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Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law

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TEXTUALISM AS AN ALLY OF ANTITRUST ENFORCEMENT: EXAMPLES FROM MERGER AND MONOPOLIZATION LAW

Robert H. Lande*

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INTRODUCTION

Should those who believe that vigorous enforcement of the antitrust laws is in the public interest fear the rise of textualism? After all, it is a method of statutory construction that, historically, largely was championed by Justice Scalia.¹ Today the

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¹ See Frank H. Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxi, xxvi (2012).

Justices who most often utilize textualism in their judicial decision-making tend to be conservative,² and do not seem reluctant to overturn long standing precedents.³

Nevertheless, fans of vigorous antitrust enforcement should not fear the rise of textualism. This is because the Sherman Act, Clayton Act and FTC Act were all enacted in part as a result of the progressive movement.⁴ These laws were written in large part to protect the interests of consumers against possible exploitation by trusts, cartels, monopolists, and large firms that desired to merge. It should not be surprising that textualism's focus on the precise words of these statutes should help the cause of consumers and vigorous antitrust enforcement.

Consider the original words contained in Section 2 of the Sherman Act,⁵ and also consider some specific words that were *not* used in the statute. Section 2 makes it unlawful for any person to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States”⁶ There is nothing in the statute, no language in Section 2, that requires anticompetitive conduct. No words carve out an exception for a monopoly that can demonstrate itself to be efficient.

A textualist interpretation of Section 2 should of course determine precisely what the terms “monopolize” and “attempt to monopolize” meant in 1890. This analysis will demonstrate that Section 2 requires courts to impose sanctions on firms that “monopolize” or “attempt to monopolize,” using definitions from 1890 that match the colloquial definitions of these terms today, without the baggage added by non-textualist court decisions. Neither of these key words in the statute requires inquiring into whether defendant engaged in anticompetitive acts to monopolize or attempt to monopolize, or whether defendant's conduct was net-efficient. Instead, textualist analysis shows that Section 2 is a no-fault statute.

² For evidence of the prevalence of textualism, see, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). All three opinions in this case employed textualist analysis, but they disagreed with one another as to the specific results of this analysis. See also Jonathan Skrmetti, Symposium, *The Triumph of Textualism: “Only the Written Word Is the Law,”* SCOTUSBLOG (June 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law> [<https://perma.cc/S4JX-5964>]; 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/7JZV-GERP>] (reporting that Justice Kagan stated: “[W]e are a generally, fairly textualist court, which will generally think when the statute is clear you go with the statute.”). For an excellent explanation of textualism, citations to much of the literature on the subject, and analysis of which justices use textualism most often, see generally Anita S. Krishnakumar, *Some Lingering Questions for Textualism* (unpublished manuscript) (on file with author).

³ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

⁴ For the populist, pro-consumer origin of the antitrust statutes, see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93–106, 135–42 (1982) [hereinafter Lande, *Original and Primary Concern of Antitrust*].

⁵ 26 Stat. 209 (1890).

⁶ 15 U.S.C. § 2.

Consider also Section 7 of the 1914 Clayton Act.⁷ It prohibits mergers, the effect of which “may be substantially to lessen competition or to tend to create a monopoly.”⁸ The statute uses “may” instead of other terms that sometimes are used in current merger case law, such as “is likely to” or “will.” To twenty-first century minds, “may” demands a tougher approach to merger enforcement than these alternatives. The textualist question is: what did “may” mean in 1914? A textualist analysis will show that the standard used in some recent cases, which only block a merger that “is likely to” or “will” “substantially lessen competition,” is not the standard embodied in the plain words of the Clayton Act.

The plain words of Section 7, moreover, do not contain or permit an efficiencies defense, at least for mergers that may “tend to create a monopoly.”⁹ Because the statute contains no such efficiencies defense, textualist analysis means that courts erred when they created one.

Perhaps the unwarranted fears of enforcement-minded members of the antitrust community explain why textualism has only been used to analyze these laws a relatively modest number of times.¹⁰ Regardless of one’s opinion as to the merits of textualism,¹¹ however, today one cannot ignore it.

⁷ Pub. L. No. 63-212, 38 Stat. 730 (1914).

⁸ 15 U.S.C. § 18.

⁹ 15 U.S.C. § 18. FTC Chair Khan may have meant this when she said: “Congress determined that an unlawful merger cannot be saved from illegality because it may be deemed beneficial on some ultimate reckoning of economic debits and credits.” Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks at the Fordham Annual Conference on International Antitrust Law & Policy, at 6 (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf [<https://perma.cc/7UCQ-FUBY>].

¹⁰ Chair Khan observed, “[D]espite the ascendance of textualism, antitrust analysis has been remarkably devoid of actually grappling with the underlying statutory text.” *Id.* at 2. For antitrust articles that have applied textualism to antitrust, see Robert H. Lande & Richard O. Zerbo, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020) [hereinafter Lande & Zerbo, *A Textualist Demonstration*]; Robert H. Lande, *The No-Fault Approach to Monopolization: Terrific, Terrible, or Textualism?*, ANTITRUST MAG. ONLINE, (Aug. 2021), <https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/august-2021/atonline-full-issue.pdf> [<https://perma.cc/FDA6-4K5J>]; Robert H. Lande, *High Tech Monopolies: Cutting the Gordian Knot with No-Fault*, 168 U. PA. L. REV. ONLINE 253 (2021); 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).

