

April 16, 2020

To: Subcommittee on Antitrust,
Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Re: Competition in the Digital Marketplace

Dear Chairman Cicilline and Ranking Member Sensenbrenner,

Your letter of March 13, 2020 asked a number of excellent questions concerning the adequacy of existing antitrust laws, enforcement policies, and enforcement levels insofar as they impact the state of competition in the digital marketplace. You specifically asked about:

1. The adequacy of existing laws that prohibit monopolization and monopolistic conduct, including whether current statutes and case law are suitable to address any potentially anti-competitive conduct.

Congress in 1890 actually intended that Section 2 of the Sherman Act should lead to the imposition of sanctions on all monopolies and attempts to monopolize, regardless whether the firm had engaged in anticompetitive conduct. Unfortunately, misguided judicial interpretations of this statute require government and private plaintiffs to prove that the firm involved engaged in anticompetitive activity. This requirement, and the overly strict way courts have implemented it, have rendered Section 2 almost a nullity. Congress should amend Section 2 to clarify and ratify its original intention.

At a minimum, new legislation should create a presumption that the antitrust laws should impose sanctions on all firms with more than 67% of a relevant market,¹ unless defendants can overcome this presumption by presenting clear and convincing evidence that the firm does not have monopoly power.

Currently, “The offense of monopoly under § 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 (i.e.

¹ Recent cases have held that there is no more than a presumption that firms possessing this market share have monopoly power. *See Verizon Communications v. Trinko*, 540 U.S. 398 (2004).

anticompetitive conduct).”² Plaintiff victories under this standard have been rare, and as a consequence an undue number of monopolies have emerged and persisted

This legislation would move the interpretation of the Sherman Act towards the original manner in which Congress intended this law to operate. The attached article (Appendix I₃) demonstrates that Congress in 1890 actually intended Section 2 of the Sherman Act to be a “no-fault” statute. Section 2 is supposed to impose sanctions on all monopolies and attempts to monopolize, not just those for which plaintiff can prove that defendant engaged in anticompetitive conduct.

The attached article demonstrates this by engaging in the first ever “textualist analysis”, a form of statutory interpretation vigorously championed by Justice Scalia and many others, of the language in Section 2. It analyzes contemporaneous dictionaries, legal treatises, and cases. It shows that when the Sherman Act was passed in 1890, the word “monopolize” simply meant that someone had acquired a monopoly. The term was not limited to monopolies acquired through anticompetitive conduct. A textualist analysis therefore demonstrates that Section 2 was designed to impose sanctions on all monopolies and attempts to monopolize. Current case law requiring plaintiffs to prove defendants engaged in improper conduct must be overturned.

The attached paper also briefly analyzes the practical economic implications likely to follow if the courts adopt this approach to monopolization and attempted monopolization law. The overall economic effects are shown to be uncertain, and to depend upon empirical issues whose net effect is speculative or ambiguous. The economic analysis nevertheless provide support for the no-fault position, and a fortiori demonstrates that the article’s textualist conclusions should be implemented.

The paper shows that there are many important benefits likely to result from a no-fault approach to monopolization law. Imposing sanctions on all monopolies is likely to improve economic welfare in many ways. It 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 raise prices and thereby 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 decrease income inequality.⁴

² See *United States v. Grinnell Corp.*, 384 U.S. 563, 571-72 (1966).

³ The Appendix is Robert H. Lande & Richard O. Zerbe Jr., “The Sherman Act Is A No-Fault Monopolization Statute: A Textualist Demonstration”.

⁴ This new standard would, admittedly, give rise to 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

In recent years there have been many calls, from very different parts of the political spectrum, for imposing sanctions on, and even breaking up, monopolies without inquiring into whether they engaged in anticompetitive conduct. The article analyzes the effects these conclusions should have on case outcomes under both the “monopolization” and “attempt to monopolize” portions of Section 2 of the Sherman Act. It also discusses why, a fortiori, no-fault monopolization should constitute a violation of Section 5 of the FTC Act.

New legislation creating a strong presumption that a firm with a 67% market share has violated the antitrust laws would be an important step in the right direction, the direction that Congress intended in 1890.

2. The adequacy of existing laws that prohibit anti-competitive transactions, including whether current statutes and case law are sufficient to address potentially anti-competitive vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors.

The antitrust laws, as they are presently interpreted, are incapable of blocking most of the very largest corporate mergers and acquisitions. They successfully blocked only three of the seventy-eight largest finalized mergers and acquisitions (defined as cases where both the acquiring and the acquired firm were valued at more than \$10 billion) that occurred between 2015 and 2019.⁵ The antitrust laws also would permit the first trillion-dollar corporation, Apple, to merge with the (as of the summer of 2019) third largest corporation, Exxon/Mobil. In fact, today every U.S. corporation could merge until just ten were left—so long as each owned only 10% of every relevant market.⁶

Even though the Congresses that enacted the anti-merger laws did so having, among other aims, the goal of limiting the political power of corporations, today the federal antitrust agencies and courts interpret these laws only in terms of price and other

market share neared the ambiguous level required for a violation. 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. But these issues are very likely to be outweighed by the proposal’s benefits.

⁵ See Robert H. Lande & Sandeep Vaheesan, “Preventing The Curse of Bigness Through Conglomerate Merger Legislation,” (forthcoming in the ARIZONA STATE L. J. (2020)); available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463878 and at https://scholarworks.law.ubalt.edu/all_fac/1102/

⁶ *Id.*

economic effects within discrete markets. Under current merger practice, the enhanced political power of corporations is irrelevant.

However, from Senators Elizabeth Warren and Bernie Sanders on the left, to President Trump and many others on the right, there is a renewed interest in using antitrust to control corporate size, structure, and practices. There is popular desire both to prevent large mergers and to break up existing companies, such as Facebook, Amazon and Google, that achieved their size, power and dominant positions in part due to hundreds of acquisitions,⁷ some of which were extremely large.⁸

In light of recent developments within most of the political spectrum, an article I co-authored with Sandeep Vaheesan of the Open Markets Institute proposes model conglomerate merger legislation suitable for our era. ⁹ This legislation would block every merger – horizontal, vertical, or conglomerate - that exceeds clearly specified asset thresholds. We are proposing a law that would block every merger in which both firms have assets exceeding \$10 billion, unless they spin-off assets so that their increase in size falls below the figure. This threshold would block at most fifteen to twenty-five of the largest mergers each year.

This Article undertakes a legal, economic, and political analysis of conglomerate merger legislation. It demonstrates that our proposed legislation would: 1. Produce no significant losses in corporate efficiency; 2. Be clearer and more predictable than the existing anti-merger laws and thus would enhance the rule of law; and 3. Help prevent significant increases in corporate political power and other forms of non-economic power caused by the largest mergers.

3. Whether the institutional structure of antitrust enforcement – including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law – is adequate to promote the robust enforcement of the antitrust laws.

⁷ “In total, Facebook managed to string together 67 unchallenged acquisitions, which seems impressive, unless you consider that Amazon undertook 91 and Google got away with 214 (a few of which were conditioned).” TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 123 (Columbia Global Reports 2018).

⁸ For example, Microsoft purchased LinkedIn for \$26.2 billion and Skype for \$8.5 billion; Facebook purchased WhatsApp for \$19 billion; and Amazon purchased Whole Foods for \$13.7 billion. These companies also acquired a number of other companies for more than \$1 billion each. *See* Lande & Vaheesan, *supra* note 5.

⁹ *See* Lande & Vaheesan, *supra* note 5.

There are many additional ways in which the antitrust laws and their enforcement could be improved significantly. Here are 7 of the most important:

A. Legislatively resurrect the Supreme Court's *Philadelphia National Bank* anti-merger presumption.

In 1963 the Supreme Court held that mergers producing a firm with an undue share of a moderately or highly concentrated relevant market "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.... [and] we are clear that 30% presents that threat."¹⁰ Unfortunately, this presumption has faded almost completely over time, and is now all-but ignored by the enforcers and the courts.¹¹

Legislation should force the enforcers and courts to return to the original formulation of this doctrine. It should create a presumption that mergers to a total of more than 30% of a market should be presumed illegal, and that this presumption could be overcome only by "clear and convincing evidence" clearly showing that the merger will not be anticompetitive, and also that any efficiencies produced by the merger will be passed to consumers. It is noteworthy that this presumption originally was drafted by a then-Supreme Court law clerk, Richard Posner, who still believes it is desirable.¹²

B. Forbid common stock ownership of competing firms above specified de minimus limits.

Professor Einer Elhauge and others have shown that a handful of extremely large institutional investors in total own large and perhaps controlling amounts of the stock of a large number of competing corporations, including those in the airline industry.¹³ This common stock ownership distorts these companies' competitive incentives in a large number ways, and easily can result in higher prices for consumers.

It is, however, uncertain whether this type of common stock ownership violates any existing antitrust law.¹⁴ New legislation could clarify this by preventing the same

¹⁰ See *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

¹¹ See Peter Carstensen & Robert H. Lande, "The Merger Incipency Doctrine and the Importance of 'Redundant' Competitors," 2018 WISCONSIN L. REV. 783 (2018).

¹² See *Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 216 (2015).

¹³ See Einer Elhauge, *Horizontal Shareholding*, 100 HARV. L. REV. 1267 (2016).

¹⁴ For a more complete discussion, see *id.*

stockholders from owning clearly specified and significant amounts of the stock of competing companies. The law could contain exceptions to allow the same person to own small amounts of stock in competing corporations. These exceptions could be patterned after the current law that forbids the same individual from being an officer or director of competing firms, but includes a number of de minimus exceptions for overlaps of less than \$34 million (a figure the FTC revises annually), or 2-4% of sales, etc.¹⁵

C. Allow indirect purchaser consumers to sue for damages under the federal antitrust laws.

Under the Supreme Court's *Illinois Brick* decision the federal antitrust laws only permit direct purchasers to sue for damages.¹⁶ Because of this case, consumers who are indirect purchasers, and quite often are the victims that ultimately pay a cartel's or monopoly's overcharges, have no standing to sue for damages.

Some states' antitrust laws do, however, allow indirect purchasers to sue.¹⁷ Even in these states however, the courts never allow the total of direct and indirect damages to exceed treble damages. Although defendants claim it could theoretically be possible for this to happen, it has never occurred.¹⁸ By far the more common result is that the cartel or monopoly pays much less than single damages in a settlement, and the consumer-end user victims, who absorb much or all of the overcharges, receive little or nothing in damages.¹⁹ This could be changed by federal legislation that would also give standing to purchasers who are end users of the cartelized or monopolized products to sue for damages.²⁰

¹⁵ See Clayton Act., Section 8 (1990). It contains a number of exceptions. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on changes in the Gross National Product.

¹⁶ *Illinois Brick Co. v. Illinois*, 431 U. S. 720 (1977).

¹⁷ For a discussion see Robert H. Lande, "New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations," 61 ALABAMA L. REV. 447 (2010).

¹⁸ *Id.* Instead courts often bring direct and indirect purchasers together and allocate the damages between them.

¹⁹ See John M. Connor & Robert H. Lande, "Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages," 100 IOWA L. REV. 1997 (2015) (victims of only 14 of the 71 studied cartels received single damages or more; the median average settlement was 37% of single damages).

²⁰ See Einer Elhauge, Horizontal Shareholding, 100 HARV. L. REV. 1267 (2016).

D. Award automatic prejudgment interest to successful victims of antitrust violations.

Violations of the antitrust laws give rise to corporate and individual penalties, and are supposed to result in victorious private plaintiffs receiving treble damages and attorneys' fees. Yet, these cases usually take many years to litigate, but these penalties do not include prejudgment interest.²¹

Legislation adding prejudgment interest to both criminal and civil violations would increase their effective size significantly, especially for durable cartels and for defendants that use delaying tactics during plea bargaining or litigation.²² This change would be considered reasonable and intuitively sound by many people from all parts of the political system.

E. Double the U.S. Sentencing Commission presumption that cartels raise prices by 10%.

Cartel fines long have been calculated on the basis of a formula promulgated by the U.S. Sentencing Commission in 1987. The lynchpin of this formula is its estimate "that the average gain from price-fixing is 10 percent of the selling price."²³ However, the median average cartel overcharge over the last 20 years has been more than 22%, and the mean overcharge has been 49%.²⁴ The U.S. Sentencing Commission should double its current presumption that cartels raise prices by an average of 10%. This would increase criminal fines substantially.

F. Forbid convicted price fixers from returning to the same industry after prison.

²¹ For an analysis of the empirical significance of the absence of prejudgment interest in antitrust and its effects on effective sanctions levels *see* Robert H. Lande, "Are Antitrust 'Treble' Damages Really Single Damages, 54 OHIO ST. L. J. 115, 130-36 (1993). See also Connor & Lande, *supra* note 18, which showed that victims of only 14 of the 71 studied cartels received single damages or more; the median average settlement was 37% of single damages.

²² *See* Lande, *id.* at 130-36.

²³ *See* John M. Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime Pays," 34 CARDOZO L. REV. 428, 435-47 (2012).

²⁴ *Id.* at 455-57. The mean is much larger than the median because some cartels raised prices substantially.

As Judge Douglas Ginsburg and others have recommended, “as part of its plea agreements with corporations, the DOJ should insist that the corporate defendant agree not to hire or re-hire anyone who has been convicted of price-fixing. These bans should remain in effect for a substantial period – say, five years after the employee gets out of prison.... the Department [also] should insist that corporations not pay the fines of their convicted employees, either directly or indirectly, or compensate them for serving time.”²⁵

G. Enact antitrust whistleblower legislation.

The United States could implement a whistleblower reward or bounty system for individuals who turn in cartels, and perhaps even for corporations who do this. This would be similar to legislation in the securities area. As former Republican FTC Chair William Kovacic and others have concluded, new bounty or reward proposals are likely to enhance cartel detection and to destabilize cartels even more than the current leniency and amnesty programs.²⁶

These bounties could be introduced gradually, and initially could be limited to individuals. But if necessary, a bounty might be awarded to corporations that turn in cartels, even if they had once been a member of the cartel. Perhaps amnesty recipients could be given 10% of other cartel participants’ fines, and if 10% is insufficient, this figure could be increased.

Please do not hesitate to contact me, at rlande@ubalt.edu or at 301-213-4539 if I can provide you with any additional information concerning any of these topics.

Sincerely yours,

Robert H. Lande
Venable Professor of Law
U. Baltimore School of Law

²⁵ See Albert Foer, Douglas H. Ginsburg, Robert H. Lande and Joshua Wright, DOJ Has the Power to Crush Price Fixers: Column, USA TODAY WEEKEND, May 29-31, 2015, Page 11A., available at [file:///C:/Users/Bob/Downloads/SSRN-id2616775%20\(3\).pdf](file:///C:/Users/Bob/Downloads/SSRN-id2616775%20(3).pdf)

²⁶ See William E. Kovacic, Private Participation in the Enforcement of Public Competition Laws, in 2 CURRENT COMPETITION LAW 167, 173–75 (Mads Andenas et al. eds., 2004).

APPENDIX: The Sherman Act Is A No-Fault Monopolization Statute: A Textualist Demonstration

Robert H. Lande¹ and Richard O. Zerbez
Draft of April 16, 2020

ABSTRACT

Section 2 of the Sherman Act was designed 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, a form of statutory interpretation vigorously championed by Justice Scalia, of the language in Section 2. 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 through anticompetitive conduct. A textualist analysis therefore demonstrates that Section 2 was designed to impose sanctions on all monopolies and attempts to monopolize.

