RESPONSE

# HIGH TECH MONOPOLIES: CUTTING THE GORDIAN KNOT WITH NO-FAULT

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*Nascent Competitors*[1] and *Antitrust Enforcement, Regulation and Digital Platforms* ("*Digital Platforms*")[2] are excellent articles. Both raise timely and extremely important problems and analyze them rigorously. Sadly, neither offers practical solutions that courts often will utilize. They each discuss problems that are protected from procompetitive solutions by a Gordian knot[3] of judicial precedent. The articles' proffered solutions rarely will be implemented due to the current judicial interpretations of Section 2 of the Sherman Act.[4] The only way an effective solution could arise would be if courts undertake a textualist analysis of the Sherman Act and thereby adopt no-fault monopolization, holding that firms violate Section 2 regardless of whether they engaged in anticompetitive conduct.[5]

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[1] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

[2] William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation and Digital Platforms*, 168 U. PA. L. REV. 1911 (2020).

[3] Gordian Knot is a legend associated with Alexander the Great and the term is now used to describe "an intricate or intractable obstacle." Evan Andrews, *What Was the Gordian Knot?*, HIST. (Aug. 29, 2018), https://www.history.com/news/what-was-the-gordian-knot [https://perma.cc/9FT3-JMYG]. The phrase "cutting the Gordian knot" is now used to describe "a creative or decisive solution to a seemingly insurmountable problem." Id.

[4] 15 U.S.C. § 2.

[5] *See generally* Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020).

The no-fault approach to monopolization and attempted monopolization is not, of course, permitted under current case law.[6] Current precedent, however, also does not usually permit the specific solutions to the problems raised and ably analyzed in *Nascent Competitors* and *Digital Platforms*. Moreover, the no-fault approach to Section 2 would be based upon a textualist or "fair meaning" approach to statutory interpretation, and no court has ever analyzed these issues using a textualist framework.[7]

Textualism, long pioneered by Justice Scalia, has been firmly embraced by Justices Kavanaugh, Gorsuch, and Barrett.[8] It also has sometimes been undertaken by other members of the Court.[9] For the reasons given in Part IV of this Response, an optimist can hope that an increasingly textualist Court would reinterpret Section 2's prohibition against firms that "monopolize, or attempt to monopolize" to constitute a no-fault approach to monopolization law.[10]

## I. NASCENT COMPETITORS

*Nascent Competitors* shows how dominant and nearly-dominant firms can purchase small but potentially innovative firms, including firms not then making the purchasing firm's products or services, but that might soon make

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[6] *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[7] *See* Lande & Zerbe, *supra* note 5, at 515.

[8] A generation ago Justice Scalia was the only justice to perform textualist analysis routinely. Now there are perhaps three strict textualists on the Court and three or four others who sometimes employ textualism. As Justice Kagan noted, even after Justice Scalia's departure, "we are a generally, fairly textualist court." Ryan Lovelace, *Elena Kagan: The Supreme Court Is a 'Textualist Court' That Reasons More Like Scalia Than Breyer*, WASH. EXAM'R (Oct. 16, 2017, 7:04 PM), https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer [https://perma.cc/TLA8-YG5K]; *see also* Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?*, 69 STAN. L. REV. ONLINE 185, 186 (2017), https://www.stanfordlawreview.org/online/spotlight-textualism-originalism [https://perma.cc/462G-ZW4C] (discussing the similarities between Justice Neil Gorsuch and Justice Antonin Scalia's methodological approaches and their commitment to textualism); Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. REGUL. ONLINE (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick [https://perma.cc/H9AG-XJGV] ("Like Justice Gorsuch and Justice Scalia, [Justice] Barrett is a textualist."). The author of this Response is not a textualist, but he recognizes that many, perhaps most, Supreme Court Justices are.

[9] *See* Lovelace, *supra* note 8 (noting Justice Kagan's view that "[p]retty much all of [the Supreme Court justices] now look at the text first and the text is what matters most"). As Justice Gorsuch recently wrote: "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020). All three opinions in this case employed textualist analysis, even though they disagreed with one another as to the specific results of this analysis.