¹¹ The author of this Article does not believe that textualism is the best method of statutory interpretation. The author believes that, when the statutory language is ambiguous, the legislative history can help interpret this language. For the author’s use of the “traditionalist” or “purposivist” approach to statutory interpretation, see Lande, *Original and Primary Concern of Antitrust*, *supra* note 4. One reason why the author is not a textualist is because some of textualism’s doctrines, including its literalness doctrine and absurdity exception, can be manipulated by result-oriented justices. For explanations of these

This Article will first briefly present an overview of the textualist method of statutory interpretation. It will then briefly engage in a textualist analysis of important portions of two antitrust statutes: Section 2 of the Sherman Act and Section 7 of the Clayton Act. At least in these areas, textualist analysis should, if anything, help re-invigorate antitrust enforcement.

I. TEXTUALISM

Justice Scalia and Bryan Garner wrote a 567-page book explaining and analyzing textualism,¹² and today there exists a vast literature on the subject.¹³ Nevertheless, a basic textualist analysis can be described relatively simply.¹⁴

Textualism only interprets the words and phrases that actually were used in the relevant statute.¹⁵ Each word and phrase is given its fair, plain, ordinary, and original meaning.¹⁶ To ascertain this meaning, textualism relies mostly upon the definitions contained in reliable and authoritative¹⁷ dictionaries of the period in which the statute was enacted.¹⁸ These definitions are supplemented by analyzing these terms as they were used in contemporaneous legal treatises and cases.¹⁹ Crucially, textualism ignores statutes' legislative history (i.e., the associated floor debates and

doctrines, see Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 568–72, 574–81. The author believes that textualism is in part a judge-promoted doctrine that was designed to shift much of the power to ascertain the will of Congress from Congress to the Courts.

¹² See SCALIA & GARNER, *supra* note 1.

¹³ For excellent analyses of textualism and citations to a large amount of textualist scholarship, see Krishnakumar, *supra* note 2.

¹⁴ This Article will employ textualism as it was articulated by SCALIA & GARNER, *supra* note 1. As Professor Krishnakumar demonstrates, however, there are many variations of textualism, including approaches that are sometimes called “formalist” and “flexible.” Different Supreme Court Justices are more likely to use particular types of textualism. See Krishnakumar, *supra* note 2, at 1 n.1, 11, 17, 40.

¹⁵ SCALIA & GARNER, *supra* note 1, at 33. Some Justices who usually employ textualism, however, have sometimes cited legislative history. *Id.* at 43–44.

¹⁶ *Id.* at 33.

¹⁷ For each time period, Scalia and Garner provide a list of dictionaries and legal treatises they consider to be reliable and authoritative. *Id.* app. at 415–24.

¹⁸ Immediately after Scalia and Garner introduce the “fair reading” method, *id.* at 33, they cite three sources on guides to statutory interpretation, and then, as examples of permissible and useful sources of meaning, four dictionary definitions of key terms, *id.* at 37; see also *id.* at 78 (“Words must be given the meaning they had when the text was adopted.”). Their inclusion of Appendix A, *A Note on the Use of Dictionaries* is also instructive. *Id.* at 415–24. As an example, Justice Alito’s textualist opinion in *Bostock v. Clayton County*, cites five contemporary dictionaries in the appendix to ascertain what the word “sex” meant in 1964. 140 S. Ct. 1731, 1784–90 (2020) (Alito, J., dissenting).

¹⁹ Scalia and Garner also provide a list of legal treatises they consider reliable. SCALIA & GARNER, *supra* note 1, at 421; see also *id.* at 320 (“Cannon of Imputed Common-Law Meaning: A statute that uses a common-law term, without defining it, adopts its common-law meaning.”).

Congressional committee reports). In the words of Justice Scalia, “[t]o say that I used legislative history is simply, to put it bluntly, a lie”²⁰

Textualism does not attempt to discern what Congress “intended to do” other than by examining the words and phrases in the statutes.²¹ 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. 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 goal Congress arguably had.²²

As Justice Scalia wrote, “once the meaning is plain, it is not the province of a court to scan its wisdom or its policy.”²³ Indeed, if a court were to do so, this would be the antithesis of textualism. A straightforward textualist interpretation of Section 2 demonstrates that a violation does not require anticompetitive conduct.

To a textualist, the preceding analysis of the goals of the antitrust laws is not relevant or useful because it is based upon the Sherman Act’s legislative history. A textualist would ignore legislative history and just fairly and plainly interpret the exact words of the statute. As will be seen, for Section 2 of the Sherman Act, the textualist task has a clear result. A full analysis of this statute does involve some relevant complications,²⁴ and required a ninety-two-page law review article.²⁵ But its complexities do not change the straightforward textualist result.