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

This article then briefly analyzes the practical economic implications likely to follow from adopting a “no-fault” approach to monopolization law. The overall economic effects will be shown to be uncertain, and to depend upon empirical issues whose net effect is speculative or ambiguous. They nevertheless provide some support

¹ Venable Professor of Law, University of Baltimore School of Law. The authors thank Neil Averitt, John Bessler, Peter Carstensen, Einer Elhague, Albert Foer, Warren Grimes, Herbert Hovenkamp, John B. Kirkwood, William Kovacic, James May, Alan J. Meese, Randy Stutz, Sandeep Vaheesan, Marc Winerman, participants at the University of Pennsylvania Oct. 11, 2019 symposium on “The Post-Chicago Antitrust Revolution”, and colleagues on the Faculty of the University of Baltimore School of Law, for valuable suggestions. All of the opinions expressed and mistakes made are solely those of the authors. The authors also thank Beatrice Bremer, Cassandra Brumback, Michael Hornzell, Nicholas Jordan and Harvey Morrell for excellent research assistance.

² Daniel J. Evans Distinguished Professor Emeritus, The Evans School, University of Washington; Adjunct Professor Emeritus, The University of Washington Law School.

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

The new standard would admittedly 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. It could 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.

There are also, however, important benefits from no-fault that should outweigh its downsides. Imposing sanctions on all monopolies could improve economic welfare in many ways. It 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 the time and cost of Section 2 litigation. And it should tend to decrease income inequality.

In recent years there have been many calls, from very different parts of the political spectrum, for imposing sanctions on, and even breaking up, monopolies without inquiring whether they 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 the relevant questions. Rather, its goal is to re-ignite 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 the textualist conclusion also constitutes a reasonable policy option.

I. Introduction

Section 2 of the Sherman Act imposes sanctions on all monopolies and attempts to monopolize regardless whether the firm engaged in anticompetitive conduct.³ To demonstrate this the article will undertake the first-ever textualist analysis, a form of statutory interpretation vigorously championed by Justice Scalia, of the language in Section 2.⁴ This analysis will demonstrate that when the Sherman

³ See 15 U.S.C. § 2 (1890).

⁴ See *id.* Section 2 of the Sherman Act makes 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..." *Id.*

Act was passed the word “monopolize” simply meant that a firm had acquired a monopoly.⁵ It was not limited to monopolies acquired through anticompetitive conduct.⁶ A textualist analysis therefore demonstrates that Section 2 imposes sanctions on all monopolies and attempts to monopolize, with no exceptions.⁷ Under a textualist approach contrary case law must be overturned.⁸

Recent events have transformed this into a timely antitrust topic.⁹ Prominent politicians on both the left¹⁰ and right¹¹ have called, not just for an investigation into whether important alleged monopolies, including Facebook, Amazon, Apple, and Google, have engaged in anticompetitive conduct. They’ve simply called for imposing sanctions on these firms or even breaking them up.¹²

⁵ See *infra* Section IV(A).

⁶ See *id.*

⁷ *Id.* A textualist analysis would not imply or create unstated exceptions. Since Section 2 of the Sherman Act contains no explicit exception for a monopoly secured without proof of anticompetitive conduct, none should be implied or created. See the discussion *infra* at Section IV(C) and note 20.

⁸ See the discussion *infra* at Section V(B).

⁹ See *infra* Section VI.

¹⁰ For example, Senator Warren recently said,” “We need to enforce our antitrust laws, break up these giant companies that are dominating *big tech*, *big pharma*, *big oil*, all of them....” <https://deadline.com/2019/10/democratic-debate-facebook-elizabeth-warren-1202761256/> See also the discussion *infra* at Section VI.

¹¹ “Astonishingly, the sentiment is bipartisan. 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.” See <https://finance.yahoo.com/news/amazon-facebook-google-antitrust-backlash-152518336.html> For the views of President Trump and other conservatives see *infra* at Section VI.

¹² See the views of Senators Warren and Sanders discussed *infra* at Section VI.

This article will re-examine the appropriateness of the current legal standards for what often is called “no-fault monopolization”.¹³ It will demonstrate that Justice Scalia’s 2004 opinion in *Trinko*,¹⁴ which clarified relevant case law and emphatically held that fault is required for a Section 2 violation,¹⁵ was wrongly decided.

This article will demonstrate this by employing the textualist method of statutory analysis.¹⁶ As background and by contrast, this article in Section II will first engage in a traditional or “purposivist” analysis of Section 2, relying on the law’s legislative history.

As Section III will explain, however, a textualist analysis instead determines the meaning of a law by analyzing the meaning of 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.¹⁷ Most crucially, textualism ignores the legislative debates and committee reports that are central to a traditional approach to statutory analysis.¹⁸ 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.¹⁹

¹³ See Marina Lau, *infra* at Section VI for the history of this term. See also *Alfred F. Dougherty, Jr.; John B. Kirkwood; and James D. Hurwitz*, Elimination of the Conduct Requirement in Government Monopolization Cases, 37 Washington & Lee L. Rev. 83 (1980).

¹⁴ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S.Ct. 872, 878–79 (2004).

¹⁵ For an analysis of prior Supreme Court opinions that were less clear, see discussion *infra* Section V (A). *Trinko* removed any possible ambiguity or doubts over whether anticompetitive conduct was required for a violation. *Trinko*, 540 U.S. at 407, 124 S.Ct. at 878–79.

¹⁶ For an analysis of the leading methods of statutory analysis see generally Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205.

¹⁷ See *infra* Section III.

¹⁸ See *infra* Section II.

¹⁹ See *infra* Section IV (C). Scalia wrote: “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.” *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 579 (1990). “Yeah. I

Textualism long was advocated by Justice Scalia (with great success because, as Justice Kagan noted, even after his departure, “we are a generally, fairly textualist court”).²⁰ Nevertheless, neither Justice Scalia nor anyone else has ever undertaken a textualist analysis of Section 2 of the Sherman Act to determine whether it requires anticompetitive conduct.²¹

This article undertakes this task, in Section IV. This will demonstrate that the Sherman Act was intended by Congress to impose sanctions on all monopolies and attempts to monopolize.

Section V will then discuss Supreme Court Sherman Act jurisprudence and other cases where the Supreme Court dramatically re-interpreted statutes after a long period. It argues that, despite current case law, precedent allows the Court to re-interpret the Sherman Act so that it imposes sanctions on all monopolies and attempts to monopolize.

Section VI will briefly discuss a half century of evolving economic thinking about the costs and benefits of this issue. 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. It could enable competitors to file baseless lawsuits, and the transaction costs involved at the remedy stage could be significant. It also could lead to special remedy issues relating to natural and patent monopolies.²²

On the other hand, no-fault could improve economic welfare in many other ways. It should increase innovation and international competitiveness. It should prevent the allocative inefficiency effects of monopoly pricing and the form of

mean, that-- the law is a law. It's not up to the judges to make exceptions to the law because-- it seems to me that-- compassion--that's-- that's not the judge's job.” Newsmaker Justice Antonin Scalia Interview, *supra* note 34 at 01:00:28:00 (September 17, 2012) 01:00:28:00

http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/Scalia_Reuters_transcript.pdf.

²⁰ See <https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer>; See also Max Alderman & Duncan Pickard, *Justice Scalia’s Heir Apparent?*, STANFORD. L. REV. ONLINE (2017), <https://www.stanfordlawreview.org/online/spotlight-textualism-originalism/>.

²¹ See *infra* Section III(C).

²² See *infra* Section VI (C).

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”, and also the waste that arises as firms attain and protect their monopolies. It should reduce the time and costs of Section 2 litigation. And it will decrease income inequality.²³

The overall economic effects of no-fault depend upon empirical issues whose net effect is speculative or ambiguous. Nevertheless, all told economic analysis offers some support for the no-fault position.²⁴

Many of these economic uncertainties 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 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.

Section VII will discuss the effects this article’s conclusions should have on case outcomes under the “monopolization and “attempt to monopolize” portions of Section 2 of the Sherman Act. It will also briefly discuss why, *a fortiori*, no-fault monopolization should constitute a violation of Section 5 of the FTC Act.

The concluding section of this article calls for a renewed debate over the legal and economic issues likely to arise from a textualist analysis of Section 2 and its no-fault conclusion. And to demonstrate that the article’s textualist result also constitutes a reasonable policy option that should be implemented.

II. A Traditional or Purposivist Legislative History Approach: Using Congressional Debates and Committee Reports²⁵

²³ See *infra* Section VI (B).

²⁴ See *infra* Section VI (F).

²⁵ Author Lande is not a textualist. He believes that 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). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065413 [hereinafter “Wealth Transfers”]. However, the only relevant question is whether a majority of the Supreme Court believes it is proper to undertake a textualist analysis of Section 2.

To better explain and contrast this article's textualist analysis, this section will undertake a traditional "purposivist"²⁶ legislative history analysis that examines relevant legislative debates.²⁷ As this will demonstrate, however, this produces an inconclusive result.²⁸

There appears to be only one reference in the Sherman Act legislative debates or committee reports relevant to the question of whether Section 2 requires anticompetitive conduct.²⁹ It is part of an exchange that took place at the very end of the debates. Senator Kenna asked:

Is it intended by the committee, as the section seems to indicate, that if an individual... by his own skill and energy, by the propriety of his conduct generally, 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 the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so 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? ³⁰

²⁶ A traditional analysis of the legislative history of a statute, one that relied upon 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 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2023527; See Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 18 (Thompson/West 2012) ("So-called purposivism, which has been called 'the basic judicial approach these days... .'").

²⁷ 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." Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 n.2 (1966). For a conventional legislative history analysis that reaches a very different result from Bork, see Lande, *Wealth Transfers*, *supra* note 21.

²⁸ See *infra* Section II.

²⁹ Author Lande found only a single reference, which is analyzed in this Section. Nor have other conventional legislative history analyses revealed any other exchanges that concern the no-fault issue. See, e.g. Bork, *supra* note 27.

³⁰ See 21 Cong. Rec. 3151 (1890) (statement of Sen. Kenna).

Senator 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.³¹

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 Hoar then gave his answer:

[I]n the case put by Senator Kenna, if] . . . a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because 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 other persons engaged in the same business.³²

Senator Edmunds then provided the final answer that was given 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." ³³

³¹ See *id.* at 3151–52 (statement of Sen. Edmunds).

³² *Id.* at 3152 (statement of Sen. Hoar).

³³ *Id.* at 3153 (statement of Sen. Edmunds).

The Sherman Act, making it illegal to "monopolize" or "attempt to monopolize" was then passed by the Senate.³⁴

It is difficult to reconcile the statements of Senators Edmunds and Hoar. They appear to have been defining the markets differently.³⁵ Senator Edmunds was discussing a large cattle sale to Mexico while Senator Hoar was discussing all of the cattle in the U.S.³⁶

Alternatively, they 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.³⁷ Senator Edmunds, however, defined "to monopolize" as merely "[t]o engross or obtain by any means . . ."³⁸ Edmunds believed that "if one person . . . did it, it was just as offensive and injurious to the public interest as if two had combined to do it."³⁹ Edmunds clearly condemned every monopoly, although by his first response he did not consider the hypothetical situation given to describe a monopoly.⁴⁰

These contradictory statements should be construed as offsetting one another, and Edmunds statement shows the issue was considered but did not result in a change in statutory language.⁴¹ 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 was one of the main sponsors of the bill,⁴² his statements could be considered to carry slightly greater weight. So perhaps this dialogue should be considered as some support for the no-fault interpretation. Moreover, the fact that this discussion

³⁴ See *id.* at 3152.

³⁵ See statement of Senator Edmonds *supra* note 31; Statement from Senator Hoar *supra* note 32.

³⁶ See *id.*

³⁷ See *id.* at 3152 (statement of Sen. Hoar).

³⁸ See *id.* at 3151 (statement of Sen. Edmunds).

³⁹ *Id.*

⁴⁰ See *id.* at 3151.

⁴¹ See statement of Senator Edmonds *supra* note 31; Statement from Senator Hoar *supra* note 37.

⁴² See discussion in Bork, *supra* note 27.

took place at the very end of the Sherman Act debate also could very well mean that it embodied Congress' final view on the subject. So perhaps Senator Edmonds' 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 were less able to be corrected or opposed by Senator Sherman or other legislators, so perhaps they should be accorded less weight.

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

III. "Textualist" Analysis⁴³

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", originalist, fair meaning or plain meaning approach.⁴⁴ He often has been joined in this methodology by other Supreme Court Justices,⁴⁵ and Justice Gorsuch recently told the Federalist Society he has become Scalia's proud successor:

Tonight, I can report that 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.⁴⁶

⁴³ 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).

⁴⁴ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997, Princeton University Press) (hereafter "Interpretation"); and Scalia & Garner, *supra* note 22, at 23. Justice Scalia makes an important distinction: "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."

⁴⁵ For examples see Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 *VA. L. REV.* 157 (2018).

⁴⁶ See Elizabeth Slattery & Tiffany Bates, *Neil Gorsuch Just Finished Year 1 on the Supreme Court. Here's How He's Making His Mark*, THE HERITAGE FOUNDATION, (Apr.

Justice Scalia expressly rejected the use of such traditional legislative history sources as the debates in Congress and the reports of congressional committees.⁴⁷ 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.⁴⁸

He explained further:

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. What-- one of-- one of the major-- functions of-- of-- of hot shot Washington lawyers is drafting legislative history. You send it up to the hill, 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-- it's crazy.⁴⁹

11, 2018), <https://www.heritage.org/courts/commentary/neil-gorsuch-just-finished-year-1-the-supreme-court-heres-how-hes-making-his-mark>.

⁴⁷ "To say that I used legislative history is simply, to put it bluntly, a lie." Debra Cassens Weiss, *Scalia Weighs In on Posner's Controversial Book Review, Calls Posner's Assertion 'a Lie'*, ABA JOURNAL, 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 [hereinafter "Interview"]

⁴⁸ Scalia, Interpretation, *infra* note 44, at 36. "[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 that the lawgiver promulgated.... It is the *law* that governs, not the intent of the lawgiver." *Id.* at 17. "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 Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means." *Id.* at 22-23 (footnotes omitted).

⁴⁹ *Newsmaker Justice Antonin Scalia and Professor Bryan A. Garner Interview*, THOMPSON REUTERS (September 17, 2012), http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/Scalia_Reuters_transcript.pdf

Instead, Justice Scalia attempted to ascertain the "plain meaning" of the text of statutes by making extensive use of such material as roughly contemporaneous dictionaries and legal decisions to define key terms.⁵⁰ Justice Scalia also examines 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.⁵¹

If Justice Scalia's textualist analysis were applied to the Sherman Act, neither its Congressional debates nor the Committee Reports would be analyzed.⁵² A textualist analysis would, by contrast, undertake a number of inquiries to ascertain what the statute "originally" and "plainly" meant.⁵³ 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 dictionaries⁵⁴) 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.⁵⁵

2. English common law pre-1890 cases should be examined to determine whether the federal Antitrust statutes borrowed key terms from the common law and, if so, what they meant in common law decisions.⁵⁶ We could also make

⁵⁰ See Scalia & Garner *supra* note 26.

⁵¹ Scalia distinguishes 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.*"⁵¹ (emphasis added) See Interview, *supra* note 47.

⁵² See Scalia & Garner, *supra* note 26, at 369 refer to: "The false notion that committee reports and floor speeches are worthwhile aids in statutory interpretation."

⁵³ *Id.*

⁵⁴ Immediately after Scalia & Garner introduce the "fair reading" method, on page 33, they cite three sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, 4 dictionary definitions of key terms. *Id.* at 37.

