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Who Cares Whether A Monopoly is Efficient? The Sherman Act Is Supposed to Ban Them All

By Robert Lande
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How many times have you heard from an antitrust scholar or practitioner that merely possessing a monopoly does not run afoul of the antitrust laws? That a violation requires the use of a restraint to extend that monopoly into another market, or to preserve the original monopoly to constitute a violation? Here's a surprise.

Both a plain reading and an in-depth analysis of the text of Section 2 of the Sherman Act demonstrate that this law's violation does not require anticompetitive conduct, and that it does not have an efficiencies defense. Section 2 of the Sherman Act was designed to impose sanctions on any firm that monopolizes or attempts to monopolize a market. Period. With no exceptions for firms that are efficient or for firms that did not engage in anticompetitive conduct.

This is the conclusion one should reach if one were a judge analyzing the Sherman Act using textualist principles. Like most of the people reading this article I'm not a textualist. But many judges and Supreme Court Justices are, so this method of statutory interpretation must be taken quite seriously today.

To understand how to read the Sherman Act as a textualist, one must first understand the textualist method of statutory interpretation. This essay presents a textualist analysis of Section 2 that is a condensation of a 92-page law review article, titled "The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration." My analysis demonstrates that Section 2 is actually a no-fault statute. Section 2 requires courts to impose sanctions on monopolies and attempts to monopolize without inquiring into whether the defendant engaged in anticompetitive conduct or whether it was efficient.

A Brief Primer on Textualism

As most readers know, a traditionalist approach to statutory interpretation analyzes a law's legislative history and interprets it accordingly. The floor debates in Congress and relevant Committee reports affect how courts interpret a law, especially in close cases or cases where the text is ambiguous. By contrast, textualism only interprets the words and phrases actually used in the relevant statute. Each word and phrase is given its fair, plain, ordinary, and original meaning at the time the statute was enacted.

Justice Scalia and Bryan Garner, a professor at SMU's Dedman School of Law, wrote a 560-page book explaining and analyzing textualism. Nevertheless, a basic textualist analysis can be described relatively simply. To ascertain the meaning of the relevant words and phrases in the statute, textualism relies mostly upon definitions contained in reliable and authoritative dictionaries of the period in which the statute was enacted. These definitions are supplemented by analyzing the terms as they were used in contemporaneous legal treatises andcases. Crucially, textualism ignores statutes' legislative history. In the words of Justice Scalia, "To say that I used legislative history is simply, to put it bluntly, a lie."

Textualism does not attempt to discern what Congress "intended to do" other than by plainly examining the words and phrases in statutes. A textualist analysis does not add or subtract from the statute's exact language and does not create exceptions or interpret statutes differently in special circumstances. Nor should a textualist judge insert his or her own policy preferences into the interpretation. No requirement should be read into a law unless, of course, it is explicitly contained in the legislation. No exemption should be inferred to achieve some overall policy g Congress arguably had unless, of course, the text demands it.

As Justice Scalia wrote, "Once the meaning is plain, it is not the province of a court to scan its wisdom or its policy." Indeed, if a court were to do so this would be the antithesis of textualism There are some complications relevant to a textualist analysis of Section 2, but they do not ch the results that follow.

A Textualist Analysis of Section 2 of the Sherman Act

A straightforward textualist interpretation of Section 2 demonstrates that a violation does not require anticompetitive conduct and applies regardless whether the firm achieved its position through efficient behavior.

Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . ." There is nothing, no language in Section 2, requiring anticompetitive conduct or creating an exception for efficient monopolies. A textualist interpretation of Section 2 therefore needs only to determine what the terms "monopolize" and "attempt to monopolize" meant in 1890. This examination demonstrates that these terms meant the same things they mean today if they are "fairly," "ordinarily," or "plainly" interpreted, free from the legal baggage that has grown up around them by a multitude of court decisions.

What Did "Monopolize" Mean in 1890?

When the Sherman Act was passed the word "monopolize" simply meant to acquire a monopoly. The term was not limited to monopolies acquired or preserved by anticompetitive conduct, and it did not exclude firms that achieved their monopoly due to efficient behavior.

As noted earlier, Justice Scalia was especially interested in the definitions of key terms in contemporary dictionaries. Scalia and Garner believe that six dictionaries published between 1851 to 1900 are "useful and authoritative." All six were checked for definitions of "monopolize". The principle definition in each for "monopolize" was simply that a firm had acquired a monopoly. None required anticompetitive conduct for a firm to "monopolize" a market, or excluded efficient monopolies.

For example, the 1897 edition of Century Dictionary and Cyclopedia defined "monopolize" as: "1. To obtain a monopoly of; have an exclusive right of trading in: as, to monopolize all the corn in a district . . . . "

Serendipitously, a definition of "monopolize" was given in the Sherman Act's legislative debates, just before the final vote on the Bill. Although normally a textualist does not care about anything uttered during a congressional debate, Senator Edmund's remarks should be significant to a textualist because he quotes from a contemporary dictionary that Scalia considered useful and reliable. "[T]he best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb "to monopolize": He went on:

> 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.

There was no requirement of anticompetitive conduct, or exception for a monopoly efficiently gained.