²⁰ Debra Cassens Weiss, *Scalia Weighs In on Posner’s Controversial Book Review, Calls Posner’s Assertion ‘A Lie,’* AM. BAR. ASS’N J. (Sept. 18, 2012, 11:42 AM), http://www.abajournal.com/news/article/scalia_weighs_in_on_a_controversial_book_review/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email [https://perma.cc/C9XZ-HKJ2].

²¹ Scalia wrote that no exception should be inferred to achieve an alleged different or greater purpose: “[E]ven if you think our laws mean not what the legislature enacted but what the legislators intended, there is no way to tell what they intended *except* the text. Nothing but the text has received the approval of the majority of the legislature and of the President, assuming that he signed it rather than vetoed it and had it passed over his veto. Nothing but the text reflects the full legislature’s purpose. Nothing.” Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

²² As Justice Gorsuch noted in *Bostock v. Clayton County*: “[U]nexpected applications of broad language reflect only Congress’s ‘presumed point [to] produce general coverage – not to leave room for courts to recognize ad hoc exceptions.’” 140 S. Ct. at 1749. A textualist would not, for example, speculate why the term “monopolize” in the statute was not followed by “using anticompetitive conduct.” These three words are not in the statute, so they should not be considered.

²³ SCALIA & GARNER, *supra* note 1, at 353.

²⁴ Relevant complications include the literalness doctrine and the absurdity exception. For explanations of these doctrines, see Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 568–72, 574–81.

²⁵ See generally *id.*

II. A TEXTUALIST ANALYSIS OF SECTION 2 OF THE SHERMAN ACT

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”²⁶ There is no language in Section 2 that even hints at an anticompetitive conduct requirement. A textualist interpretation of Section 2 therefore needs only to determine what the terms “monopolize” and “attempt to monopolize” meant in 1890. This examination will demonstrate that these terms meant the same things they would mean today if they were “fairly,” “ordinarily,” or “plainly” interpreted, free from the legal baggage that has grown up around them by a multitude of court decisions.²⁷ These terms did not require anticompetitive conduct in 1890, and they should not today.

A. 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.

As noted earlier, Justice Scalia was especially interested in the definitions of key terms in contemporary dictionaries.²⁸ Scalia and Garner believe that six dictionaries of the 1851 to 1900 period are “useful and authoritative.”²⁹ All six were checked for definitions of “monopolize,” as were other dictionaries, including *The Oxford English Dictionary*, which Scalia and Garner consider useful and authoritative even though the volume containing “monopolize” was published somewhat later (in 1908).³⁰

The contemporary dictionaries show that the principle definition in each for “monopolize” was simply that a firm had acquired a monopoly. None required anticompetitive conduct. For example, the 1897 edition of *The Century Dictionary and Cyclopedia* defined “monopolize” as: “To obtain a monopoly of; have an exclusive right of trading in: as, to monopolize all the corn in a district”³¹

Second, and 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.

²⁶ 15 U.S.C. § 2.

²⁷ See, e.g., *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

²⁸ See SCALIA & GARNER, *supra* note 1, app. at 421–24.

²⁹ *Id.* app. at 419, 421.

³⁰ See *Monopolize*, 6 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 624 (Henry Bradley ed., 1st ed. 1908). This work was subsequently re-printed in 1933 under the title *The Oxford English Dictionary*.

³¹ *Monopolize*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3843 (William D. Whitney ed., 1st ed. 1897).

[T]he best answer I can make to both my friends is to read from Webster’s Dictionary the definition of the verb “to monopolize”: 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea³²

These definitions are essentially the same as those in the 1898 and 1913 editions of *Webster’s Dictionary*.³³ The four other dictionaries of the period considered reliable by Scalia and Garner contained essentially identical definitions.³⁴ In addition, the first edition of *The Oxford English Dictionary* 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.³⁵

Not only did *The Oxford English Dictionary* equate “monopolize” with “monopoly,” but nowhere did it require that a monopolist have engaged in anticompetitive conduct.

In sum, all of the surveyed roughly contemporaneous dictionaries defined “monopolize” as simply to gain a monopoly.³⁶ In the above cited definitions, *The Oxford English Dictionary* defined “monopolize” in part as “[t]o obtain exclusive possession or control of.” *Merriam-Webster’s Dictionary* defined it as “with the view to appropriate or control the exclusive sale of”; Stormonth defined it as “one who has command of the market”; Latham defined it as “to have the sole power or privilege of vending” and Hunter & Morris defined it as “to have exclusive command over.”³⁷ None required conduct we would today characterize as anticompetitive. None would define a firm gaining a monopoly by efficient conduct as not having “monopolized.” A few definitions did give specific examples of how a firm might become a monopoly by anticompetitive means, or by engrossing (which is similar to merging), and most used a phrase like “controlling the market,” which is ambiguous as to whether anticompetitive conduct must be involved.³⁸

³² 21 Cong. Rec. 3152 (1890). This definition could, however, exclude an accidental monopolist. But the other definitions of monopolize do not.