⁵⁵ *Id.* at 78: "Words must be given the meaning they had when the text was adopted." See generally *id.*, Appendix A, A Note on the Use of Dictionaries, pages 415–24.

⁵⁶ "53. Cannon of Imputed Common-Law Meaning: A statute that uses a common-law term, without defining it, adopts its common-law meaning." Scalia & Garner, *supra* note

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.⁵⁷

3. Another inquiry would be into how federal antitrust cases from the 1890s used key terms to help determine "what people thought it meant immediately after its enactment."⁵⁸

4. A textualist analysis also would consider the "history of the times".⁵⁹ It therefore would use the history of the period producing the antitrust laws to help

26, at 320. *See* note 69, *infra*, where Justice Scalia cited, with apparent approval, a pre-Sherman Act common law antitrust case.

⁵⁷ 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: "Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which 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." *Id.* at 584. Scalia also was guided by analogous state statutes: "Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 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.

⁵⁸ In *Heller*, 554 U.S. at 605, Justice Scalia used statutory interpretations of the Second Amendment from the period shortly after it was adopted 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.... the 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 support an individual right unconnected to militia service."

⁵⁹ Scalia & Garner, *supra* note 26, at 399 discuss "how the history of gun use in the United States helps interpret a gun control statute. *Id.* at 400–02. 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

ascertain what Congress meant when it used terms like "monopolize" or "attempt to monopolize" in the Sherman Act.

5. Finally, a textualist analysis would not imply any exemptions that are not plainly evident in the words of the statutes.⁶⁰ 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.⁶¹ The only very narrow exception would be one provided by the "absurdity doctrine" which Justice Scalia would save for technical or drafting errors.⁶²

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 24, at 29–30 (footnote omitted)

⁶⁰ See Section III (C) *infra* and note 20 *supra*.

⁶¹ Scalia believes no exception should be inferred to achieve a greater purpose because: "But secondly, even 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." The Hon. Antonin Scalia & John F. Manning, *A Dialogue on Statutory Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (Nov. 2012).

⁶² "Justice Scalia endorsed the canon, or at least what he called a "narrow version" of it [the absurdity doctrine]. According to the Justice, two conditions must coincide 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." (citations omitted) See Alan J. Meese, *Justice Scalia and Sherman Act Textualism* 92 NOTRE DAME L. REV. 2036 (2017).

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 5 antitrust opinions,⁶³ 3 concurrences⁶⁴ and 3 dissenting⁶⁵ opinions in Antitrust cases. Most do not even come close to undertaking a textualist analysis of the no-fault issue.⁶⁶ Nevertheless, some are instructive illustrations of textualist analysis.

For example, in *Hartford Fire Insurance Co. v. California*⁶⁷ 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 exception to the Antitrust laws:

Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present cases requires precise definition of the word 'boycott.' It is a

⁶³ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 133 S. Ct. 2304 (2013); *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426 (2013); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872 (2004); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 111 S.Ct. 1344 (1991); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988).

⁶⁴ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 176, 124 S. Ct. 2359, 2373 (2004); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169 (1992); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 S. Ct. 2535 (1990).

⁶⁵ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (J. Scalia, dissenting); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891 (1993) (Justice Scalia delivered the opinion of the Court with respect to Part I and delivered a dissenting opinion with respect to Part II); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 112 S. Ct. 2072 (1992) (J. Scalia, dissenting); *Summit Health v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842 (1991) (J. Scalia, dissenting).

⁶⁶ Most Scalia decisions did not even come close to undertaking a relevant textualist analysis. *See* *Omni Outdoor Advert., Inc.*, 499 U.S. 365, 111 S.Ct. 1344 (1991); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359 (2004); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169 (1992); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 112 S. Ct. 2072 (1992); *Summit Health, v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842 (1991).

⁶⁷ *Hartford Fire Ins. Co. v. California*, 509 U.S. 763, 800 (1993) (writing for the majority in part and dissenting in part).

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.'⁶⁸

Justice Scalia then used this dictionary definition to resolve a key legal dispute.⁶⁹ 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 *infra*.

The Scalia opinion that would have been most likely to have undertaken the relevant textualist analysis was *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*⁷⁰ because the case involved the core meaning of Section 2 of the Sherman Act. Unfortunately, Justice Scalia's opinion did not undertake a textualist analysis of the overall meaning of Section 2. He instead simply cited precedent – the *Grinnell* case – for his assertion that the Sherman Act contains an exception for a monopolist that gains its monopoly through historical accident or superior efficiency.⁷¹

Justice Scalia extensively analyzed the term "restraint of trade" in *Business*

⁶⁸ *Id.* at 800–01 (quoting 2 OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989)).

⁶⁹ “See WEBSTER'S NEW INTERNATIONAL DICTIONARY 321 (2d ed. 1950) (defining “boycott” as “to withhold, wholly or in part, social or business intercourse from, as an expression of disapproval or means of coercion” (emphasis added). “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.

⁷⁰ See *Verizon Commc'ns Inc.*, *supra* note 10, 540 U.S. at 398.

⁷¹ *Id.* Justice Scalia stated: “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 §2 of the Sherman Act, 15 U.S.C. § 2 which declares that a firm shall not “monopolize” or “attempt to monopolize.” *Id.* 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.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

Electronics Corp. v. Sharp Electronics Corp.⁷² using a common-law based textualist analysis, 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.⁷³ His opinion considered the common law antecedents of modern Antitrust law but did not involve the no fault issue.⁷⁴

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*,⁷⁵ a Robinson-Patman Act 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 are . . . sold or delivered. There is no exception for "reasonable" Functional discounts that do not meet this requirement.⁷⁶

This textualist discussion is noteworthy because it affirms the "fair 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).

⁷² *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988).

⁷³ "In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted 'restraint of trade' at the time the Sherman Act was adopted...." 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...." *Id.* at 733.

Justice Scalia also cited, with apparent approval, a pre-Sherman Act common law case: "The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. *See Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 409, 9 S.Ct. 553, 557 (1889)." *Id.* at 731–32.

⁷⁴ "Of course the 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...." *Id.* at 732–33.

⁷⁵ *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

⁷⁶ *Id.* at 579.

Justice Gorsuch has written one Supreme Court opinion (a dissent in *Apple Inc. v. Pepper*⁷⁷) and three Circuit Court opinions that substantively address § 2 of the Sherman Act.⁷⁸ None perform a textualist analysis of the no-fault issue. The majority opinion in *Apple Inc.* 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.⁷⁹

IV. A Textualist Analysis of Section 2 Shows That It Does Not Require Fault

A. A Textualist Analysis of "Monopolize"

The use of Justice Scalia's textualist analysis of the Sherman Act's approach to the no-fault issue leads to a startling result. Section 2 should be interpreted to prohibit all monopolies, not just monopolies acquired by anticompetitive conduct. The Sherman Act should not contain an exception for efficient monopolists or for firms that achieved their monopoly by historical accident. Nor should it require that the offending monopoly have monopoly power.

Section 2 of the Sherman Act prohibits anyone who shall "monopolize or attempt to monopolize..."⁸⁰ The statute never defines "monopolize",⁸¹ and uses it in place of the more straightforward term "monopoly". It is difficult to know whether "monopolize" was intended to mean the same thing as "monopoly", was meant to be a broader or narrower term, or had a different meaning.

The key question is whether the statute's prohibition against firms that "monopolize" or "attempt to monopolize" was intended to encompass only the

⁷⁷ *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 203 L. Ed. 2d 802 (2019) (Gorsuch, J., dissenting).

⁷⁸ *Kay Elec. Co-op. v. City of Newkirk, Okla.*, 647 F.3d 1039 (10th Cir. 2011); *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216 (10th Cir. 2009); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013).

⁷⁹ *Apple Inc.*, 139 S. Ct. at 1525–26.

⁸⁰ *See* 15 U.S.C. 2 (1890).

⁸¹ Indeed, it was rare for pre-Sherman Act restraint of trade cases to use the term "monopolize." For an exception see *Leslie v. Lorillard* 1888 65 Sickels 519110 N.Y. 51918 N.E. 363 ("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, they become a public menace.").

subset of conduct that created a monopoly through anticompetitive means (the current legal requirement for a Section 2 violation).⁸² 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 attempting to acquire a monopoly. The statute contains no exception for a monopoly acquired through superior efficiency or historical accident.⁸³

1. Roughly Contemporaneous Dictionaries

As noted earlier, Justice Scalia was especially interested in the definitions of key words in contemporary dictionaries.⁸⁴ Serendipitously, a contemporary dictionary was cited during the Sherman Act's legislative debates, just before the final vote.⁸⁵ Senator Edmunds cited a dictionary to define the term "monopolize". Although normally a textualist approach would not care about anything uttered during a Congressional debate, Senator Edmund's remarks should be particularly significant to a textualist because he said that Congress should employ in the Sherman Act the meaning of "monopolize" as it was used in a contemporary Webster's dictionary:

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 the read from Webster's dictionary the definition of the verb "to monopolize": 1. To purchase or obtain position of the whole of, as a commodity or goods in the market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.... 2. To engross or obtain by any means the exclusive rights of, especially the right of trading to any place, or with any country or district....⁸⁶

⁸² United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

⁸³ See 15 U.S.C. 2 (1890).

⁸⁴ As noted earlier, immediately after Scalia & Garner introduce the "fair reading" method, on page 33, they cite 3 sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, 4 dictionary definitions of key terms. *Id.* at 37. They also have an Appendix titled, "A Note on the Use of Dictionaries", starting on page 415.

⁸⁵ See 21 Cong. Rec. 3153 (1890).

⁸⁶ *Id.* This is part of the exchange that took place at the very end of the Sherman Act debates which was analyzed in Section II *supra*.

This shows that "monopolize" simply meant to acquire a monopoly.⁸⁷ The definition was not restricted to acquisitions of monopoly status through anticompetitive conduct.⁸⁸ It was, moreover, essentially the same as the definitions in 1898, 1828 and 1913 editions of Webster's Dictionary that are available online.⁸⁹

These definitions are essentially identical to that in the Oxford English Dictionary of 1908:

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"To obtain exclusive possession or control of; to get or keep entirely to oneself...⁹⁰

⁸⁷ See *id.*

⁸⁸ It is, however, possible that the "with the view to" language could excuse an accidental monopoly, if there could be such a thing.

⁸⁹ "MONOPOLIZER, noun 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." *Monopoly*, WEBSTER'S DICTIONARY 540 (1898)..... To have or get a monopoly of."

<https://ia802602.us.archive.org/1/items/websterscollegia00web/websterscollegia00web.pdf>

"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 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 sold 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" See 2 Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 727 (1828)..

Mo*nop"o*lize ... [From Monopoly.] To 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.

<https://www.websters1913.com/words/Monopolize>

⁹⁰ *Monopolize*, OXFORD ENGLISH DICTIONARY 624 (1st ed. 1908).

<https://public.oed.com/history/oed-editions/#first-edition>

These definitions also are in relevant part identical to the definitions in five other roughly contemporaneous dictionaries.⁹¹ In sum, all 10 roughly contemporaneously dictionaries define “monopolize” as simply to mean to gain a monopoly. None restricts the definition to a monopoly gained by anticompetitive conduct.

2. Roughly Contemporaneous Legal Treatises

The only available contemporary legal treatises that define “monopolize” contain virtually the same definition of the term. This can be seen in Green’s legal treatise from 1889, which itself cited Webster:

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 having the power to command the prices. 2. To engross or obtain by any means the exclusive right of trading to any place, and

⁹¹ See John Craig, *Monopolize*, UNIVERSAL ENGLISH DICTIONARY, COMPRISING THE ETYMOLOGY, DEFINITION, AND PRONOUNCIATION OF ALL KNOWN WORDS IN THE LANGUAGE, AS WELL AS TECHNIAL TERMS USED IN ART, SCIENCE, LITERATURE, COMMERCE, AND LAW 174 (Routledge and Sons, eds., 1869) (“MONOPOLIZE, mo-nop’o-lize, v. u. To engross so as to have the sole power, or exclusive privilege of vending any commodity. MONOPOLIZER, mo-nop’o-li-zur, One who engrosses a commodity by purchasing the entire article, with a view to enhance the price.”)

See Nashua, N. H.: C. C. Parker., *Monopolize*, THE NEW EXCELSIOR DICTIONARY 183. (Nashua, N. H.: C. C. Parker, eds., 1889) (“Monopolize, (mou-op’ol-lg) v. to engross the whole).

See Hurst, Thomas D., *Monopolize*, THE AMERICAN POPULAR DICTIONARY: CONTAINING EVERY USEFUL WORD TO BE FOUND IN THE ENGLISH LANGUAGE; WITH ITS TRUE MEANING, DERIVATION, SPELLING, AND PRONOUNCIATION. ALSO, A VAST AMOUNT OF ABSOLUTELY NECESSARY INFORMATION 196. (Hurst & co., eds., 1879) (“Monopolize (mo-nop’o-liz),v. to obtain or engross the whole.”)

Sullivan’s Dictionary of the English Language, APA Citation, Sullivan, R, *Monoplize*, A DICTIONARY OF THE ENGLISH LANGUAGE, FOR THE USE OF SCHOOLS, AND FOR GENERAL REFERENCE 179 (A. Thom & sons., eds., 1854) (“Monopolize, v. to engross all of a commodity or business into one’s own hands. Monop’olizer, s. a monopolist.”)

Johnson, S, *Monopolize*, A DICTIONARY OF THE ENGLISH LANGUAGE 247. (London: Longmans, Green, eds. 1882) (“Monopolize: Engross, so as to have the sole power or privilege of vending any commodity.”).

the sole power of vending any commodity or goods in a particular place or country.⁹²

See also the 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 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; " ⁹³

Other roughly contemporaneous legal dictionaries such as Black's Law Dictionary defined "monopoly" but not "monopolize."⁹⁴

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: "as a federal judge observed....[in 1892] the English common law on monopolies has for some years been drifting towards 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.'"⁹⁵ Moreover, the pre-Sherman Act common law antitrust cases

⁹² Sanford Moon Green, *Monopolize*, CRIME: NATURE, CAUSES, TREATMENT AND PREVENTION 309 (1889) (emphasis omitted); Ewell, Marshall D. 1 ESSENTIALS OF THE LAW 617 (1889).

⁹³ See John Bouvier, BOUVIER'S LAW DICTIONARY 826 (1897)(citing 78 Ind. 487; 68 N. Y. 558; A. & E. Encyc. See Trust).

⁹⁴ Black's Law Dictionary, 1st Edition from 1891, only has the term "monopoly": "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...." *Monopoly*, BLACK'S LAW DICTIONARY (1st ed. 1891). The 1856 edition of Bouvier's Law Dictionary, Revised 6th Edition (1856), also contains only "monopoly". Bouvier's Law Dictionary (6th ed. 1856), <http://www.dict.org/bin/Dict?Form=Dict2&Database=bouvier&Query=MONOPOLY>.

Alexander Burrills Jurisprudence of the United States (1867) also does not define the word "monopolize".

⁹⁵ *Id.* at 904, quoted from *Oliver v. Gilmore*, 52 Fed. 562, 566 (C.C.D. Mass 1892) (Putnam, J). These lower court cases came down on both sides of the no fault issue.

are of limited relevance because we found only one that used the term “monopolize” (it did so a manner consistent with a no-fault approach).⁹⁶ We also note that some common law cases stated that if entry was easy a firm could not be a “monopoly”⁹⁷ but others did not.⁹⁸

See Letwin at 901–14. For example, an 1891 District Court case, *American Biscuit & Mfg. Co. v. Klotz*, Circuit Court, E.D. Louisiana. January 8, 1891, 44 F. 721, 724–25, held that the concern of Section 2 was simply whether defendant held a monopoly: “[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 statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc....” *Id.* at 725. This court thus appeared to expressly reject the need for anticompetitive conduct. The opinion continued: “The offense is defined to.... ‘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.”