[10] 15 U.S.C. § 2.

either the acquiring firm's products, or related products that might help the firm achieve, solidify, and/or expand its dominance.[11] The Article makes a strong case that the antitrust laws should prevent this, and it certainly does suggest possible ways this could happen, at least on occasion.[12] It is related to an approach that would call for the courts to revitalize the merger incipiency doctrine and implement it in the manner Congress intended.[13]

*Nascent Competitors* does not, however, really discuss the many reasons why the courts are extremely unlikely to block the types of high tech mergers the Article warns against. The Article's primary focus is Section 2 of the Sherman Act's attempted monopolization prohibition.[14] But for plaintiffs to prevail in such cases, they would have to win every one of a staggering number of issues. For each extremely difficult issue, a plaintiff's victory would be far from likely—and all too often would be extremely unlikely.

First, plaintiffs would have to win on market definition even though quite often the nascent competitor does not participate in the incumbent's market at the time of the acquisition.[15] The second difficult issue would be to prove defendant's market power even though the courts usually require firms in attempted monopolization cases to have at least fifty percent of the affected market and proof by plaintiffs of effective barriers to new entry.[16] Third, and perhaps most daunting, would be the requirement that plaintiff prove that defendant engaged in anticompetitive conduct and that there was a high probability at the time of the acquisition that this conduct was the cause of

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[11] *See* Hemphill & Wu, *supra* note 1, at 1880.

[12] *See id.* at 1881 (discussing a potential "enforcement policy that prohibits anticompetitive conduct that is reasonably capable of contributing significantly to the maintenance of the incumbent's market power").

[13] The enforcers and the courts have not implemented the merger incipiency doctrine in the vigorous manner Congress intended. The purpose of this doctrine is to have merger law recognize that markets need "resilient redundancy."

Merger enforcement typically allows mergers down to the bare number of firms required for effective competition. Yes, quite often one or more firms in a market will wither or implode as a result of normal competition, or vanish due to an unexpected shock to the market. Frequently this occurs surprisingly quickly. Moreover, when enforcers challenge a merger, they often allow it subject to complex remedies. But if the remedy fails, as they often do, the market will have too few competitors by the enforcers' own estimate. Taken together these scenarios often leave markets with too few firms.

A revitalized incipiency doctrine would retain the resilient redundancy that would preserve competition, while sacrificing little or nothing in terms of efficiency or innovation. The enforcers and the courts should implement such a policy aggressively. *See generally* Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors*, 2018 WIS. L. REV. 783.

[14] *Nascent Competitors* also would attempt to use Section 7 of the Clayton Act to block mergers likely to lead to dominant firms. *See* Hemphill & Wu, *supra* note 1, at 1893-96.

[15] *See id.* at 1893-94 (discussing the complexity that occurs "where the nascent competitor offers solely future competition").

[16] *See ABA Section of Antitrust Law*, *in* 2012 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 37, 51 (2013).

its nascent market power.[17] This would be an especially difficult task for a plaintiff because the defendant will always try—and will often succeed—in convincing the courts that its conduct was benign or procompetitive.[18] Indeed, a recent Federal Trade Commission (FTC) survey of judicial opinions on Section 2 claims between 2000 and 2007 found that "[p]laintiffs won a favorable judicial ruling on at least one section 2 claim in just two percent of all cases."[19]

A plaintiff would be especially unlikely to prevail in the types of high tech cases *Nascent Competitors* focuses on because there is increased uncertainty about what the products will look like in these cases in the future.[20] In these markets, moreover, the attempted monopolization concerns often would arise from multiple acquisitions, none of which by itself, at the time of the acquisition, would result in a high probability of developing into a serious competitor to the acquiring company.[21]

Sadly, there is little reason to believe the current conservative judiciary will reverse its precedent in all these[22] areas and interpret Section 2 in a vigorous manner that will lead to many plaintiff victories. *Nascent Competitors* raises many alarms about ways in which consumer welfare will be harmed significantly but offers little hope that the Sherman Act will be interpreted aggressively enough to prevent these harms. By contrast, the no-fault solution could at least remedy these problems afterwards.