³³ See Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 521 nn.118–20.

³⁴ *Id.* at 522 n.124.

³⁵ *Monopolize*, 6 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 624 (Henry Bradley ed., 1st ed. 1908).

³⁶ See Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 523–24 nn.129–30.

³⁷ Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 522 n.124.

³⁸ *Id.* at 524.

Moreover, all but one of the definitions in Scalia's preferred dictionaries were not limited to firms with every sale in a market. These five definitions roughly correspond to the modern definition of "monopoly power" as the power to "control prices or exclude competition"³⁹ by defining "monopolize" as the ability to control or command a market.

Under these definitions a firm with, for example, an eighty percent market share that "controlled" or "commanded" the market could be held to have monopolized the market.⁴⁰

In summary, all of the period's dictionaries that Justice Scalia preferred defined "monopolize" as simply to gain a monopoly of a market. All but one included firms that controlled or commanded a market in their definition of firms that monopolized the market, a formulation that roughly corresponds to the modern requirement of monopoly power, which can be met by firms with only a seventy percent market share.⁴¹ None of these dictionaries required anticompetitive conduct for "monopolization," and there is no explicit or implicit language in Section 2 that requires anticompetitive conduct for a violation. A textualist analysis of contemporary legal treatises and cases yields the same result.⁴²

B. 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 twenty-first century meaning, and there was no requirement in the statute that an "attempt to monopolize" required anticompetitive conduct.

The "useful and authoritative" 1897 edition of *The 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"⁴³ The 1898 *Webster's Dictionary* gives a similar definition: "1. To make trial or experiment of; to try. 2.

³⁹ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946)).

⁴⁰ See 1 ABA SECTION OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 230–31 (8th ed. 2017) ("A market share in excess of 70 percent generally establishes a prima facie case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output. In contrast, courts rarely find monopoly power when market share is less than about 50 percent. The greatest uncertainty exists when market shares are between 50 percent and 70 percent.").

⁴¹ Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 569.

⁴² *Id.* at 524–30.

⁴³ *Attempt*, 1 THE CENTURY DICTIONARY AND CYCLOPEDIA 371 (William D. Whitney ed., 1st ed. 1897) (emphasis omitted). Three other contemporary legal treatises Scalia and Garner consider reliable have a similar definition. See Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 530–31 n.158.

To try to move, subdue, or overcome, as by entreaty.”⁴⁴ The 1913 edition of *Webster’s* contains a similar definition.⁴⁵ *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”⁴⁶

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.”⁴⁷ 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.”⁴⁸ No source of the period, however, defined the magnitude or nature of the necessary acts with great specificity (indeed, a precise definition might 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 end⁴⁹

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.⁵⁰ Although the meaning of a criminal “attempt” to violate a law has evolved

⁴⁴ *Attempt*, WEBSTER’S COLLEGIATE DICTIONARY 62 (1898).

⁴⁵ *Attempt*, WEBSTER’S 1913.COM, <https://www.websters1913.com/words/Attempt> [<https://perma.cc/XRP9-6SAH>] (last visited Jan. 29, 2023) (“A[n] essay, trial, or endeavor; an undertaking; an attack, or an effort to gain a point; esp. an unsuccessful, as contrasted with a successful, effort. . . . Attempt to commit a crime (Law), such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime which it was designed to effect.”).

⁴⁶ 1 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 547 (James A.H. Murray ed., 1st ed., 1888).

⁴⁷ 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 728 (7th ed., 1882).

⁴⁸ *Id.*

⁴⁹ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 68–69 (Little, Brown, & Co. 1949) (1881).

⁵⁰ In *Swift & Co. v. United States*, 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.” 196 U.S. 375, 402 (1905).

since 1890,⁵¹ 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.⁵² 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. Since current case law only imposes sanctions under Section 2 if a court decides the firm engaged in anticompetitive conduct,⁵³ this case law was wrongly decided. It should be overturned.

Moreover, the current “dangerous probability” requirement⁵⁴ should be modified. Today it is unusual for a court to find that a firm illegally “attempted to monopolize” if it had less than fifty percent of a market.⁵⁵ But suppose a firm with only a thirty percent market share was seriously trying to monopolize a relevant market. Under a textualist interpretation of Section 2, isn’t a firm with a thirty percent market share often capable of seriously *attempting* to monopolize a market?

C. Conclusions

Where did the requirement that a Section 2 violation be predicated upon anticompetitive conduct come from? It is not even hinted at in the text of the Sherman Act. Shouldn’t we recognize that conservative judges simply made up the anticompetitive conduct requirement because they thought it was good policy?⁵⁶ This is not textualism. In fact, it’s the opposite of textualism.

⁵¹ The adoption of the Model Penal Code might have changed the classic definition of attempt. See 2 WAYNE R. LAFAYE, JR., *SUBSTANTIVE CRIMINAL LAW* § 11.4(e), Westlaw SUBCRL (updated Oct. 2022); 4 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 704 (15th ed. 1996).