⁹⁶ *Leslie v. Lorillard* 1888 65 Sickels 519110 N.Y. 51918 N.E. 363 (“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, they become a public menace.”).

⁹⁷ For examples of cases requiring monopoly power see *Diamond Match Co. v. Roeber*, 106 N.Y. 473 (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* 1839 21 Wend. 157 (“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.”); *Watertown Thermometer Co. v. Pool* 1889 51 Hun 15720 N.Y.St.Rep. 592 (“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.”); *Attorney General v. Consolidated Gas Co. of New York* 1908, 124 A.D. 401108 N.Y.S. 823 (“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.”).

⁹⁸ For examples of cases that did not appear to require monopoly power see *Munn v. People of State of Illinois* 1876 94 U.S. 1134; *Angelica Jacket Co. v. Angelica* 1906

The Supreme Court decided six Sherman Act cases in the decade after the law went into effect.⁹⁹ The overriding lesson of these cases is that the opinions used the terms "monopolize" and "monopoly" interchangeably. Although none of the early cases explicitly said that Section 2 did not require anticompetitive conduct, by equating these two terms they implicitly support the no-fault approach. For example, U.S. v. E. C. Knight Co.¹⁰⁰ was concerned with a "monopoly" despite the statute's use of "monopolize", and implied that every monopoly that materially affected interstate commerce had been sanctioned by the Sherman Act:

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. ...in other words, when it becomes a practical monopoly to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community -- is subject to regulation by state legislative power.¹⁰¹

It also is noteworthy that E. C. Knight held that what we today would define as "monopoly power"¹⁰² (proof of the existence of barriers to new competition) was not needed:

In the view which we take of the case, we need not discuss whether.... aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved, or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries, after becoming stockholders of

121 Mo. App. 226, 98 S.W. 805; *Cravens v. Rodgers* 1890 101 Mo. 24714 S.W. 106; *Rafferty v. Buffalo City Gas Co.*, 37 A.D. 618, 56 N.Y.S. 288 (app. Div. 1899)

⁹⁹ See generally William Letwin, *The First Decade of The Sherman Act: Judicial Interpretation*, 68 YALE L. J. 900 (1959). Letwin includes *In Re Debs*, 158 U.S. 564 (1895) and gives the total as 7, but this case is actually about the prosecution's use of an alternative to a Sherman Act proceeding. *Id.* at 913–14.

¹⁰⁰ 156 U.S. 1, 115 S.Ct. 249 (1895).

¹⁰¹ *Id.* at 11. The Court continued on page 17: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

¹⁰² For the modern definition of "monopoly power," see *U.S. v. E.I. Du Pont De Nemours & co.*, 351 U.S. 377, 404 (1956), which defines monopoly power as the power to "control price or exclude competition."

the American Company, might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.¹⁰³

¹⁰³ *Id.* at 11. *See also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) (“Now the restraint thus imposed on themselves was only partial -- it did not cover the United States; there was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies.”) (citing E.C. Knight).

Significantly, the court characterized defendant as a “monopoly” that had “monopolized”¹⁰⁴ even though it only had 98% of the market.¹⁰⁵ 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.”¹⁰⁶ 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.¹⁰⁷

Most of the other early Supreme Court cases also appeared to use the terms “monopolize” and “monopoly” interchangeably. See *United States v. Trans-Missouri Freight Ass’n*,¹⁰⁸ *Addyston Pipe & Steel Co. v. United States*.¹⁰⁹ *Anderson v. United States*,¹¹⁰ The remaining early cases were silent on the issue. See ***United States v. Joint Traffic Association***¹¹¹ and *Hopkins v. United States*.¹¹² *U.S. v. Standard Oil* and the cases it cited seemed to use the term “monopoly” to even include markets where defendant did not quite have 100% of the market.¹¹³

¹⁰⁴ “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.... Again, 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.” *Id.* at 11.

¹⁰⁵ The court said that “Revere produced annually about two percent of the total amount of sugar refined.” *Id.* at 4.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.*

¹⁰⁸ *United States v. Trans-Missouri Freight Ass’n*, 160 U.S. 290, 299, 300, 301 (1897).

¹⁰⁹ *Addyston Pipe & Steel Co. v. United States* 175 U.S. 211, 237 (1899) (“But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies.”).

B. A Textualist Analysis of “Attempt” To Monopolize

We should analyze the word “attempt” as it was used in 1890 to gain understanding as to what Congress meant by the “attempt to monopolize” offense. However, no unexpected or counterintuitive result comes from this examination.¹¹⁴ For example the 1908 Oxford English Dictionary reads: ¹¹⁵

1. attempt... A putting forth of effort to accomplish what is uncertain or difficult; a trial, essay, endeavour; effort, enterprise, undertaking....
2. attempt, ...To endeavour, try, essay.... ¹¹⁶

An 1898 Webster’s Dictionary gives a similar definition:

At-tempt... 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. Syn. — See Try. At-tempt'. n. An essay, trial, or

¹¹⁰ *Anderson v. United States*, 171 U.S. 604 (1898) (“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.”).

¹¹¹ *United States v. Joint Traffic Association*, 171 U.S. 505, 509 (1898).

¹¹² *Hopkins v. United States*, 171 U.S. 578 (1898).

¹¹³ *See* *Standard Oil* and the cases it cited, note 162 *infra*. A pre-Sherman Act case, *Munn v. People of State of Illinois* 94 U.S. 1134 (1876), essentially equated monopoly and “virtual monopoly”: “something 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.”

¹¹⁴ *United States v. E. C. Knight Co.*, 156 U.S. 1, 17 (1895) (“Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked.”).

¹¹⁵ *Attempt*, OXFORD ENGLISH DICTIONARY ONLINE (2019), <https://www.oed.com/view/Entry/12765?rskey=WdNqpF&result=1&isAdvanced=false#eid> (accessed June 18, 2019).

¹¹⁶ *Id.* The original Volume M was first published in 1908. *See* <https://public.oed.com/history/oed-editions/>

endeavor; an undertaking ; an attack, or an effort to gain a point. Syn. — Attempt; endeavor; effort ; exertion; trial. At-tempt'¹¹⁷

So do the 1828 and 1913 editions of Webster.¹¹⁸ These definitions are essentially identical to its modern definition of “attempt”.¹¹⁹

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.”¹²⁰ 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.”¹²¹ none defined the magnitude or nature of the necessary acts with great

¹¹⁷ *Attempt*, WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1898) <https://ia802602.us.archive.org/1/items/websterscollegia00web/websterscollegia00web.pdf>.

¹¹⁸ *Attempt*, WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) <https://ia802602.us.archive.org/1/items/websterscollegia00web/websterscollegia00web.pdf> (“ATTEMPT.... to try; to strain, urge, stretch.] 1. To make an effort to effect some object; to make trial or experiment; to try; to endeavor; to use exertion for any purpose; as, to attempt to sing; to attempt a bold flight.”)

From a 1913 Webster’s Dictionary:” At*tempt", n. An 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....Syn. -- Attempt, 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.... At*tempt" (?; 215), v. t.... to try; to endeavor to do or perform (some action); to assay; as, to attempt to sing; to attempt a bold flight.... *Attempt*, WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1913).

¹¹⁹ *Attempt*, OXFORD ENGLISH DICTIONARY ONLINE (2019), <https://www.oed.com/view/Entry/12765?rskey=WdNqpF&result=1&isAdvanced=false#eid> (accessed June 18, 2019).

¹²⁰ JOEL PRENTISS BISHOP, BISHOP'S NEW CRIMINAL LAW 438–39 (8th ed., 1892).

¹²¹ *Id. See also* SEYMOUR F. HARRIS, PRINCIPLES OF CRIMINAL LAW 19 (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., 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

specificity 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....¹²²

It was clear, however, that acts constituting mere preparation or planning were insufficient.¹²³

THE CRIMINAL LAW (Crimes and Punishments) 88 (1877) (“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* 303 (1882) (“An attempt 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.”).

¹²² O. W. Holmes, Jr., “*The Common Law*,” 68-69 (1881). *See also* W.M. L. CLARK, *CLARK’S CRIMINAL LAW* 126 (2nd ed., 1894) (“An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission . . . The act must be such as would be proximately connected with the completed crime.”).

¹²³ *See* JOEL PRENTISS BISHOP, *COMMENTARIES OF THE CRIMINAL LAW* 401 (1877) (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, *CRIMES AND CRIMINAL PROCEDURE* 297, (2nd ed., 1904) (“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—BOOK OF DEFINITIONS* 5 (1828) (“Attempt: 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* 23 (1881) (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; and 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, *MAY’S CRIMINAL LAW* 12 (2d ed. 1893) (“An attempt is an act done in part execution of a design to commit a crime. There must be an intent that a crime

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.¹²⁴ It implies that Congress intended a meaning of "attempt to monopolize" far different from the current requirements of the offense. Although the meaning of a criminal "attempt" to violate a law has evolved since the common law formulations presented above,¹²⁵ a textualist approach to the "attempt to monopolize" prong of Section 2 would move it back towards the common law approach to the "attempt" doctrine.

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

These definitions of "monopolize" and "attempts to monopolize" include all monopolies, even those acquired by luck, historical accident, or superior efficiency.

shall be committed, and an act done, not in the full execution, but in pursuance, of the intent."); EMLIN MCCLAIN, *OUTLINES OF CRIMINAL LAW AND PROCEDURE. FOR THE USE OF STUDENTS*. 85 (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 (James Kay, et al. eds., 1846) (Defining a person guilty of attempt as "every 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.").

¹²⁴ In *Swift & Co. v. United States*, 196 U.S. 376, 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.**)

¹²⁵ The adoption of the Model Penal Code has changed the classic definition of attempt. See 2 WAYNE R. LAFAYE ET AL., *SUBSTANTIVE CRIMINAL LAW* 18, 36 (1986); 4 WHARTON'S *CRIMINAL LAW* 580 (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." See *id.* at 36; Model Penal Code § 5.01. The substantial step must be "strongly corroborative" of the defendant's criminal purpose. *Id.* at § 5.01(2). The statute enumerates several examples of a "substantial step," including "lying in wait" or "search[ing] for or following the contemplated victim of the crime" or "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission." *Id.*

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. v. Hasbrouck*, no exception should be read into a statute unless, of course, it is explicitly contained in the statute.¹²⁶ Moreover, one of the earliest Antitrust cases, *United States v. Trans-Missouri Freight Ass'n*, explicitly held that no exceptions to the Antitrust statutes should be implied:

In other words, we 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.... These considerations are, however, not for us. If the Act ought to read as contended for by defendants, Congress is the body to amend it, and not this Court, by a process of judicial legislation wholly unjustifiable.¹²⁷

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.

V. 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 2.¹²⁸ Scalia's majority opinion also contained much more praise for monopolies than had ever before appeared in a Supreme Court decision.¹²⁹ Moreover,

¹²⁶ "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." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 579 (1990).

¹²⁷ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897). *See also*: "no exception or limitation can be added without placing in the act that which has been omitted by congress." *Id.* at 328.

¹²⁸ *See discussion infra* note 150.

¹²⁹ *Id.*

many agree with Justice Scalia that clear opinions deserve more stare decisis deference than ambiguous opinions.¹³⁰

Trinko was different in tone and clarity, and arguably even in its overall holding, from the then-existing monopolization standard from the 1966 *United States v. Grinnell Corp.*¹³¹ case. *Grinnell* merely held that a “willfully acquired or maintained”, or “consciously acquired”,¹³² monopoly should be condemned. Grinnel added, “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹³³ *Grinnell* usually is read to require anticompetitive conduct,¹³⁴ and the court in *Grinnell* found that defendant in that case had engaged in “unlawful and exclusionary” behavior.¹³⁵ *Grinnell*, 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.”¹³⁶ 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

¹³⁰ See Brett N. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2119 (2016).

¹³¹ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (“The offense of monopoly under § 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...”).

¹³² Note 7 reads: “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.* 384 U.S. at 576 n. 7.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ “And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices . . .” *Id.*

¹³⁶ Donald Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1219 (1969).

successful competitive strategy is 'willfully' acquired."¹³⁷ Turner stated: "I have come to believe, contrary to my earlier expressed views, that courts can fairly be asked to extend the scope of the Sherman Act's application [to include no-fault cases]."¹³⁸ Ultimately, however, Turner concluded *Grinnell* suggested that monopoly "solely attributable to accident" should not be an offense.¹³⁹ 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.¹⁴⁰

Similarly, the immediately prior relevant Supreme Court decision, the 1948 *United States v. Griffith*¹⁴¹ standard, 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 antitrust 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 Act.¹⁴²

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

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

¹³⁷ *Id.*

¹³⁸ *Id.* at 217.

¹³⁹ *Id.*

¹⁴⁰ See the discussion of the 1978 Areeda/Turner proposal in Areeda & Hovenkamp, 3 ANTITRUST LAW 71, item 3, (4th ed. 1978).

¹⁴¹ 334 U.S. 100 (1948).

¹⁴² *Id.* The opinion continued: "As stated in *United States v. Aluminum Co. of America*, 148 F.2d 416, 432, '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." Similarly, in *American Tobacco Co. v. United States*, 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 competitors is essential to sustain a charge of monopolization under the Sherman Act." 328 U.S. 781, 810 (1946).

it to pass is necessary in order to produce a dangerous probability that it will happen.¹⁴³

Similarly, in *American Tobacco Co. v. United States*, 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 competitors is essential to sustain a charge of monopolization under the Sherman Act.”¹⁴⁴ Two years later, the Court in *Schine Chain Theatres, Inc. v. United States*, read *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.”¹⁴⁵

One could reasonably conclude that the *Grinnell* and *Griffith* Courts, in opinions written by Justice Douglas – certainly no fan of monopolies – was being deliberately vague and arguably self-contradictory.¹⁴⁶ Perhaps Justice Douglas was knowingly and deliberately preserving the ambiguity of the then-prevailing *Alcoa* standard,¹⁴⁷ which could be read either as requiring fault, as not requiring fault, or as a cleverly disguised no-fault standard.¹⁴⁸

¹⁴³ *Id.*

¹⁴⁴ 328 U.S. 781, 810 (1946).

¹⁴⁵ *Id.* 334 U.S. 110, 130 (1948)

¹⁴⁶ *See supra* notes 131-141 and accompanying text.

¹⁴⁷ *See United States v. Alcoa*, 148 F.2d 416 (2nd Cir. 1945).

¹⁴⁸ The court in *Berkey Photo* called “the cryptic *Alcoa* opinion a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes.” 603 F. 3d 267, 273 (1979). The Court continued to explain the contradictory nature of *Alcoa*: “Having stated that Congress ‘did not condone ‘good trusts’ and condemn ‘bad’ ones; it forbade all,” *Alcoa, supra*, 148 F.2d at 427, he declared with equal force, “The successful competitor, having been urged to compete, must not be turned upon when he wins,” *id.* at 430.”

Former Federal Reserve chairman Alan Greenspan criticized *United States v. Alcoa* in an essay published in *Capitalism: The Unknown Ideal*. 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....”