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[17] *See* Hemphill & Wu, *supra* note 1, at 1907-08. The authors state:

> To be clear, we are not arguing that liability exists if technological change, subsequent to the transaction, results in a convergence of markets that no one anticipated at the time. Such a development cuts off the causal link between the acquisition and subsequent poor market performance. But it might be, for example, that the incumbent, with a keen understanding of its own industry, understood well that a firm was highly likely to be a future competitor, in a manner not yet recognized by the enforcer.

*Id.* at 1908. One should add "or to the reviewing court."

[18] *Id.* at 1902.

[19] William F. Adkinson, Jr., Karen L. Grimm & Christopher N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice* 15 (Nov. 3, 2008) (working paper), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf [https://perma.cc/7FM5-DPSU]. Settlements are not included in this statistic.

[20] *See, e.g.*, Hemphill & Wu, *supra* note 1, at 1887-88 ("Uncertainty about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence—uncertainty about the degree to which those products will actually compete.").

[21] *Id.* at 1901 (discussing the cumulative effects of multiple small acquisitions on eliminating competition).

[22] The relevant areas are market definition, the dangerous probability of monopoly power or monopoly power, anticompetitive conduct, causation between the conduct and the acquisition, etc. of monopoly, and the absence of significant efficiencies. Each of these tasks would have to succeed despite the uncertainties involved and the predilections of a mostly conservative judiciary.

## II. DIGITAL PLATFORMS

*Digital Platforms* identifies and analyzes reforms for courts' inability to deal effectively with the long-term monopolies created by many means, including the acquisitions of nascent competitors. It shows spectacularly well that once a firm becomes a monopoly, especially a platform or other high tech monopoly, it often will be extremely durable.[23] Accordingly, *Digital Platforms* proposes a number of regulatory or quasi-regulatory solutions (including atypical solutions for antitrust cases)[24] for many dominant firm situations. The Article demonstrates that these remedies often will be the best possible approaches to ameliorating the harms to consumer welfare caused by firms that possess monopoly power.[25]

But, of course, courts only think about the optimal remedy if they first find every element of a monopolization violation of Section 2 of the Sherman Act. For the reasons discussed earlier, these plaintiff victories are rare. Indeed, *Digital Platforms* acknowledges this explicitly, using, as a striking example, the apparent absence of even a single example of a plaintiff victory in a predatory pricing case during the last twenty-eight years![26]

Because plaintiff victories in monopolization cases are so rare, *Digital Platforms* notes that "Congress could enact new legislation that creates an entirely new regulatory agency for digital platforms or could give new statutory authority to an existing agency. Alternatively, the FTC could promulgate competition rules under authority that it arguably already has under the FTC Act of 1914."[27]

*Digital Platforms* thus concedes that unless there is some type of drastic change in Section 2 law, its proposed regulatory and quasi-regulatory

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[23] *See* Rogerson & Shelanski, *supra* note 2, at 1912-13.

[24] *See id.* at 1914 ("We nonetheless find three main reasons why, despite the challenges in getting regulation right, limited regulation might have advantages over traditional antitrust adjudication in the context of large-scale industries with network effects.").

[25] *Id.* at 1913 ("This Article describes how regulation could usefully supplement general-purpose antitrust laws to address the competition policy challenges of digital platforms.").

[26] *Id.* at 1918-19 ("No plaintiff has prevailed in a predatory pricing case in a US court since [*Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)]."); *see also* C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 Yale L.J. 2048, 2062-63 (2018) ("Some observers worry that, after *Brooke Group*, a meritorious predation case is almost impossible to win."). Of course, this conclusion omits consideration of settlements. Regardless, *Digital Platforms* correctly notes: "Economic research demonstrates, however, that predatory conduct *does* occur and *does not* depend on either below-cost pricing or recoupment. Predation is just one area in which court-made doctrine appears out of step with the relevant economic facts and knowledge." Rogerson & Shelanski, *supra* note 2, at 1919.