⁵² See BISHOP, *supra* note 47, § 728.

⁵³ The “dangerous probability” requirement comes from *Swift & Co. v. United States*, 196 U.S. at 396.

⁵⁴ See *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004).

⁵⁵ See 1 ABA SECTION OF ANTITRUST L., *ANTITRUST LAW DEVELOPMENTS* 298–99 (4th ed. 1997) (“Although there are no precise market share boundaries, and while [defendant’s ability to lessen or destroy competition in that market, intent, etc.] affect the analysis, courts often find a dangerous probability [of monopolization] where the defendant starts with a market share of more than 50 percent; they rarely find market shares between 30 percent and 50 percent sufficient; and they virtually never find shares of less than 30 percent sufficient.” (citations omitted)).

⁵⁶ A textualist judge is not supposed to substitute his or her policy judgement for that of Congress, especially as the policy questions involved in the consideration of no-fault monopoly are complex. For example, no-fault monopolization and attempted monopolization could improve economic welfare in many ways. It should increase

No-fault monopolization embodies a love for competition and a distaste for monopoly that is so strong that it does not even undertake a full economic analysis of the pros and cons of the particular situation. It is a powerful directive that would simply impose sanctions on all monopolies and attempts to monopolize.

Even though the current Supreme Court is largely textualist, it also is extremely conservative. Would it decide a no-fault case in the way that textualism suggests? Or would it find some way to evade this conclusion?

III. TOWARDS A TEXTUALIST ANALYSIS OF SECTION 7 OF THE CLAYTON ACT

A. Current Judicial Standards

Section 7 of the Clayton Act prohibits mergers the effect of which “may be substantially to lessen competition or to tend to create a monopoly.”⁵⁷ Although a number of Supreme Court cases have interpreted this language, the most recent relevant decision is almost a half century old,⁵⁸ so it is difficult to know how much weight to give these cases. Some merely recite the “may” language,⁵⁹ but others appear to deviate from it.⁶⁰

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 monopolists enjoying a “quiet life,” and also the waste that arises as firms attain and protect their monopolies. It should significantly reduce the time and costs of Section 2 litigation. It should improve privacy. It should decrease income inequality. It should spur entry. Since Section 2 litigation always takes many years, it would give the firm many years of monopoly return before the sanctions are imposed and would be similar to the period of time a patent allows for monopoly returns on innovation. For a discussion of the economic pros and cons of no-fault monopolization, see Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 542–68.

⁵⁷ See 15 U.S.C. § 18.

⁵⁸ See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

⁵⁹ See, e.g., *id.*; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 548–50 (1966); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

⁶⁰ See, e.g., *Int’l Shoe Co. v. FTC*, 280 U.S. 291, 297–98 (1930) (“[T]he act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, that is to say, to such a degree as will injuriously affect the public.” (citation omitted)); *United States v. du Pont*, 353 U.S. 586, 589 (1957) (“Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation.”); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (“Eighth, Congress used the words ‘*may be* substantially to lessen competition,’ to indicate that its concern was with probabilities, not certainties.” (emphasis added)); *United States v. Cont’l Can Co.*, 378 U.S. 441, 458 (1964) (“The issue is whether the merger

There have, however, been a large number of more recent lower court merger decisions that have interpreted this language. Some recent decisions adopt the “may” language in a way that appears to be identical or similar to how this term is interpreted colloquially today.⁶¹ By contrast, some courts have employed a very different re-articulation of “may.” For example, in *United States v. Baker Hughes, Inc.* (then) Circuit Court Judge Thomas affirmed a district court’s conclusion that “it is not likely that the acquisition *will substantially lessen competition* in the United States either immediately or long-term.”⁶² A similar articulation appeared in *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, a requirement that “the effect of the merger *is to substantially lessen competition* or tend to create a monopoly.”⁶³

Other courts have re-formulated the “may” language in the context of implementing a three-part balancing test,⁶⁴ including the Third Circuit’s recent opinion in *FTC v. Hackensack Meridian Health, Inc.*⁶⁵ Under the first prong of this

between Continental and Hazel-Atlas will have probable anticompetitive effect Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent.” (citation omitted)); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622–23 (1974) (“Moreover, the proscription expressed in § 7 against mergers [applies] ‘when a “tendency” toward monopoly or [a] “reasonable likelihood” of a substantial lessening of competition in the relevant market is shown’ But it is to be remembered that § 7 deals in ‘probabilities,’ not ‘ephemeral possibilities.’” (quoting *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 171 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962))).

⁶¹ See, e.g., *Ginsburg v. INBEV NV/SA*, 649 F. Supp. 2d 943, 947 (E.D. Mo. 2009) (“Section 7 exists primarily to arrest, at their incipiency, mergers that could produce anti-competitive results. A violation of Section 7 ‘can occur when there is a threat or possibility of substantially lessening competition or creating a monopoly.’” (citations omitted) (quoting *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 442 (8th Cir. 1999))); *id.* at 952 (“The factors present in Yamaha upon which the Eighth Circuit determined that the merger might substantially lessen competition are not present in this case.”).