See generally William E. Kovacic & Marc Weimerman, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L. J. 295 (2013) (From its abstract: “consistent with Hand’s philosophy of legislative interpretation, the decision sought to implement Congressional 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 Section 2 violation.) (“There are

As noted earlier, when Justice Scalia authored the opinion in *Trinko* he did not undertake a textualist analysis of Section 2.¹⁴⁹ He simply cited precedent for his assertion that the Sherman Act contains an exception for a monopolist that gained its monopoly through superior efficiency.¹⁵⁰

Nevertheless, the pro-monopoly tone of Scalia's language in *Trinko* went much further than that of any other Supreme Court monopolization opinion.¹⁵¹ Elsewhere Justice Scalia has denounced the type of expansion of precedent he undertook in *Trinko*.¹⁵² We can only speculate why Justice Scalia avoided undertaking a textualist analysis in *Trinko*, but instead used to opportunity to move the law of monopolization even further away from the result that should follow from a textualist approach.

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" (quoting Bench Memo, at 296).

It is possible that Judge Hand wrote his opinion in a manner that was deliberately ambiguous on the anticompetitive conduct issue because Hand's fair 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 have been nervous as to whether this interpretation would be accepted by the Supreme Court. So he obfuscated. Thus, a plain or fair reading of Section 2 might help explains much of the Alcoa opinion.

¹⁴⁹ See *Trinko*, supra note 14.

¹⁵⁰ Scalia wrote: "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.'" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

¹⁵¹ Contrast the language from earlier Supreme Court opinions, supra notes 130-40, with *Trinko*, supra note 14, at 880 : "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*."

¹⁵² See *Conic v. Thompson*, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring) (decrying "sub silentio expansion" of substantive precedent).

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 . . . even where the error is a matter of serious concern, provided correction can be had by legislation.”¹⁵³

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,”¹⁵⁴ which gives courts “exceptional law-shaping authority.”¹⁵⁵ The Court explained: “We have . . . felt relatively free to revise our legal analysis as economic understanding evolves and . . . reverse antitrust precedents that misperceived a practice’s competitive consequences....”¹⁵⁶ This is consistent with an explanations in *Kahn* 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. . . . [T]he Court . . . reconsider[s] its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.¹⁵⁷

¹⁵³ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting).

¹⁵⁴ See ***Kimble v. Marvel Entm’t., LLC*, 135 S. Ct. 2401 (2015). For an analysis of this and related cases see Barak Orbach, Antitrust Stare Decisis, Antitrust Source, Oct. 2015, at 1, passim.**

¹⁵⁵ ***Id.* at 2413.**

¹⁵⁶ ***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.

¹⁵⁷ See *State Oil v. Kahn*, 522 U.S. 3, 20-21 (1997).

Leegin might have gone even a step further, stating that “[s]tare decisis is not as significant . . . [when] the issue before us is the scope of the Sherman Act.”¹⁵⁸ Moreover, in *Leegin* Justice Scalia voted to overturn precedent from 1911 that the Supreme Court in two decisions (opinions that Justice Scalia joined) re-considered but declined to overturn.¹⁵⁹ Precedent that Justice Scalia ignored when he joined Justice Kennedy's opinion in *Leegin*.¹⁶⁰

Supreme Court precedent that is 16 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 54 years old, such as *Grinnell*, deserves even more respect under stare decisis. However, *Grinnell* deserves less deference because it is ambiguous.¹⁶¹

The longest period after which the Supreme Court dramatically re-interpreted the Sherman Act apparently was 93 years, when *Leegin* overturned the holding in the 1911 *Dr. Miles*¹⁶² decision concerning the legal status of resale price maintenance (“RPM”). In 1911 the Court interpreted the Sherman Act to make RPM per se illegal,¹⁶³ but in 2007 the Court changed the legal standard to rule of reason.¹⁶⁴

¹⁵⁸ *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). **But not always. As Barak Orbach points out, some Antitrust precedent** “are truly anomalous, yet enjoy “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.” (*Antitrust Stare Decisis*, ANTITRUST SOURCE 1, 8–9 (Oct. 2015) (footnotes omitted).

¹⁵⁹ *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988); *Monsanto v. Spray-Rite Svc. Corp.*, 465 U.S. 752 (1984).

¹⁶⁰ *See Leegin*, *supra* note 158.

¹⁶¹ *See* Amy Coney Barrett, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1921, 1934 (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.” *Id.* at 1934.

¹⁶² *See Leegin*, *supra* note 158.

¹⁶³ *Dr. Miles* did not actually use the term “per se” because it had not yet entered the Antitrust lexicon. Nevertheless, the Court in *Leegin* noted that *Dr. Miles* promulgated a per se opinion. *See Leegin*, *supra* note 158.

¹⁶⁴ *Leegin*, *supra* note 158.

This chance was not made, however, because the Court acknowledged it had been mistaken concerning the intentions of the Congress that enacted the Sherman Act. Rather, the basis of their reasoning concerned evolving or changing economic learning concerning how often resale price maintenance (RPM) is anticompetitive.¹⁶⁵ In dissent, four justices cited the importance of 96 years of precedent as an important reason for keeping the Dr. Miles standard.¹⁶⁶ Stare decisis was not enough, however, for the Court's majority.¹⁶⁷

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 intentions of Congress. Surely the foremost task of the Supreme Court should be to determine the intent of Congress as to the meaning of the statutes it enacted.

VI. The Evolving Economic Analysis

The Antitrust field has not seriously undertaken an overall economic analysis of the no-fault approach to monopolization law in half a century.¹⁶⁸ Perhaps this is because the subject has not been taken seriously on a political level during most of this period.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* The dissent pointing out that the Court had never “overturned so well-established a statutory precedent.”¹⁷

¹⁶⁷ *Id.* at 877.

¹⁶⁸ Justice Brandeis was the earliest prominent legal scholar to condemn all privately attained monopolies. See the quotation from *The Curse of Bigness*, *supra* at [the first footnote in the Conclusion]. No fault's high point came in the 1960s and 1970s when it was advocated in large part—using their expansive interpretation of Section 2 of the Sherman Act—by a number of mainstream scholars. See Donald Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1220–21 (1969); Phillip Areeda & Donald Turner, *ANTITRUST LAW*, Volume 3, at 63–67 (1978). Their scholarship helped spur the first major no-fault policy initiative, President Johnson's Neal Task Force, and the first no-fault bill, introduced by Senator Hart in 1976. For an excellent analysis of these issues and an insightful history of the no fault movement, see Marina Lao, *No-Fault Digital Platform Monopolization*, WM. & MARY L. REV. (forthcoming 2019) (manuscript at 10–15).

Recently, however, a significant number of prominent politicians have demonstrated an interest in breaking up firms they perceived as being “monopolies”—often without inquiring into whether they engaged in anticompetitive conduct.¹⁶⁹ It is perhaps unsurprising that breaking up such possible¹⁷⁰ monopolies such as 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 Elizabeth Warren¹⁷¹ and Bernie Sanders.¹⁷² 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,¹⁷³ and even calls for their break-up or regulation

¹⁶⁹ See *infra* footnotes 170-75.

¹⁷⁰ **As President Trump said concerning Google and Facebook, “I think it’s a bad situation, but obviously there’s something going on in terms of monopoly.”** Makena Kelly, *Donald Trump on Tech Antitrust: ‘There’s Something Going On,’* THE 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>. **(We make no judgment as to whether Google or Facebook is a monopoly. We merely note that some prominent politicians believe that they are.)**

¹⁷¹ **Senator Elizabeth Warren** promised that if elected president she would break up Amazon, Facebook and Google. Sean Moran, *Elizabeth Warren proposes breaking up Amazon, Facebook, Google*, BREITBART (Mar. 8, 2019), <https://www.breitbart.com/politics/2019/03/08/elizabeth-warren-proposes-breaking-up-amazon-facebook-google/>. She published a detailed plan to break up big tech companies, including the creation of a threshold of \$25 billion in annual revenue, above which companies would be subject to restrictions and regulations that would require divesting certain portions of the company. Elizabeth Warren, *It’s time to break up Google, Amazon, and Facebook*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

¹⁷² **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.” From the Corner, and Cristiano Lima, *Bernie Sanders said 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>. **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. Press Release, Sen. 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>.

¹⁷³ **See the Tweet: Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017),**

from a large number of other leading conservative figures, including Steve Bannon¹⁷⁴ and Senator Ted Cruz.¹⁷⁵

This article will not undertake a complete analysis of the economics of no-fault monopolization. This task easily could require a lengthy book. 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.

https://twitter.com/realDonaldTrump/status/889675644396867584?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E889675644396867584&ref_url=https%3A%2F%2Fwww.thedailybeast.com%2Ftrump-vilifies-washington-post-as-lobbyist-weapon-for-amazon

(“Is Fake News Washington Post being used as a lobbyist weapon against Congress to keep Politicians from looking into Amazon no-tax-monopoly?”). Trump also said he was looking at breaking up all three companies.

<https://www.axios.com/trump-big-tech-google-amazon-facebook-957600ac-2d45-476c-a5ee-9bf534c85f80.html>; Emily Stephenson, *Trump vows to weaken U.S. media ‘power structure’ if elected*, REUTERS.COM (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> (“As an example of the power structure I’m fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it’s too much concentration of power in the hands of too few,” Trump said. He also said he would look at ‘breaking’ up Comcast’s acquisition of NBC Universal in 2013. Deals like this destroy democracy,” he said.”).

¹⁷⁴ **Trump’s former** chief strategist and right-wing icon, Steve Bannon, called for public utility regulation of tech platforms like Facebook and Google. 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/>.

¹⁷⁵ Robert Kraychik, *Exclusive - Ted Cruz: Use Antitrust Laws to Break ‘Massive Power’ of Tech Lords to ‘Subvert our Democratic Process,’* BREITBART (Apr. 25, 2018), <https://www.breitbart.com/radio/2018/04/25/exclusive-ted-cruz-use-antitrust-laws-to-break-massive-power-of-tech-lords-to-subvert-our-democratic-process/>. For more examples of conservative and liberal politicians calling for the breakup of firms alleged to have monopoly power, see Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, AZ. ST. L. J. (forthcoming 2019) (manuscript at 16–18) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463878).

Our analysis begins with a very brief historical overview of the evolution of the profession's analysis concerning the no-fault issue, and then briefly discusses one of its most important economic issues: the probable effects of a no-fault policy on innovation.¹⁷⁶ 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.¹⁷⁷ The article then briefly discusses its possible effect on income equity and equality.¹⁷⁸ As a part of these discussions it will note the inefficiencies that can arise as firms attain and protect their monopoly.¹⁷⁹

The paper also will overview 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.¹⁸⁰ It could be especially likely to discourage firms from competing hard when a firm's size neared the ambiguous market share levels required for a violation. Moreover, at least 90% of antitrust cases are private actions, so a relevant question would be to ask the effects of no-fault be on such actions? Would it increase or decrease the degree to which the Sherman Act is used 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.¹⁸¹

It must be emphasized that this article will not attempt to fully analyze these issues, let alone to quantify them and thereby determine the overall net effects of no-fault on economic welfare. The modest goal of this article is to encourage the antitrust profession to re-start the analysis and the debate over sanctioning all monopolies. This analysis should, moreover, be carried out mindful of the uncertainty as to its outcome and consequences. 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

¹⁷⁶ See *infra* Section VI (A) and (B).

¹⁷⁷ See *infra* Section VI (B).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *infra* Section VI (C).

¹⁸¹ 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 Incipency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783.

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.¹⁸² We do not provide an answer here. We only suggest that the existing literature contains enough support for a no-fault position so that the doctrine is not *a priori* unreasonable.¹⁸³

A. Economists' Evolving Opinions

The Sherman Act initially had broad appeal.¹⁸⁴ Later surveys suggest that in general, economists continue to favor the Act. In a survey of a random sample of economists, 83% agreed that the antitrust laws should be used aggressively to reduce monopoly power.¹⁸⁵ A half-century ago there were, however, plenty of opinions on the subject, but little evidence about the economic effects of monopolies. One of the earliest important attempts to determine the efficacy of antitrust was by Nobel Laureate George Stigler.¹⁸⁶ In 1952 Stigler was a proponent of no-fault monopolization, although later he changed his view.¹⁸⁷ 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

¹⁸² These concerns are sometimes called Type 1, Type II, and Type III errors. See Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1670–77 (1983).

¹⁸³ See *infra* Section VI (F).

¹⁸⁴ William Letwin notes the favorable public view of the Sherman Act at the time it was passed. William Letwin, *Congress and The Sherman Antitrust Law, 1887-1890* (1956) 23 U. CHI. L. REV. 221. <https://chicagounbound.uchicago.edu/uclrev/vol23/iss2/3>. Sanford Gordon, surveyed journal and popular press opinions before the Sherman Act was passed and concluded that there was considerable support for it. See also Arthur Robert Burns, *The Antitrust Laws and the Regulation of Price Competition*, in 4 LAW AND CONTEMPORARY PROBLEMS 301-320 (1937).

¹⁸⁵ Bruno Frey, et al., *Consensus and Dissent Among Economists*, (1984) 74 AM. ECON. REV., 986 at 986–994; See also J. Kearl, C. Pope, G Whiting and L. Wimmer, *A Confusion of Economists?* 69 AM. ECON. REV. 30 (1979).

¹⁸⁶ George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J. L. & ECON. 225–58 (Oct. 1966).

¹⁸⁷ See Lao, *supra* note 168, at 10–11.

per year.¹⁸⁸ The following is a brief survey of a number of possible economic effects of a no-fault monopoly proposal.

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 on average monopoly retards innovation.¹⁸⁹ 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, richly supported by the empirical literature, is that innovation, broadly defined, is spurred if the market is contestable; that is, if multiple firms are vying to win profitable future sales."¹⁹⁰ In other words, competition is usually good for innovation.

As Whinston¹⁹¹ notes in his review of Carl Shapiro's work, the forces determining innovation are complex, but market structure is itself important. The major thrust of the literature is that the rate of innovation tends to be greatest under when a market is competitive. This result is consistent with the work of Pakes, and McGuire¹⁹² and is illustrated in the following diagram, which shows low levels of innovation with very competitive markets, high R&D rate for contestable markets and a leveling off of innovation for markets with little competition, with monopolies innovating the least.

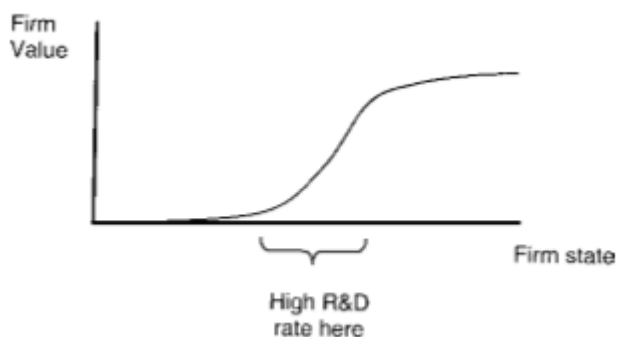
¹⁸⁸ THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* (Belknap Press of Harvard University Press, 2019).

¹⁸⁹ Joseph Schumpeter thought large firm market share enhanced innovation, but only up to a point. He 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 which ... strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives." Joseph Schumpeter, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82 (New York: Harper and Roe Publishers, 1942).

¹⁹⁰ Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?* in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 361, 361–404, 406 (Josh Lerner & Scott Stern eds., National Bureau of Economic Research, Inc. 2012.) [www.nber.org/chapters/c12360].

¹⁹¹ See Shapiro, *id.*, at 361–404.