[27] Rogerson & Shelanski, *supra* note 2, at 1916. *Digital Platforms* elaborates: "For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward." *Id.* at 1919.

solutions will rarely be imposed.[28] The anticompetitive monopolies the Article so ably describes will continue harming consumer welfare. Unless, of course, the Supreme Court adopts no-fault monopolization.

## III. THE NO-FAULT SOLUTION

A better solution, one that would largely remedy the problems identified by both Articles, would be to recognize that the Sherman Act is a no-fault statute. No-fault would solve the problem of courts failing to block enough acquisitions of nascent competitors, and also would prevent many of the problems arising from the long-term dominance of monopolies. The no-fault approach follows from a textualist interpretation of the specific words of Section 2.

Textualists interpret statutes by using contemporary dictionaries, legal treatises, and cases to ascertain what key terms meant when the statute was passed.[29] Textualism doesn't go beyond the literal words of the statute to imply exceptions or conditions.[30] A textualist would search for the key Section 2 terms, "monopolize," and "attempt" in a large number of reliable dictionaries and legal treatises, and also analyze antitrust cases that were roughly contemporaneous to the 1890 Sherman Act.

The results of this search are striking. Every contemporary source defined the word "monopolize" simply to mean to obtain a monopoly. No source limited "monopolization" to gaining a monopoly though anticompetitive conduct.[31] This textualist analysis demonstrates that Section 2 is a no-fault

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[28] *Id.* at 1916 ("[P]otential shortcomings of the evolution and application of antitrust doctrine through the courts should lead policy makers to consider supplementing the traditional adjudicative model of U.S. antitrust enforcement in limited circumstances.").

[29] Lande & Zerbe, *supra* note 5, at 510-15. As Justice Gorsuch observed, "we [first] orient ourselves to the time of the statute's adoption . . . and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand . . . ." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738-39 (2020).

[30] Lande & Zerbe, *supra* note 5, at 513, 534-35. As Justice Gorsuch noted in *Bostock*, "unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" 140 S. Ct. at 1749 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012)). Scalia and Garner's text itself reads:

> Some think that when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve. . . . Traditional principles of interpretation reject this distinction because the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions.

SCALIA & GARNER, *supra*, at 101.

[31] Lande & Zerbe, *supra* note 5, at 518-26. "In sum, all of the surveyed roughly contemporaneous dictionaries define 'monopolize' as simply to gain a monopoly." *Id.* at 522-23. For similar results from an analysis of contemporary legal treatises and antitrust cases, see *id.* at 524-30.

statute.[32] Cases holding that anticompetitive conduct is required for a violation should be overturned.[33]

A no-fault approach would significantly revitalize monopolization law insofar as it would eliminate the anticompetitive conduct requirement. If this approach is adopted, however, courts might not find a monopolization violation unless defendants had a "monopoly"—i.e., 100% or close to 100% of the relevant market. Today, by contrast, for a monopolization violation, to establish monopoly power, "lower courts generally require a minimum market share of between 70% and 80%."[34] Because of these opposing effects, the net result of no-fault on monopolization law might not be revolutionary.

No-fault would, however, have a much larger revitalizing effect on attempted monopolization law. The word "attempt" meant the same thing in 1890 as it does today.[35] In statutes of that period the "attempt" requirement meant only that a serious act towards the intended goal had been undertaken.[36] For an attempted monopolization violation, plaintiff would only have to show that defendant had an intent to take over a market, and had performed one concrete, significant act in furtherance of this intent.[37]

This is very different from the current attempted monopolization requirement that defendants have a "dangerous probability"[38] of acquiring monopoly power. Today the "dangerous probability" threshold is interpreted quite stringently. For example, it seldom can be met by a firm with just 50% of a market, and rarely if ever by a firm with only a 30% market share.[39] As noted earlier, today very few attempted monopolization suits are successful.[40]

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[32] *See id.* at 528 ("Although none of the early [Sherman Act] cases explicitly said that Section 2 did not require anticompetitive conduct, by equating [monopolize and monopoly] they implicitly support a no-fault approach.").