⁶² See *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990) (emphasis added) (quoting *United States v. Baker Hughes, Inc.*, 7 F. Supp. 3, 12 (D.D.C. 1990)).

⁶³ *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 1:14-md-2508, 2015 U.S. Dist. LEXIS 121620, at *46 (E.D. Tenn. June 24, 2015) (quoting *HTC Sweden AB v. Innovatech Products & Equip. Co.*, 2008 U.S. Dist. LEXIS 76690, 2008 WL 4510710, at *14 (E.D. Tenn. Sept. 30, 2008) (emphasis added)).

⁶⁴ See, e.g., *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016).

⁶⁵ *Fed. Trade Comm’n v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 166 (3d Cir. 2022).

test, “the FTC must establish a *prima facie* case that the merger is anticompetitive.”⁶⁶ The Ninth Circuit has used a similar approach.⁶⁷

Some recent opinions from the District of D.C. have substituted “is likely to” for “may,” including *United States v. UnitedHealth Grp. Inc.*:⁶⁸ “[T]he government must show, by a preponderance of the evidence, ‘that the proposed merger is likely to substantially lessen competition, which encompasses a concept of reasonable probability.’”⁶⁹

The “is likely to” standard also was used in the recent ALJ’s opinion in the FTC’s merger case against the Illumina/Grail merger.⁷⁰ For the government to prevail, “the Court *must* conclude that the government has introduced evidence sufficient to show that the challenged ‘transaction is likely to lessen competition substantially’”⁷¹ As part of satisfying that burden, Section 7 “‘demand[s] that a plaintiff demonstrate that the substantial lessening of competition will be ‘sufficiently probable and imminent’ to warrant relief.’ . . . ‘Of course the word ‘may’ [in Section 7] should not be taken literally, for if it were, every acquisition would be unlawful.’”⁷²

Notes on how each circuit interprets the word “may” are included in this Article’s Appendix. None of these opinions, however, undertook a textualist analysis of the language involved. These differing re-formulations of “may” give

⁶⁶ *Id.* (emphasis added); *Penn State Hershey Med. Ctr.*, 838 F.3d at 337–38 (“*First, the Government must establish a prima facie case that the merger is anticompetitive.* If the Government establishes a *prima facie* case, the burden then shifts to the Hospitals to rebut it. If the Hospitals successfully rebut the Government’s *prima facie* case, ‘the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times.’ To establish a *prima facie* case, the Government must (1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive.” (emphasis added) (quoting *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 783 (9th Cir. 2015); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008))).

⁶⁷ *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 783 (9th Cir. 2015) (“The plaintiff must first establish a *prima facie* case that a merger is anticompetitive.” (emphasis added)). Elsewhere, however, the court uses an articulation similar to the “is likely” standard: “Once the relevant geographic market is determined, a *prima facie* case is established if the plaintiff proves that the merger will probably lead to anticompetitive effects in that market.” *Id.* at 785 (emphasis added).

⁶⁸ See *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 19, 2022).

⁶⁹ *Id.* at *6 (quoting *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019); see also *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115 (D.D.C. 2004) (“To warrant injunctive relief under the Clayton Act, the challenged acquisition *must be likely* substantially to lessen competition.” (emphasis omitted from “substantially”) (emphasis added)).

⁷⁰ See *FTC v. Illumina Inc.*, at 131 (FTC, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf [<https://perma.cc/PB9R-U53D>].

⁷¹ *Id.* (quoting *AT&T, Inc.*, 310 F. Supp. 3d 161, 189 (D.D.C. 2018)).

⁷² *Id.* at 131 (alterations in original) (citations omitted) (quoting *FTC v. Arch Coal, Inc.* 329 F. Supp. 2d 109, 115 (D.D.C. 2004); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)).

rise to a question for which textualist analysis is extremely well-suited: what did “may” mean when the Clayton Act was passed in 1914? Did it mean the same thing that “may” means today? Did it mean, as some of the various judicial opinions use the term, “possibly,” “is likely to,” “will,” or something else?

B. Using the Textualist Approach

A textualist analysis of Section 7 certainly can determine whether “may,” as this word was used in the original anti-merger statute, meant the same as, or was different from, the language the courts have substituted for it in recent years. This undertaking would start—and in almost all cases end⁷³—with the exact words of the statute. It would ascertain what critical words such as “may” meant when the statute was enacted by giving them the plain, ordinary meaning they had at the time.⁷⁴ But it would ignore the statute’s legislative history.⁷⁵

As noted earlier, Justice Scalia’s treatise on textualism emphasized that modern enforcers and courts should analyze how the words in question were used in leading English language dictionaries of the period and (if applicable) also in contemporaneous legal dictionaries, legal treatises, and cases.⁷⁶ Justice Scalia helpfully provided lists of the English language dictionaries and legal dictionaries and treatises he considered “the most useful and authoritative”⁷⁷ for various time

⁷³ Textualism has some exceptions, including the “literalness” doctrine and the “absurdity” doctrine. See Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 513–14, 568–81.