¹⁹² Pakes, A., and P. McGuire, *Computing Markov-Perfect Nash Equilibria: Numerical Implications of a Dynamic Differentiated Product Model*, 25 *RAND J. ECON.* 555–89 (1994).



Recent empirical scholarship has shown that more competitive markets result in more innovation¹⁹³ and that “market power tends to slow innovation and productivity improvements in the affected markets.”¹⁹⁴ Carstensen and Lande note that “it 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 different market and technological conditions or predict which innovation will be successful and which will prove a

¹⁹³ Christina Bohannon & Herbert Hovenkamp, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 8–12 (2012).

¹⁹⁴ *Id.* For a summary of the literature see Jonathan B. Baker, *Market power in the U.S. economy today*, WASHINGTON CENTER FOR EQUITABLE GROWTH 57–58 (Mar. 20, 2017) available at <http://equitablegrowth.org/research-analysis/market-power-in-the-u-s-economy-today/> and accompanying notes. 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....” (citing Shapiro, *supra* n. 22, at 372–74 (Josh Lerner & Scott Stern eds., 2012.); *Id.* at note 57.

As Professor Baker 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.* To support his conclusion Prof. Baker provides the following: “ Wesley M. Cohen, *Fifty Years of Empirical Studies of Innovative Activity and Performance*, 1 HANDBOOK OF THE ECONOMICS OF INNOVATION 129, 146–48, 154–55 (Bronwyn H. Hall & Nathan Rosenberg eds., 2010); Shapiro, *supra* note 21, at 380. For an older survey finding no losses in innovation from mergers see DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 29 (4th ed. 2004).

failure.”¹⁹⁵ Thus, it is vital to continue to have many innovative options being explored and developed 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 drug companies merge.”¹⁹⁶ Similarly, John Kwoka in his review of the merger literature, concludes that: “[O]verall, 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 these studies that suggests that these mergers adversely affect R&D.”¹⁹⁷ Nearly all studies found that increases in competition led to increases in industry productivity.¹⁹⁸ 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 power and thereby extract surplus from the monopoly.¹⁹⁹

¹⁹⁵ Peter Carstensen and Robert Lande, *The Merger Incipency Doctrine and the Importance of Redundant Competitors*, 2018 WIS. L. REV. 783 (2018). 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 (1995).

¹⁹⁶ See Justus Haucap & Joel Stiebale, *Research: Innovation Suffers When Drug Companies Merge*, HARV. BUS. R. (Aug. 3, 2016), <https://hbr.org/2016/08/research-innovation-suffers-when-drug-companies-merge>.

¹⁹⁷ See John Kwoka, *The Effects of Mergers on Innovation: Economic Framework and Empirical Evidence* at 30 (draft on file with the authors).

¹⁹⁸ For example, Michele Boldrin and David K. Levine, *A Model of Discovery*, AM. ECON. REV., 99 (2): 337-42; J De Loecker, PK Goldberg, *Firm performance in a global market*, 6 ANN. REV. ECON. 2014, 201–07.

¹⁹⁹ James A. Schmitz Jr. Reserve Bank of Minneapolis Research Department Staff Report 286 Revised February 2005, 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(3) J. POL. ECONOMY 582–624 (2005). See also the Thomas J. Holmes and Andrew S. Schmitz, *Competition at Work: Railroads as Monopoly in U.S. Shipping*, Federal Reserve Bank, MINNEAPOLIS QUARTERLY REV., 25(2) 3-39 (2001). The effect of competition also is shown by the review of Holmes and Schmitz (2010), which examines the literature of industries experiencing dramatic changes in their competitive environment. Thomas J Holmes and James A. Schmitz Jr.,

2. Effects On International Competitiveness

Michael Porter finds that the prevalence of domestic rivals tends to lead to an international advantage and has a direct role in stimulating improvement and innovation.²⁰⁰ He further notes that firms that do not innovate will not succeed.²⁰¹

Porter finds that “few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry,” whereas “creating a dominant [domestic] competitor rarely results in international competitive advantage.”²⁰² 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 are best gained through selling abroad, not through dominating the home market.”²⁰³ Practical politics, according to Porter, make a market of one or two firms a “policy nightmare” as “there is a strong tendency for special deals and favored treatment by government that dull incentives.”²⁰⁴

Porter’s work is not alone in finding that domestic competition is central to economic growth.²⁰⁵ By contrast, 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 and the political community.²⁰⁶ Stronger competition policy can be

Competition and Productivity: A Review of the Evidence, 2 ANNUAL REV. OF ECON. 619. See cites to other studies in Holmes and Schmitz articles.

²⁰⁰ MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 143 (The Free Press, 1990).

²⁰¹ *Id.* at 30.

²⁰² *Id.* at 662

²⁰³ *Id.* at 662.

²⁰⁴ *Id.* This echoes Schumpeter’s statements about the effect of monopoly on political structure.

²⁰⁵ See e.g., F. D. Leigh Díez., and S. Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, (IMF, Working Paper No. 18/137, 2018).

²⁰⁶ Gabriela Lecaro Calle, OECD-IDB Latin American Competition Forum 2012, *Cooperación Económica y Técnica V Reunión Anual del Grupo de Trabajo en Manta, Ecuador 2 y 3 de diciembre de 2015* in COMERCIO Y COMPETENCIA DE AMÉRICA LATINA Y EL CARIBE (GTCC) (2016).

part of changes in competition that might help promote economic growth and competition.²⁰⁷

Spurred by increasing globalization, there is increasing interest in international cooperation with respect to antitrust.²⁰⁸ Globally, antitrust law is part of a striking mixture of promoting competitiveness on the one hand, and protection of favored industries and cartel exemptions on the other.²⁰⁹ There are clear attempts of nations to slant antitrust in ways that favor the home country at the expense of others.²¹⁰ As each country does this, it would seem to result in harm to each country's trade and to lower welfare. A global no fault approach could help address this collective action problem.

3. Effects on Allocative Inefficiency & Wealth Transfers

In 1954 Harberger estimated that the costs of monopoly that resulted from misallocation of resources across industries were trivial.²¹¹ Harberger's focus was on the deadweight loss (DWL) from monopoly pricing²¹² (but not on its transfer effects). This research led to the near consensus in the economics profession that monopoly effects on efficiency are of little significance.²¹³ Scherer and Ross evaluated several

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ For example, American law provide an explicit exception for export cartels. *See generally* Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L. L. 355 (2004).

²¹⁰ *Id.*

²¹¹ Arnold C. Harberger, *Papers and Proceedings of the Sixty-sixth Annual Meeting of the American Economic Association*, 44 AM. ECON. REV. 2, 77–87 (May 1954) (May, 1954).

²¹² For a definition of the deadweight loses from monopoly pricing see Richard Zerbe & Dwight Dively, *BENEFIT-COST ANALYSIS IN THEORY AND PRACTICE* (Harper and Row, 1994).

²¹³ For other attempts to measure the costs of market power, see Keith Cowling and Dennis C. Mueller, *The Social Cost of Monopoly Power*, 88 ECON. J. 727–48 (Dec. 1978); Joaquin Maudos and Juan Fernandex de Guevara find that for 15 EU countries

empirical estimates of the relative sizes of the deadweight loss to get somewhat higher values of DWL (0.5 to 2.0% of GNP).²¹⁴

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.²¹⁵ Further, insofar as government regulation or policy can be used to create or preserve monopoly, there will be competition to gain government support for this.²¹⁶ These costs are income or wealth transfers²¹⁷ without accompanying productive gains: rent-seeking.²¹⁸ Gordon Tulloch introduced this idea in 1967 and Anne Krueger expanded and labeled it in 1974.²¹⁹ In 1975, Richard

over 1993–2002, “the welfare gains associated with a reduction of market power are greater than the loss of bank cost efficiency, showing the importance of economic policy measures aimed at removing the barriers to outside competition.” *The cost of market power in banking: Social welfare loss vs. cost inefficiency*, 31 J. Banking & Finance 2103–25 (July 2007), <https://doi.org/10.1016/j.jbankfin.2006.10.028>. Generally see J. De Loecker, and J. Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (NBER, Working Paper No. 23687, 2017).

For a criticism of market power studies and measurements, see Stephen C. Littlechild, *Misleading Calculations of the Social Costs of Monopoly Power*, 91 ECON. J. 348–63 (June 1983).

²¹⁴ See F. M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 667–78 (3rd ed. 1990)

²¹⁵, See, e.g., James Schmitz, *New and Larger Costs of Monopoly and Tariffs*, FEDERAL RESERVE BANK OF MINNEAPOLIS RESEARCH DEPARTMENT STAFF REPORT 468 (July 2012).

²¹⁶ Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV., 291–303 (1974).

²¹⁷ As an example of the transfer effects of monopoly power, work by Brett Gordon and Ron Goettler examined whether or not the presence of AMD caused Intel to innovate their central processing units (CPUs) more or less than they would have absent the competition. They find that Intel would have innovated more as a monopoly with an important caveat: even though Intel might have been more innovative, most consumers were better off with slightly less innovation and the stronger price competition that AMD brought to the marketplace. See Ronald L. Goettler and Brett R. Gordon, *Does AMD Spur Intel to Innovate More?*, 119 J. POLIT. ECON. 6, 1141–1200 (Dec. 2011) [<http://www.jstor.org/stable/10.1086/664615>].

²¹⁸ See Krueger, *supra* note 216, at 291–303.

²¹⁹ See *id.*

Posner argued that competition to engage in rent seeking could raise costs until all monopoly profits were transformed into costs.²²⁰

Further development has both attempted to quantify these costs and shown that rent-seeking occurs both *within* a monopoly firm and outside it.²²¹ These estimates come from examining histories of industries in which a monopoly is destroyed or created. 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.²²² As Schmitz notes, “[w]hen a monopoly is created, “rents” are created”.²²³ Conflict emerges among shareholders, managers, and employees of the monopoly as they negotiate how to divide these rents. Mechanisms are set up to split the rents. These mechanisms are often means to reduce competition among members of the monopoly. Although the mechanisms divide rents, they also destroy them (by leading to low productivity and misallocation)²²⁴. The costs due to just (1) above, that is, low productivity are large. As monopoly was destroyed in each of these industries, productivity at each factory soared. Doubling of productivities in a few years was common. The value of the wasted inputs was as much as 20 percent to 30 percent of industry value added.²²⁵

4. Effects on Income Equity & Equality²²⁶

²²⁰ See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POLIT. ECON. 807, 816 (1975).

²²¹ See, e.g., Schmitz, *supra* note 215, at 582–625.

²²² *Id.*

²²³ *Id.*

²²⁴ See *id.*

²²⁵ *Id.*

²²⁶ 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. 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. For the original article on existence values see John Krutilla: *Conservation*

Thomas Piketty in *Capital in the Twenty-First Century* 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.²²⁷

Higher levels of inequality are associated with social instability and lower growth rates. Piketty sees inequality challenging democracy and leading to oligarchy, if left unabated.²²⁸ He predicts dire consequences in the absence of remedies.²²⁹ Similarly, Jonathan Baker and Steve Salop maintain that inequality may undermine the legitimacy of our social order, given the wealthiest have a disproportionate influence on public policy and reduce economic growth.²³⁰

Part of the cause for rising inequality lies in competition policy. An OECD paper²³¹ covering eight OECD countries--Canada, France, Germany, Korea, Japan, Spain, the United Kingdom and the United States--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." The paper suggests that

Reconsidered. In: *The American Economic Review*, Volume 57, Issue 4, Sep. 1967, pp. 777-786

²²⁷ Thomas Piketty, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Harvard University Press, 2013). Zerbe (2016) has estimated that the while the 2015 current top 1% has about 7 times the per capital wealth of the bottom 50%, by 2065 this will grow to a factor of 185 if the present trend continues. Richard O. Zerbe, *THE PATH OF HUMAN PROGRESS*, Ch. 9 (2016).

²²⁸ Piketty, *Id.*

²²⁹ *See id.*

²³⁰ Jonathan Baker and Steve Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEO. L.J.* 1, 5–8 (2015).

²³¹ Sean Enis et al., *Inequality: A Hidden Cost of Market Power*, OECD 21, 39. (2017) [www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm.]

lack of competition is an important one source of economic inequality.²³² Greater equality may then be a by-product of a strong competition policy.²³³

C. Overview of Economic Arguments Against No-Fault

1. Incentives To Not Compete As Vigorously

The effects of incentives on business behavior are complex and sometimes counter-intuitive, so prediction in the case of no-fault is difficult.²³⁴ One would think, however, that the possibility of an antitrust action against a firm achieving monopoly without engaging in anticompetitive behavior would have some deterrent effect on monopoly formation.²³⁵ 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.²³⁶ George Bittlingmayer, for example,

²³² *Id.* Monopolies also give rise to political and welfare effects. Schumpeter noted that even if the giant concerns were all managed perfectly, the political consequences of concentration would still exist because the political structure of a nation is profoundly affected by the elimination of a host of small and medium size firms. *See also* JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (Harvard University Press, 3rd edition, 1950).

²³³ *See id.*

²³⁴ For example, research finds that state tax decreases have little effect on business location or behavior. Soledad Artiz Prillaman and Kenneth J. Meier, *Taxes, Incentives, and Economic Growth: Assessing the Impact of Pro-business Taxes on U.S. State Economies*, 76 J. POLIT. 364–379 (2014). Galliana (2017) finds that monetary incentives for workers have a less persistent effect than implicit incentives such as in-house competition, and that monetary incentives can crowd out desirable behavior which would otherwise be found. Susana Gallani, *Incentives, Peer Pressure, and Behavior Persistence* (Harvard Business School, Working Paper No. 17-070, 2017).

²³⁵ Justice Hand noted in *Alcoa* that: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945). Justice Scalia went even further in *Trinko*: "The mere possession of monopoly power, and the concomitant charging of monopoly prices . . . 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." *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

²³⁶ For the minimum market share levels usually required for a Section 2 violation, *see* Section VII, notes 283 and 309 *infra*.

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.”²³⁷ Similarly, when a monopolist is shielded from hard competition it may be able to relax and enjoy a quiet life.²³⁸ Jonathan Baker²³⁹, for example, suspects there is a positive welfare effect of antitrust deterrence that is large. Baker examines socially beneficial antitrust challenges by the federal antitrust agencies to price-fixing and other forms of collusion, to mergers that appear likely to harm competition; and to monopolists that use anticompetitive exclusionary practices to obtain or maintain their market power.²⁴⁰ He then reviews systematic empirical evidence on the value of antitrust derived from informal experiments involving the behavior of US firms during periods without effective antitrust enforcement, and the behavior of firms across

²³⁷ George Bittlingmayer, *Investment and Antitrust Enforcement*, 3 CATO J. 295-325, 344 (2001).

²³⁸ Sir John Hicks observed in 1935 that 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.” See J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRA 18 (1935).

Economists have written about inefficiencies that result when a monopolist is shielded from hard competition. See Liebenstein, *Allocative Efficiency vs. “X-Efficiency,”* 56 AM. ECON. REV. 392 (1966). Professor Liebenstein argues that the motivations and incentives of workers and managers are different when their firm does not have to face competition: “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, monopolies can create “organizational slack” by tolerating inefficiency and waste. Without the discipline of competition, monopolies may have less incentive to cut waste and to search for ways to reduce costs. They may have the discretion to make only a comfortable profit and to tolerate a substantial amount of “fat” in their organizations and thus further waste society’s resources. 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 F. M. Scherer and David Ross, *supra* note 48, at 466.

²³⁹ Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSPECTIVES 27–50. (2003).