[33] These cases include, for example, Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[34] *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989). However, for an analysis of the textualist "literalness" doctrine and the argument that firms with a market share as low as 88% or even 70% could be found to have "monopolized" in violation of Section 2, see Lande & Zerbe, *supra* note 5, at 568-72.

[35] For a discussion of the types of acts needed to constitute an "attempt," see Lande & Zerbe, *supra* note 5, at 530-34.

[36] *Id.* at 533-34, 534 n.168.

[37] *Id.* at 532.

[38] *ABA Section of Antitrust Law*, *in* 2012 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS 37, 51 (2013). The "dangerous probability" requirement comes from *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905), where Justice Holmes noted the common law origin of the attempt to monopolize offense: "The distinction between mere preparation and attempt is well known in the criminal law." His "dangerous probability" of success formulation is, however, of only limited help in ascertaining which conduct should suffice. *Id.* at 396.

[39] *See* Lande & Zerbe, *supra* note 5, at 583 ("Today, a firm with only 50% of the market could only rarely meet the 'dangerous probability' threshold, and a firm with only a 30% market share could never or almost never meet the threshold.").

[40] *See supra* note 19 and accompanying text.

How much would a textualist approach reinvigorate attempted monopolization law? For example, how much should a court relax the current requirements, such as a 50% market share, when the courts decide whether defendant has undertaken a serious attempt to monopolize? The line of illegality would be as uncertain as the current "dangerous probability" requirement.[41] But it would be much more likely to result in firms found to be illegally attempting to monopolize. Could a defendant with a market share as low as 30% often (instead of virtually never) be found to have violated the Sherman Act? Regardless, the elimination of the anticompetitive conduct requirement should lead to many more successful attempted monopolization cases.

Imposing sanctions on all monopolies and attempts to monopolize could improve economic welfare in many ways.[42] It could also, admittedly, cause costs and difficulties.[43] The economics of no-fault have not, however, been seriously analyzed for a half century. Its net economic effects depend upon a number of empirical issues that are unknown or ambiguous.[44] The economic benefits of no-fault are, however, likely to outweigh the costs.[45]

But why should the net economic effects matter at all? If a textualist analysis shows that Section 2 is a no-fault statute, shouldn't that end the debate? Not necessarily.

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[41] As Oliver Wendall Holmes noted in his discussion of Attempts:

> Eminent judges have been puzzled where to draw the line . . . . [T]he 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 . . . .

OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 68-69 (Boston, Little, Brown & Co. 1881).

[42] Implementing no-fault monopolization should increase innovation and international competitiveness. It should prevent the allocative inefficiency effects of monopoly pricing and the form of exploitation that arises when monopolies acquire wealth from consumers. It would be likely to decrease the inefficiencies that result from monopolies enjoying a "quiet life." It should avoid the waste that can arise as a firm struggles to attain and protect its monopoly, and some of the time and cost of Section 2 litigation. It should improve privacy and decrease income inequality. *See* Lande & Zerbe, *supra* note 5, at 547-56.

[43] 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. *See* Lande & Zerbe, *supra* note 5, at 556-60.

[44] *See id.* at 566-68 (describing a summary of the costs and benefits of different policy options).

[45] *See id.* at 567-68 (providing a table displaying that for the No Fault Policy the net gains compared to the base cost are positive).

