly or a modestly sized innovative company of a no-fault violation, a court might not find this doctrine "absurd" if it were applied to such extremely large alleged contemporary monopolies as Google, Facebook, Amazon and Apple.[443]

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437. *See* FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

438. *See supra* notes 220–25 and accompanying text.

439. Use of the FTC Act would have the advantage that its violation cannot result in criminal penalties, and a violation of the Act does not automatically lead to private cases with their potential for treble damages. Moreover, the Court would not have to overturn an FTC Act precedent as clear as *Trinko*. *See supra* Section V.C.

440. *See* Scalia, *supra* note 57, at 16 ("[W]hen the text of a statute is clear, that is the end of the matter.").

441. *See* Kavanaugh, *supra* note 174, at 2118–19. As Justice Kagan noted, "[P]retty much all of us now look at the text first and the text is what matters most . . . . And if you can find clarity in the text that's pretty much the end of the ballgame. Often texts are not clear, you have to look [farther]." *See* Lovelace, *supra* note 6.

442. *See* Kavanaugh, *supra* note 174, at 2156–57.

443. *See supra* notes 12–16 and accompanying text.

The justices may believe, as we do, that reasonable people can disagree over no-fault's net economic effects. This Article has shown that no-fault's overall net effects on economic welfare depend upon a number of empirical issues whose effects are unknown and ambiguous from both an overall perspective and in particular contexts. If the justices believe that the net effects of no-fault are close from an economic perspective, and not "absurd," they should be more likely to implement a "fair reading" of the words of Section 2 and impose sanctions on all monopolies. We wrote this Article because we believe these issues deserve thoughtful analysis and debate.[444]

In 2016, (then) Judge Gorsuch observed: "[A] judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels."[445] If the current conservative Supreme Court does not want Section 2 of the Sherman Act to impose sanctions on all monopolies, it should heed the more recent advice of Justice Gorsuch: "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."[446]

444. There is, of course, a huge difference between interpreting Section 2 to be a no-fault statute with no efficiencies defense, and the enforcers bringing a case, and requesting a remedy, that the enforcers do not believe is in the public interest. We hope and expect enforcers would never bring any type of antitrust case or impose a remedy in these cases they thought to be unwise, simply because defendant had violated the law. This should apply a fortiori to no-fault cases. We hope and believe the enforcers would believe that, even though anticompetitive conduct was not a requirement of a violation, the remedy sought would benefit consumers and in other respects be in the public interest.

445. A.M. *ex rel.* FM v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, dissenting).

446. Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). For an excellent analysis of these two Gorsuch references, see Robert Connolly, *Supreme Court Review Sought for Per Se Rule in Criminal Cases*, CARTEL CAPERS (Oct. 30, 2019), http://cartelcapers.com/blog/supreme-court-review-sought-for-per-se-rule-in-criminal-cases [https://perma.cc/TB48-9RMU].