²⁴⁰ See *id.*

different national antitrust regimes.²⁴¹ 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.²⁴²

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.²⁴³ Similarly, it could serve to reduce the presence of monopoly less expensively than conventional antitrust actions. 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 litigation²⁴⁴ is non-legitimate litigation whose purpose is to raise rivals costs relative to those of the firm filing the lawsuit.²⁴⁵ It is a type of non-price predatory behavior.²⁴⁶ A study by Christopher Klein suggested economic criteria for determining whether such litigation is sham or legitimate.²⁴⁷ He examined 117 Sherman Act countersuits alleging sham litigation.²⁴⁸ He found that while fewer countersuits were litigated than had been expected according to his criteria, more of

²⁴¹ *See id.*

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ Areeda notes, however, that protections against sham litigation run the risk of chilling access to First Amendment rights of free speech. Phillip Areeda and E. Little-Brown, 1982 SUPPLEMENT TO ANTITRUST LAW.

²⁴⁵ *See, e.g.,* William Baumol and Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & ECON. 247–65 (May 1985). R. Preston McAfee, Hugo M. Mialon, and Sue H. Mialon, *Private Antitrust Litigation: Procompetitive or Anticompetitive?*, DOJ (Dec. 1, 2015), <https://www.justice.gov/atr/private-antitrust-litigation-procompetitive-or-anticompetitive>.

²⁴⁶ *See* Steven Salop and David Scheffman, *Raising Rivals Costs*, AM. ECON. REV. (May 1983).

²⁴⁷ Christopher Klein, *The Economics of Sham Litigation: Theory Cases and Policy*, BUREAU OF ECONOMICS STAFF REPORT TO THE FEDERAL TRADE COMMISSION (April 1989) and also Klein, *Strategic Sham Litigation: Economic Incentives in the Context of the Case Law*, INT'L. REV. L. & ECON. (December 1986).

²⁴⁸ *See id.*

the countersuits were allowed to pass summary judgment than his criteria predicted.²⁴⁹ Applying his economic criteria would have then found fewer countersuits as legitimate than was the actual case.²⁵⁰ The implication for no fault is that the application and development of economic criteria to apply 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 conduct oriented.²⁵¹ Moreover, virtually every Antitrust case is expensive for both sides.²⁵² 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.²⁵³ 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 Problems involving Natural Monopolies and Patents

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ For an excellent analysis of many of the possible transaction costs that could arise, especially in digital technology markets, see Diana L. Moss, *Breaking Up Is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets*, ANTITRUST SOURCE (2019) [americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-october2019/oct19_mossc.pdf].

²⁵² For examples of the high costs of antitrust litigation see Joshua P. Davis & Robert H. Lande, *Toward An Empirical And Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1305–10 (2013).

²⁵³ *See Alan A. Fisher & Robert H. Lande, Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1670–77 (1983).

Non-structural relief is the traditional kind of relief ordered in monopolization cases, even in cases not involving natural monopolies or patents.²⁵⁴ This is because the Supreme Court observed that structural remedies are “more drastic” than injunctive relief.²⁵⁵ For example, in *United States v. Microsoft Corp.*, the court said that “structural relief, which is ‘designed to eliminate the monopoly altogether . . . require[s] a clearer indication of a significant causal connection between the conduct and creation or maintenance of the market power.’”²⁵⁶ In other words, the standards for a court ordering a structural remedy are higher than they are for conduct oriented remedies.²⁵⁷

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. 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.”²⁵⁸ Even if Microsoft’s absolutist assertion is, as Professor Kovacic demonstrates, a significant exaggeration,²⁵⁹ there is no doubt that divestiture is an

²⁵⁴ *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

²⁵⁵ *Id.* Areeda & Turner note that an injunction “is the least disruptive” remedy a court can give and the court’s goal is to restore competitive conditions, not to punish. 4A Philip E. Areeda, et al., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 990c, at 126 (4th ed. 2014); 2A Philip E. Areeda, et al., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 325c, at 17 (4th ed. 2014).

²⁵⁶ 253 F.3d 34, 106 (D.C. Cir. 2001) (en banc) (per curiam) (quoting Areeda & Hovenkamp, *supra* note 12, ¶ 653b, at 9192) As one federal district judge noted after finding that the defendant, the American Can Company, had violated the Sherman Act: “I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows the defendant to be.” *United States v. American Can Co.*, 230 F. 2d 859, 908 (D. Md. 1916).

²⁵⁷ At a Sherman Act Joint Hearing, MIT professor Franklin Fisher noted that “courts are traditionally reluctant to grant structural relief” and “crafting [a structural remedy] is not easy and may sometimes be impossible.” Sherman Act Section 2 Joint Hearing: Remedies Hr’g Tr. 47, Mar. 28, 2007(?), at 110 (Fisher).

²⁵⁸ See Brief for Petitioner-Appellant at 128, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. Nov. 27, 2000).

²⁵⁹ For example, Professor Willinam E. Kovacic provides 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

unusual remedy in a monopolization case.

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.²⁶⁰ There are in fact a number of suggested remedies short of breakup such as data sharing, open platforms and other solutions.²⁶¹

1. Natural Monopoly

Natural monopolies are those for which economies of scale or scope exceed sustainable market size.²⁶² A major modern concern relating to natural monopoly is

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. It begins with a review of the historical trends and ends by attempting to explain their causes." 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).

²⁶⁰ An expert report to the European Commission has said antitrust law could specify when data holders could be forced to grant access to their competitors. A report by Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer, Competition Policy for the Digital ERA, EUROPEAN COMMISSION Directorate-General for Competition E-mail:comp-publications@ec.europa.eu European Commission B-1049 Brussels, <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

²⁶¹ See Moss, *supra* note 251.

²⁶² Natural monopolies are those whose costs decline with volume so that competition tends to be unviable. These network effects can be due to economies of scale, but often arise when there are economies in the production of related products, called economies of scope. In this sense, the no-fault rule can legitimately apply in the case of natural monopoly short of breakup, suggesting restraints on use of monopoly positions. The concept of natural monopoly was first given a theoretically satisfactory definition, based on the idea of subadditivity, by JOHN PANZER, ROBERT WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (Harcourt Brace

network externalities which include both scale and scope economies.²⁶³ A classic example of a natural monopoly is the type of networks that exist in telecommunications field. The more people sign up, the cheaper it is for the provider per unit of service. 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 information collected as part of their monopoly and can themselves be reasonably tempered by requiring them to share data acquired from customers. Moreover, if plaintiff 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.²⁶⁴

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 20 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 leaving patent monopoly status to quickly lower their prices. Moreover, Michele Boldrin and David K. Levine find little evidence that patents spur innovation.²⁶⁵ If they are correct the current patent system may be misguided.²⁶⁶ 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

Javonovich, 1982). A cost function is “subadditive” when any given total 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.

²⁶³ *See id.*

²⁶⁴ *See* the explanation for this type of likely reaction provided by William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, in 2 CURRENT COMPETITION LAW 173–74, (Mads Andenas et al. eds., 2004)., discussed *infra* at ____.

²⁶⁵ Michele Boldrin and David Levine, *The Case Against Patents*, 27 J. ECON. PERSPECTIVES 3–22 (2013).

²⁶⁶ *Id.*

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 could be performed 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.²⁶⁷ In 1982 the Justice Department announced that they were abandoning the IBM case and that AT&T had capitulated.²⁶⁸ AT&T lost their case.²⁶⁹ IBM won theirs.²⁷⁰ 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.²⁷¹ 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."²⁷² Robert Allen the chairman of AT&T noted, "We were forced by 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 IBM in that change was forced on us."²⁷³

Although the decision to break up AT&T was controversial at the time²⁷⁴, the facts "don't lie."²⁷⁵ Since the break-up, the telecommunications field has gone from

²⁶⁷ See James B. Stewart, *Whales and Sharks*, NEW YORKER 37, Feb. 15, 1993.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id. at 38.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See OECD, *Supporting Investment in Knowledge Capital, Growth and Innovation* 161 (OECD Publishing, 2013). The report documents the importance of innovation achieved by knowledge bases technology (KBT) in the United States and Europe.

²⁷⁵ TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 96–97 (noting of the breakup of AT&T: "Some economists point to lower prices in the wake of the dissolution, but the real impact [increased innovation] was different and far more important.").

high-cost long-distance phone calls and rotary dial phones to smart phones, wireless technology, and the development of the Internet. As one account notes of the breakup: "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 (led by Ameritech, beginning in the Chicago area that was home to Motorola, which helped develop the radio technology) also began offering mobile service in the 1980s after it had been developed by Bell Labs."²⁷⁶ 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."²⁷⁷ Porter also concluded that telecommunications services became a hotbed of innovation after that breakup of AT&T.²⁷⁸

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 IBM 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 IBM had been broken up, and it would have been better for the public. I think it would have been better for the shareholders too.²⁷⁹

F. 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

²⁷⁶ JOHN M. JORDAN, INFORMATION, TECHNOLOGY, AND INNOVATION: RESOURCES FOR GROWTH IN A CONNECTED WORLD 173 (Hoboken, NJ: John Wiley & Sons, 2012).

²⁷⁷ Wu, *supra* note 275, at 96–97.

²⁷⁸ See Porter, THE COMPETITIVE ADVANTAGE OF NATIONS 664 (Free Press, 1990).

²⁷⁹ See *Whales and Sharks*, *supra* note 266, at 38.

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 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 [deadweight loss]. "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 is worth considering, not that it is the obvious choice.

Summary Table of Costs of Present Status, a No-Action and a 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
NET GAINS COMPARED TO BASE CASE	ZERO	NEGATIVE	POSITIVE

VII. Specific Effects Of This Textualist Analysis On Antitrust Law

A. Effects On Monopolization Law

All of the 15 circa 1890 sources cited earlier defined “monopolize” as simply to acquire a monopoly position, and all of the earliest Sherman Act cases that used

the terms “monopolize” and “monopoly” equated them.²⁸⁰ Today, of course, anticompetitive conduct is required for a violation, but a court sometimes will find the “monopoly power” required for the offense of “monopolization” when a firm has less than 100% of a market.²⁸¹ This is because the current requirement for monopoly power is not that the firm have a 100% complete “monopoly”. Rather it is that the firm has the power to “raise price or restrict output”.²⁸² This ability can be found in some situations when a firm’s market share is as low as 70%, and possibly even lower.²⁸³

²⁸⁰ See *supra* Section 4(A).

²⁸¹ See Robert H. Lande, *Are Antitrust 'Treble' Damages Really Single Damages?*, 54 OHIO STATE L. J. 115, 148-51 (1993). “These results imply an “average” monopolist market share of between seventy-five and eighty-five percent.”

²⁸¹ Moreover, “monopoly” might have been used colloquially the same way - to only apply to firms with 100% of a market. For example, one of the most influential business journalists of the period, Ida Tarbell, seemed to use “monopoly” this way.

In her extremely influential article “The History of the Standard Oil Company,” Ida Tarbell most often refers to the Standard Oil Company and the South Improvement Company, a related Rockefeller company, as not quite being a “monopoly”. First, in referring to the Standard Oil Company’s beginnings, she states that after John Rockefeller secured a lower shipping rate for his company’s oil in 1870, he had achieved “almost a complete monopoly” just a few years later. Ida M. Tarbell, *The History of the Standard Oil Company*, MCCLURE’S MAGAZINE 3, Nov. 1902, 118. In 1972, 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.* The owner of one of these refineries, in explaining why he chose to sell his business to the South Improvement Company, said it was easier to sell “rather than fight such a monopoly.” *Id.* at 127. As the South Improvement Company grew, the press and the public heard rumors of its advantageous deals with railroads. *Id.* at 252. Tarbell describes the general opinion at the time as “if the railroads had made the contracts as charged . . . nothing but an absolute monopoly of the entire oil business by this combination could result.” *Id.* Finally, Tarbell notes that the Standard Oil Company’s competitors, like the Pennsylvania Railroad, raised a “cry of monopoly” and considered the company to be “aiming at an absolute monopoly.” *Id.* at 497, 508. See

<https://babel.hathitrust.org/cgi/pt/search?q1=monopoly&id=mdp.39015012153097&view=image&seq=130&num=118>.

²⁸² *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

²⁸³ “A market share in excess of 70 percent generally establishes a prima facie case

Moreover, the vast majority of firms found to have engaged in illegal monopolization had market shares less than 100%.²⁸⁴ For this reason if a textualist approach to an alleged “monopolization” violation required a 100% market share, this would dramatically limit Section 2’s reach.

It certainly is possible, however, that a textualist interpretation of Section 2 would not require a “monopolizing” firm to have 100% of a relevant market. Scalia & Garner believe that the “notion that words should be strictly construed” is untrue.²⁸⁵ They quote Justice Frankfurter in *Utah Junk Co. v. Porter*: “Literalness may strangle meaning.”²⁸⁶ They conclude: “Strict constructionism understood as a judicial straightjacket is a long-outmoded approach deriving from a mistrust of all enacted law” and “Textualists should object to being called strict constructionists. Whether they know it or not, that 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. (emphasis added)”

Could interpreting Section 2 as only prohibiting monopolies with a 100% market share be considered to be overly strictly construing the word “monopoly,” and not a “fair reading” of the statute? After all, a firm with a 98% market share as a practical matter is as likely to be able to use monopoly power to harm consumers as a firm with 100% of a market. Indeed, the 1895 *E. C. Knight* case referred to a firm with a 98% market share as a “monopoly”.²⁸⁷ And the 1911 Standard Oil decision

of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output.” ABA Section of Antitrust Law, *Antitrust Law Developments*, 225 (4th ed. 1997) at 225-329. “In contrast, courts virtually never 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.” ABA Section of Antitrust Law, *Annual Review of Antitrust Law Developments*, 37 (7th ed. 2012) at 38–39.

²⁸⁴ See Lande, *supra* note 281.

²⁸⁵ See Scalia & Supra note 26 at 155.

²⁸⁶ *Id.*, quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946).

²⁸⁷ **United States v. E.C. Knight Co., 156 U.S. 1 (1895)** (“Revere produced annually about two percent of the total amount of sugar refined.” *Id.* at 4) (“By the purchase of the stock of the four Philadelphia refineries with shares of its own stock the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. 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

stated that, at common law, "monopoly" and "restraint of trade" were synonymous. That is, something could be deemed a "monopoly" if it produced some of its "baneful effects" even if the defendant did not possess a complete monopoly.²⁸⁸ This would support the conclusion that a firm could be found to be a "monopoly" with less than a 100% market share.²⁸⁹

It seems reasonable that a firm with somewhat less than 100% of a market that otherwise exhibits all the characteristics of a firm with a 100% market share, a firm that produces the same harmful effects,²⁹⁰ should be included within Section

in the mode attempted by this bill. ... Again, 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.). *Id.* at 16

²⁸⁸ "And, by 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. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade."

It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." *And see especially* the opinion of Parker, C.J., in *Mitchel v. Reynolds* (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That, by 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." *See U.S. v. Standard Oil*, 221 U.S. 1, 31 (1911) (We are indebted to Prof. Meese for directing us to this and other relevant references).

²⁸⁹ Of course this opinion was issued 21 years after the Sherman Act was passed, so it should carry less weight than a more contemporaneous opinion.

²⁹⁰ "Textualism does not purport to exclude consideration of purpose or policy from statutory interpretation. To the contrary, because all statutory language is at least somewhat open-ended, textualists acknowledge that a 'certain degree of discretion'

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.²⁹¹ Justice Scalia believed that "Some outcome-pertinent consequences... are relevant to a sound textual decision – specifically, those that: (1) cause a private instrument or government prescription to be ineffective."²⁹² Moreover, to construe the "monopoly" requirement in a manner that neutralizes the statute would be an arguably absurd result. As Justice Scalia²⁹³ and Justice Kavanaugh noted, the "absurdity doctrine"²⁹⁴ can, in truly extreme situations, prevent statutes from being interpreted irrationally.