These definitions are essentially the same as those in the 1898 and 1913 editions of Webster's Dictionary. The four other dictionaries of the period Scalia & Garner considered reliable also contained essentially identical definitions. The first edition of the Oxford English Dictionary, from 1908, also contained a similar definition of "monopolize:"

> 1 . . . . To get into one's hands the whole stock of (a particular commodity); to gain or hold exclusive possession of (a trade); . . . . To have a monopoly. . . . 2 . . . . To obtain

> exclusive possession or control of; to get or keep entirely to oneself.

Not only does the 1908 Oxford English Dictionary equate “monopolize” with “monopoly,” but nowhere does it require a monopolist to engage in anticompetitive conduct.

Moreover, all but one of the definitions in Scalia’s preferred dictionaries do not limit monopolies to firms making every sale in a market. They roughly correspond to the modern definition of “monopoly power,” by defining “monopolize” as the ability to control a market. The 1908 Oxford English Dictionary defined “monopolize” in part as “To obtain exclusive possession or control of.” The Webster’s Dictionary defined monopolize as “with the view to appropriate or control the exclusive sale of.” Stormonth defined monopolize as “one who has command of the market.” Latham defined monopolize as “ to have the sole power or privilege of vending.…” And Hunter & Morris defined monopolize as “to have exclusive command over.”

In summary, every one of Scalia’s preferred period dictionaries defined “monopolize” as simply to gain all the sales of a market or the control of a market. A textualist analysis of contemporary legal treatises and cases yields the same result. None required conduct we would today characterize as anticompetitive, or exclude a firm gaining a monopoly by efficient means.

A Textualist Analysis of “Attempt to Monopolize”

A textualist interpretation of Section 2 should analyze the word “attempt” as it was used in the phrase “attempt to monopolize” circa 1890. However, no unexpected or counterintuitive result comes from this examination. Circa 1890 “attempt” had its colloquial 21st Century meaning, and there was no requirement in the statute that an “attempt to monopolize” required anticompetitive conduct or excluded efficient attempts.

The “useful and authoritative” 1897 Century Dictionary and Cyclopedia defines “attempt” as:

> 1. To make an effort to effect or do; endeavor to perform; undertake; essay: as, to attempt a bold flight . . . . 2. To venture upon: as, to attempt the sea.— 3. To make trial of; prove; test . . . . .

The 1898 Webster’s Dictionary gives a similar definition: “Attempt . . . 1. To make trial or experiment of; to try. 2. To try to move, subdue, or overcome, as by entreaty.’ The Oxford English Dictionary, which defined “attempt” in a volume published in 1888, similarly reads: “1. A putting forth of effort to accomplish what is uncertain or difficult….”

However, the word “attempt” in a statute did have 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.” 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 itse with things trivial and small.” But no source of the period defined the magnitude or nature of t necessary acts with great specificity (indeed, a precise definition might well be impossible).

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 . . .

Congress's choice of the phrase "attempt to monopolize" surely built upon the existing common law definitions of an "attempt" to commit robbery and other crimes. Although the meaning of a criminal "attempt" to violate a law has evolved since 1890, a textualist approach towards an "attempt to monopolize" should be a "fair" or "ordinary" interpretation of these words as they were used in 1890, ignoring the case law that has arisen since then. It is clear that acts constituting mere preparation or planning should be insufficient. Attempted monopolization should also require the intent to take over a market and at least one serious act in furtherance of this plan.

But "attempted monopolization" under Section 2 should not require the type of conduct we today consider anticompetitive, or exempt efficient conduct. Because current case law only imposes sanctions under Section 2 if a court decides the firm engaged in anticompetitive conduct,this case law was wrongly decided. It should be overturned, as should the case law that excuses efficient attempts.

Moreover, attempted monopolization's current "dangerous probability" requirement should be modified significantly. Today it is quite unusual for a court to find that a firm illegally "attempted to monopolize" if it possessed less than 50 percent of a market.But under a textualist interpretation of Section 2, suppose a firm with only a 30 percent market share seriously tried to take over a relevant market. Isn't a firm with a 30 percent market share often capable of seriously *attempting* to monopolize a market? And, of course, attempted monopolization shouldn't have an anticompetitive conduct requirement or an efficiency exception.

Textualists Should Be Consistent, Even If That Means More Antitrust Enforcement

Where did the exception for efficient monopolies come from? How did the requirement that anticompetitive conduct is necessary for a Section 2 violation arise? They aren't even hinted at in the text of the Sherman Act. Shouldn't we recognize that conservative judges simply made up the anticompetitive conduct requirement and efficiency exception because they thought this was good policy? This is not textualism. It's the opposite of textualism.

No fault monopolization embodies a love for competition and a distaste for monopoly so strong that it does not even undertake a "rule of reason" style economic analysis of the pros and cons of particular situations. It's like a *per se* statute insofar as it should impose sanctions on all monopolies and attempts to monopolize. At the remedy stage, of course, conduct-oriented remedies often have been, and should continue to be, found appropriate in Section 2 cases.

The current Supreme Court is largely textualist, but also extremely conservative. Would it decide a no-fault case in the way that textualism mandates?

Ironically, when assessing the competitive effects of the Baker Hughes merger, (then) Judge Thomas changed the language of the statute from "*may* be substantially to lessen competitio "*will* substantially lessen competition," despite considering himself to be a textualist. So much sticking to the language of the statute!

Until recently, textualism has only been used to analyze an antitrust law a modest number of t This is ironic because, even though textualism has historically only been championed by conservatives, a textualist interpretation of the antitrust laws should mean that the antitrust

statutes will be interpreted according to these laws' original aggressive, populist and consumer-oriented language.

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