Everyone agrees that courts should faithfully interpret and implement the words of statutes when they are clear.[46] But whether a statute is "clear" often is in the mind of the judge or justice.[47] As a practical matter, a court's decision as to the Sherman Act's clarity on the no-fault issue could depend in part upon what particular judges or justices think about the net economic effects of imposing sanctions on all monopolies. Moreover, even textualists make an exception for results they consider "absurd."[48] Justice Scalia argued that we should limit the "absurdity" exception to situations involving a typo or drafting error. But others might have an "absurdity" exception that, as a practical matter, is somewhat broader.[49]

Perhaps the issue of whether no-fault is desirable from an economic perspective is a close, ambiguous, and unknowable issue about which reasonable people can disagree. This is why it is worth focusing upon the standard under which the economics of no-fault should be analyzed. The standard should not be whether the presiding judge or justice believes that no-fault is the best possible approach to Section 2.[50] The standard should be whether they believe that, economically, no-fault would be "absurd."

## IV. CUTTING THE GORDIAN KNOT WITH NO-FAULT MONOPOLIZATION

As discussed earlier, *Nascent Competitors* and *Digital Platforms* analyze problems that are protected from procompetitive solutions by a Gordian knot of judicial precedent. Both articles raise extraordinarily important and timely issues. Both propose crucial reforms that are contingent on the courts

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[46] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter."). As Justice Gorsuch wrote: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[47] As Justice Kagan noted, "[P]retty much all of us now look at the text first and the text is what matters most . . . . And if you can find clarity in the text that's pretty much the end of the ballgame. Often texts are not clear, you have to look [farther]." *See* Lovelace, *supra* note 8 (alterations in original).

[48] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 352 (2012).

[49] *Id.* For a discussion of the absurdity doctrine, see Lande & Zerbe, *supra* note 5, at 572-73.

[50] This was addressed in *Bostock*, where Justice Gorsuch stated that

> the [defendants] are left to . . . fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.

140 S. Ct. at 1753.

changing every one of a large number of areas of Section 2 precedent.[51] Rather than hope for all these changes, no-fault could be used to cut this Gordian knot.

A no-fault approach to Section 2 admittedly suffers from the same need for judicial change, and it would not cure every one of the anticompetitive problems discussed by these articles. But, as noted, there are important differences between the change required for no-fault and the changes specifically required for *Nascent Competitors* and *Digital Platforms* to succeed:

1. A textualist consideration of Section 2 on the issue of no-fault monopolization has never been considered by any court.
2. Textualism was long championed by conservative icon Justice Scalia, and it has several strong adherents on the Court today.

For the anticompetitive scenarios described in *Nascent Competitors* and *Digital Platforms* to be prevented or cured, plaintiffs would have to secure a series of changes in many areas of antitrust law. Yet, these articles offer the courts no clear path towards their needed changes other than the argument that their suggested changes would be in the public interest. By contrast, the no-fault solution would require only one change, admittedly a change that would be both large and extremely controversial.

Is there even a slim chance that the current conservative court would recognize that the Sherman Act is a no-fault statute? 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."[52] Indeed, one could speculate that Justice Gorsuch disagrees on policy grounds with the results of his textualist opinion in *Bostock*, which held that "[a]n employer who fires an individual merely for being gay or transgender defies the law." [53] Is it possible Gorsuch and other conservative justices would use a similar textualist analysis to achieve no-fault monopolization, a result they might find equally undesirable on policy grounds?

If the Supreme Court does not want the Sherman Act to impose sanctions on all monopolies and attempts to monopolize, 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."[54]

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[51] Legislation is also, of course, possible.

[52] A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016).

[53] *See Bostock*, 140 S. Ct. at 1754.

[54] Perry v. Merit Sys. Prot. Bd., 137 S. Ct 1975, 1990 (2017) (Gorsuch, J., dissenting). For an excellent analysis of these two Gorsuch references, see Robert Connolly, *Supreme Court Review Sought for Per Se Rule in Criminal Cases*, CARTELCAPERS (Oct. 30, 2019), http://cartelcapers.com/blog/supreme-court-review-sought-for-per-se-rule-in-criminal-cases [https://perma.cc/UFB5-WSUD].

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