There are two other situations that could arise if Section 2 were interpreted textually where the absurdity doctrine also perhaps could be invoked. First, private plaintiffs could sue under a no-fault theory for treble damages and other relief.²⁹⁵ Under a textualist interpretation this could indeed happen. At least in theory.

There would, however, be nothing "absurd" about requiring even a monopolist that had not undertaken any anticompetitive conduct to nevertheless return the monopoly overcharges it took from customers, and remedy any other damages it caused. Moreover, if Antitrust's so-called "treble damages" remedy is analyzed empirically, with consideration given to its lack of prejudgment interest, lack of payments for allocative inefficiency effects or umbrella effects of monopoly pricing, and other factors, even a "treble damages" award is probably on average really only single damages.²⁹⁶

is suitable in 'most' judicial decision making. 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 HARVARD L. REV. 2388, 2408 (2003).

²⁹¹ **However, a firm with only a 2% market share might not be viable.**

²⁹² **Scalia and Garner, *supra* note 26, at 352.**

²⁹³ *Id.*

²⁹⁴ *See* Kavanaugh, *supra* note 130, at 2119.

²⁹⁵ **Structural remedies are relatively unusual in Section 2 cases and have traditionally been saved for the most egregious violations. See *supra* notes 257-59. Surely structural relief would be the rare exception in no fault cases.**

²⁹⁶ *See* Robert H. Lande, "Are Antitrust "Treble" Damages Really Single Damages? 54 OHIO ST. L.J. 115 (1993).

Would many courts order true treble damages – or even true single damages - in a no-fault case? Or would they do what courts often do even in routine antitrust cases when they believe 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 anti-trust 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."²⁹⁷ For these reasons, as a practical matter damages awarded in a no-fault monopolization case rarely would be awarded, and those damages that were awarded would be defined stingily.²⁹⁸

Another arguably “absurd” outcome could result if prosecutors tried to impose criminal penalties in a no-fault case. This result would be as “absurd” as two other types of cases that could occur today under the Sherman Act as it is currently interpreted.

First, suppose two tiny competing businesses (such as bicycle stores), each on the opposite end of a large metropolitan area, fix prices. Assume that interstate commerce is impacted and their agreement did not result in a new product or significant efficiencies. If the government charged them with a criminal Section 1 violation, they would not be able to argue as a defense that no prices actually increased, that entry was easy, etc.²⁹⁹ They would be guilty of a felony.³⁰⁰ 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 did not cover price fixing, or would it instead act as Professor Kovacic indicated courts sometime act, and find some way to exonerate defendants, or at least to subject them to no more than a nominal penalty?

²⁹⁷ See William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, in 2 CURRENT COMPETITION LAW 167, 173–74 (Mads Andenas et al. eds., 2004). This and other sources making similar points was quoted in Robert H. Lande, *Five Myths About Antitrust Damages*, SAN FRANCISCO L. REV. 663, <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1167&context=usflawreview>

²⁹⁸ **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.

²⁹⁹ See *Antitrust Law Developments*, *supra* note 283.

³⁰⁰ *Id.*

Second, in 1980 the Department of Justice, followed by 15 State Attorney Generals, prosecuted resale price maintenance (RPM) criminally, in *United States v. Cuisinarts, Inc.*, and succeeded in obtaining a *nolo contendere* plea and a \$250,000 fine.³⁰¹ At the time RPM was per se illegal, but today it is judged under the rule of reason,³⁰² and many respected scholars believe it should be taken off the list of antitrust offenses entirely.³⁰³ When this prosecution was commenced many or most members of the antitrust community believed RPM was almost always anticompetitive. The tide of scholarly opinion has changed considerably since 1980. But in theory RPM could again be prosecuted criminally. And surely the court handling the case would do as Professor Kovacic suggests and find a way to exonerate defendant.

What would happen if the Department of Justice tried to prosecute a monopolist criminally under a no-fault theory?³⁰⁴ The court would find a way to

³⁰¹ See *In re Grand Jury Investigation of Cuisinarts, Inc.* 516 F. Supp 1008, 1011-11 (D. Conn) (discussing the criminal case, which resulted in a *nolo contendere* plea and a \$250,000 fine), *aff'd*, 665 F. 2d 24 (2d Cir. 1981). "The indictment was returned by a grand jury...." *Id.* at 1009.

³⁰² See ***Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).**

³⁰³ See *id.*

³⁰⁴ One might ask: "Does the language of Section 2 suggest that Congress meant for DOJ to prosecute, and for juries to convict, executives of all companies that achieved monopoly positions? 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? Was the judicial interpretation of the statute to require "bad acts" inevitable in light of the criminal nature of the Sherman Act? It seems to me that 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 Edmunds have said in reply? Suppose DOJ had tried to prosecute individuals criminally for no-fault offenses. Would that have destroyed the statute by creating massive political backlash?"

A textualist might reply, "You're in effect making an argument that textualism is a poor way to interpret statutes. But several justices believe in textualism. So even if your hypothetical dialogue had occurred, it is irrelevant. A textualist does not try to determine what Congress would have done in hypothetical circumstances other

rule in favor of defendant. The court could, for example, define the market(s) involved in a way that meant defendant was not a monopolist.³⁰⁵ This hypothetical – and the two Section 1 hypos – show that even the possibility of criminal sanctions is an undesirable feature of Section 2. But as Justice Scalia noted concerning the interpretation of statutes, “When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy.”³⁰⁶

In summary, a textualist interpretation of Section 2 would not find a requirement that defendant attained its monopoly by anticompetitive conduct. Whether a textualist court would absolve a firm with slightly less than a 100% market share is questionable. It is less likely, however, that a textualist would convict a firm of monopolization with a market share as low the lower bound market share (i.e., 70%) required today for a firm that had engaged in anticompetitive conduct.

B. Effects on “Attempt To Monopolize” Law

Even if a textualist interpretation would in some ways increase but in other ways diminish the effectiveness of the “monopolization” portion of Section 2, its effects on the “attempt to monopolize” violation would do more than restore Section 2’s vigor. Defendant would only be required to “attempt” to gain a monopoly, a requirement that should be construed as requiring only the intent to take over a market, 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.”³⁰⁷

than by simply looking at the “fair meaning” of the words of the statute, dictionaries of the period, etc. A textualist would in this way define “monopolize” and, since the statute does not contain an efficiency exception, not imply one. 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 and Garner, *supra* note 26, at 349.

³⁰⁵ One might even ask: “Suppose DOJ even 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.

³⁰⁶ See Scalia & Garner, *supra* note 26, at 353

³⁰⁷ See the sources cited *supra* Section IV (C), and especially the Bishop quotation in note 121 *supra*.

This is very different from the current way the courts interpret the requirement that defendant have a “dangerous probability”³⁰⁸ of acquiring monopoly power. Today the “dangerous probability” threshold often can be met by a firm with a lower market share than that required for “monopolization,” sometimes by a defendant with as little as 50% of a market. But rarely by a firm with only a 30% market share.³⁰⁹ A textualist analysis, using the common law requirements for an “attempt”,³¹⁰ means that the “attempt to monopolize” requirements should be satisfied for a defendant even with a relatively low market share level, such as 30% (assuming the existence of barriers to entry, etc.).

The attempted monopolization doctrine would, however, only apply to firms attempting to take over an entire market (or, since a textualist might not construe the word “monopoly” strictly, 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 plan that would, if successful, give it 70% of that market. This is far short of a 100% market share, and this defendant should not be convicted of attempted monopolization.³¹¹ Although firms’ plans to expand market

³⁰⁸ “[B]ecause the attempt offense requires only that the defendant have a dangerous probability of acquiring monopoly power, whereas the monopolization offense requires that the defendant already possess that power, a lesser showing is required in an attempt case.” ABA Section of Antitrust Law, *Annual Review of Antitrust Law Developments*, 37 (7th ed. 2012) at 51.

³⁰⁹ As *Antitrust Law Developments* noted: “Although there are no precise market share boundaries, and while the other factors discussed below [defendant’s ability to lessen or destroy competition in that market, intent, etc.] affect the analysis, courts often find a dangerous probability of success [of monopolization] where the defendant starts with a market share greater than 50 percent. In contrast, courts rarely find market shares between 30 percent and 50 percent sufficient. Courts virtually never find shares of less than 30 percent sufficient. ABA Section of Antitrust Law, *Annual Review of Antitrust Law Developments*, 37 (7th ed. 2012) at 51; ABA Section of Antitrust Law, *Antitrust Law Developments*, 225 (4th ed. 1997) at 225–329.

³¹⁰ See text accompanying note 122 *supra*, and notes 120–25 *supra*. In *Swift & Co. v. United States*, 196 U.S. 376, 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.” His “dangerous probability of success” formulation is of only limited help in ascertain which conduct should suffice. *Id.* at 396. For an interesting attempt to monopolize with a very low market share see *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (defendant had only a 12% share of the relevant market in which the alleged predation took place).

share significantly but remain far short of a 100% share may be common,³¹² courts should of course be skeptical of manufactured self-serving evidence that defendant was not actually trying to achieve complete control of a market.

In sum, a textualist approach to the “attempt to monopolize” portion of Section 2 would require that defendant had intended to take over an entire market, or perhaps almost all of it (i.e., 85% or even 98% of it). It would not require that defendant had undertaken anticompetitive conduct. It should only require that defendant had the intent to acquire a monopoly and that it had taken a serious, significant and concrete step in this direction, an act that was sufficient in terms of magnitude and proximity. A defendant market share as low as 30% should, assuming barriers to entry, etc., sometimes suffice.

C. No-Fault Monopolization As A Violation of Section 5 of the FTC Act

When Congress enacted the FTC Act it intended this law to be more expansive than the Sherman Act.³¹³ Despite the existence of the Sherman Act, Congress decided that additional, more encompassing, legislation was needed. Section 5 of the FTC Act was intended to prohibit not only every violation of the Sherman Act, but also (i) incipient violations of this law, (ii) conduct violating the spirit of the Sherman Act, and (iii) conduct violating recognized standards of business behavior.³¹⁴ The Supreme Court has explicitly adopted this interpretation of the FTC Act,³¹⁵ although the relevant precedent is more than a generation old.³¹⁶

³¹¹ ABA Section of Antitrust Law, *Annual Review of Antitrust Law Developments*, 37 (7th ed. 2012) at 51.; ABA Section of Antitrust Law, *Antitrust Law Developments*, 225 (4th ed. 1997) at 225–329.

³¹² **For example, in the FTC case against duPont involving the titanium dioxide market defendant has approximately a 40% market share and engaged in conduct likely to give it approximately 60% of the relevant market. It never had an actionable plan to reach a 100% market share. See <https://www.nytimes.com/1979/09/18/archives/ftc-case-on-du-pont-dismissed-judge-finds-no-monopoly-bid-largest.html>**

³¹³ 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, passim (1980).

³¹⁴ *Id.* at 299–300

³¹⁵ See, e.g., *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–240 (1972).

³¹⁶ The Supreme Court’s most recent expansive interpretation of Section 5 was in *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986), where the Court characterized Section 5

Section 5 is a civil statute – its violation cannot result in criminal penalties.³¹⁷ Section 5 actions cannot be brought by private parties, and do not constitute Sherman Act precedent unless the court specifically finds that the practices at issue also violate the Sherman Act.³¹⁸

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 sanction monopolies would occur if the Court is willing to re-think Section 2 using a textualist approach, but decides to do so in a non-expansive manner because it does not want no-fault cases to be brought by private parties, or for there to be even a tiny fear that no-fault could lead to criminal penalties.

For these reasons the Court might not want to find that a firm had 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. For these reasons the Court might well find that Section 5, but not Section 2, sanctions all monopolies and attempts to monopolize.

VIII. Conclusions: An Increasingly Textualist Supreme Court Should Implement No-Fault

A no-fault interpretation of the Sherman Act is consistent with the tradition of Justice Brandeis, who believed:

[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.³¹⁹

as including traditional antitrust violations and also “practices that the Commission determines are against public policy for other reasons.”

³¹⁷ See *Averitt*, *supra* note 313.

³¹⁸ *Id.*

We hope and expect that the enforcers would never bring any type of antitrust case they believed was not in the public interest simply because defendant had violated the law. This should apply a fortiori to no-fault cases. We also hope the enforcers would emphasize 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.

There is an old saying that “the Supreme Court follows the election returns.”³²⁰ Regardless how true this is, is there even a small chance the current conservative Supreme Court would hold that Section 2 of the Sherman Act (or Section 5 of the FTC Act) does not require anticompetitive conduct? This article is of course making a textualist argument, and today the Supreme Court probably has at least 5 justices who sometimes or always are receptive to textualist arguments.³²¹ If the next election gives our country a President who believes in sanctioning all monopolies, could the Court be open to the possibility that the Sherman Act (or at least the FTC Act) is a no-fault statute?

Everyone agrees that courts should faithfully interpret and implement the words of statutes when they are clear.³²² But whether a statute is “clear” often is in the mind of the judge or justice.³²³ As practical matter, the Court’s decision as to the Sherman Act’s clarity on the no-fault issue could depend in part upon what particular justices think about the net economic effects of sanctioning all monopolies.

³¹⁹ Louis D. Brandeis, *The Curse of Bigness*, HARPER’S WEEKLY, Jan. 10 1914, at 114–16 (1934).

³²⁰ See Mr. Dooley, WIKIPEDIA, https://en.wikipedia.org/wiki/Mr._Dooley (accessed Feb. 15, 2020).

³²¹ See Krishnakumar, *supra* note 45 at 226, providing a chart with a breakdown of judicial decisions involving a textualist approach and which Justice authored each one. The author considers Justice Thomas a “textualist” and Roberts and Alito as “textualist leaning.” *Id.* at 226 n. 18. If Gorsuch and Kavanaugh are added as textualists, it appears that the Supreme Court has 5 textualist or “textualist leaning” Justices. See also Justice Kagan, *supra* note 17, “we are a generally, fairly textualist court.”

³²² See Scalia, *supra* note 44, at 16: “When the text of a statute is clear, that is the end.”

³²³ See Brett N. Kavanaugh, *supra* note 130, at 2119. As Justice Kagan noted, “ “[P]retty much all of us now look at the text first and the text is what matters most,” Kagan said Monday. “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 note 17 *supra*.

As Justice Kavanaugh noted, the “absurdity doctrine”³²⁴ 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 or FTC Act embodies a congressional intent to sanction all monopolies.

On the other hand, the justices may believe, as we do, that reasonable people can disagree over its 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 on both an overall perspective and in particular contexts. If the justices believe that the net effects 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 sanction all monopolies. We believe that the issue deserves thoughtful analysis both overall and in particular industry contexts.

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.”³²⁵ If the current conservative Supreme Court does not want the Sherman Act or the FTC Act to sanction 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.”³²⁶

³²⁴ See Kavanaugh, note 130 *supra*.

³²⁵ *A.M. ex rel. FM v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016). For an excellent analysis of these two Gorsuch references, see Robert Connolly, CARTEL CAPERS (Oct. 30, 2019), <http://cartelcapers.com/blog/supreme-court-review-sought-for-per-se-rule-in-criminal-cases/>.

³²⁶ *Perry v. Merit Sys. Protection Board*, 137 S. Ct 1975, 1990 (2017) (Gorsuch, J., dissenting).