⁷⁴ See SCALIA & GARNER, *supra* note 1, app. at 422.

⁷⁵ See Lande & Zerbe, *A Textualist Demonstration*, *supra* note 10, at 510–11. For an analysis of the passage of the 1914 Clayton Act and the 1950 Celler-Kefauver Act, see Peter C. Carstensen & Robert H. Lande, *The Merger Incipency Doctrine and the Importance of “Redundant” Competitors*, 2018 WIS. L. REV. 783, 789–97 (2018). A textualist Supreme Court probably would not be interested in an earlier Supreme Court summary of the legislative history of Section 7, in *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39. (1962) (“In the course of both the Committee hearings and floor debate, attention was occasionally focused on the issue of whether ‘possible,’ ‘probable’ or ‘certain’ anticompetitive effects of a proposed merger would have to be proven to establish a violation of the Act. Language was quoted from prior decisions of the Court in antitrust cases in which each of these interpretations of the word ‘may’ was suggested as appropriate. The final Senate Report on the question was explicit on the point: ‘The use of these words [‘may be’] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [sic] effect The words ‘may be’ have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.” (alterations in original) (citations omitted)).

⁷⁶ See SCALIA & GARNER, *supra* note 1, app. at 415–24.

⁷⁷ *Id.* app. at 419.

periods. Two of these lists covered the 1901 to 1950 period,⁷⁸ which encompasses both the 1914 enactment of the Clayton Act and its major amendment in 1950.⁷⁹

C. Definitions of “May”

1. English Language Dictionaries

All four of the English language dictionaries from this period that Justice Scalia considered to be the “most useful and authoritative” defined “may,”⁸⁰ but none defined the full phrase, “may be substantially.” What follows are the principle definitions contained in each dictionary.

The Century Dictionary and Cyclopedia (1904) defined “may” principally as:

To have power; have ability; be able; can. In the absolute original use, ‘can,’ now rare . . . except where a degree of contingency is involved The principal uses are as follows: (a) To indicate subjective ability, or abstract possibility: rarely used absolutely (b) To indicate possibility with contingency (f) In law, *may* in a statute is usually interpreted to mean *must*, when used not to confer a favor, but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest.⁸¹

The Oxford English Dictionary (1933) defined “may” principally as:

The primary sense of the verb is to be strong or able, to have power . . . to have power or influence; to prevail (*over*) . . . Expressing objective possibility, opportunity, or absence of prohibitive conditions; = CAN . . . Expressing subjective possibility, i.e. the admissibility of a supposition. a. In relation to the future (*may* = ‘perhaps will’) . . . *Law*. In the interpretation of statutes, it has often been ruled that *may* is to be understood as equivalent to *shall* or *must*.⁸²

⁷⁸ *Id.* app. at 422.

⁷⁹ See Carstensen & Lande, *supra* note 75, at 789–97.

⁸⁰ These sources are: The 1903 edition of *The Century Dictionary and Cyclopedia*, the 1933 edition of *The Oxford English Dictionary*, the 1934 edition of *Webster’s Second New International Dictionary*, and the 1943 edition of *Funk & Wagnalls New Standard Dictionary of the English Language*. See SCALIA & GARNER, *supra* note 1, app. at 422.

⁸¹ *May*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3667–68 (William Dwight Whitney ed., 1904 rev.).

⁸² *May*, 6 THE OXFORD ENGLISH DICTIONARY 256–59 (1961 repr.) (1933).

Webster's Second New International Dictionary (1934) defined “may” principally as:

To have power; to be able . . . a. Archaic Ability; competency;—now expressed by *can*. Liberty; opportunity; permission; possibility; as, he *may* go; you *may* be right Desire or wish Contingency . . . Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force.⁸³

Funk & Wagnalls New Standard Dictionary of the English Language (1943) defined “may” principally as:

To have permission; be allowed; have the physical or moral opportunity as, you *may* go; . . . To be contingently possible; as it *may* be; you *may* get off *Law*. To have liberty or power to: often (in the construction of statutes) held to mean *must*, as imposing obligation, tho in every other use *may* has only a permissive or discretionary connotation.⁸⁴

Thus, *The Century Dictionary and Cyclopedia* explicitly said that, even though “may” could be used to mean only a theoretical or “abstract possibility,” may was “rarely used absolutely” in this way. *Webster's Second New International Dictionary* similarly said, “Archaic Ability; competency;—now expressed by *can*”⁸⁵ The other two dictionaries did not, however, say that an absolutist or literal usage of “may” meant that even a tiny or theoretical possibility was archaic. All four dictionaries, of course, defined “may” in terms of a possibility or contingency. None used anything resembling an “is likely to” or any other type of “more likely than not” standard.

In addition to the 1901 to 1950 dictionaries Justice Scalia considered the most useful and authoritative, he also provided lists of reliable dictionaries that were published during different time periods.⁸⁶ These dictionaries did not contain any definitions that were significantly different from definitions presented earlier.⁸⁷ Interestingly, dictionaries that Justice Scalia termed the most useful and

⁸³ *May*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1517 (1934).

⁸⁴ *May*, 1 FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1531 (rev. ed. 1943).

⁸⁵ See *supra* text accompanying note 83.

⁸⁶ See SCALIA & GARNER, *supra* note 1, app. at 421–23.

⁸⁷ See sources cited *supra* notes 81–84; *May*, DICTIONARY OF THE ENGLISH LANGUAGE 889 (Joseph E. Worcester ed., 1860); *May*, 3 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3067 (Robert Hunter & Charles Morris, eds., 1897); *May*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (1976); *May*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 808 (1st ed. 1969); *May*, 9 THE OXFORD ENGLISH DICTIONARY 498–503 (2d ed. 1989).

authoritative from 1860⁸⁸ and 1897⁸⁹ noted that the definition of “may” to mean “can” was even then almost obsolete. None of the dictionaries, however, said that the definition of “may” meaning possibility or contingency was obsolete.

2. *Legal Dictionaries and Treatises*

For the 1901 to 1950 period, Justice Scalia listed five legal dictionaries and treatises he considered to be “the most useful and authoritative.”⁹⁰ Four included definitions of the word “may.”⁹¹

The Cyclopedic Dictionary of Law (1901) defined “may” as: “Is permitted to; has liberty to. The term is ordinarily permissive, but in order to carry out the intention of a statute, or of a contract, it will be held to be mandatory.”⁹²

A Dictionary of Law (1910) by Henry Campbell Black defined “may” as: “[I]n the construction of public statutes, is to be construed ‘must’ in all cases where the legislature mean [sic] to impose a positive and absolute duty, and not merely to give a discretionary power.”⁹³

Legal Definitions by Benjamin Pope (1920) defined “may” principally as:

In general, enabling words, such as ‘may’ are construed as compulsory whenever the object of the power given is to effectuate a legal right The word ‘may’ and like expressions give, in their ordinary meaning, an enabling and discretionary power When a statute declares that something “may” be done, the language is, as a general rule, permissive.⁹⁴

Bouvier’s Law Dictionary defined “may” as:

Is permitted to; has liberty to. In interpreting statutes the word *may* should be construed as equivalent to *shall* or *must* in cases where the good sense of the entire enactment requires it. . . . Where there is nothing in the connection of the language or in the sense and policy of the provision to

⁸⁸ See *May*, DICTIONARY OF THE ENGLISH LANGUAGE 889 (Joseph E. Worcester ed., 1860) (“It was formerly used for can.”).

⁸⁹ See *May*, 3 UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3067 (Robert Hunter & Charles Morris, eds., 1897) (“1. Subjective power, ability, or might. . . . In this sense almost, if not quite, obsolete, its place being taken by can; may being reserved for those cases in which there is something regarded as possibly true or likely to happen.”).

⁹⁰ See SCALIA & GARNER, *supra* note 1, app. At 419, 422.

⁹¹ The four legal dictionaries that defined “may” are: The 1901 edition of *The Cyclopedic Dictionary of Law*, the 1910 and 1933 editions of *Black’s Law Dictionary*, the 1919 edition of *Legal Definitions*, and any relevant edition of *Bouvier’s Law Dictionary* in the period. The 1911 edition of *Wharton’s Law Lexicon* does not define “may.”

⁹² *May*, THE CYCLOPEDIA OF LAW 587 (Walter A. Shumaker & George Foster Longsdorf eds., 1901) (citations omitted).

⁹³ *May*, BLACK’S LAW DICTIONARY 767 (2d ed. 1910).

⁹⁴ *May*, 2 LEGAL DEFINITIONS 942–45 (Benjamin W. Pope ed., 1920).

require an unusual interpretation, its use is merely permissive and discretionary.⁹⁵

These legal dictionaries and treatises are thus consistent with the uses of “may” in the English language dictionaries of the period, although they use both “probably” and “highly probably.”

3. *Analysis: The Meaning of “May”*

The dictionaries selected by Justice Scalia contained three different definitions of “may.” The first defined “may” in terms of a possibility or contingency.⁹⁶ The second defined “may” to mean “can,” although some of the sources said this “absolutist” usage was rare.⁹⁷ The third definition was specialized; the sources stated that in some statutes “may” meant “must,” but that these usages were for instances when the government was compelling someone to do something.⁹⁸ None of the surveyed sources employed a definition similar to the definition in some of the cases cited earlier,⁹⁹ of “will” or “is likely to,” or any other definition that required more than a fifty percent probability.

Of the definitions found in the sources recommended by Justice Scalia, the third clearly is not relevant to a textualist analysis of Section 7 because no government was compelling the firms subject to Section 7 to merge or to in any way refrain from competing. The second definition of “may”—to mean “can” or only a theoretical possibility of substantially lessening competition—is also extremely unlikely to be the meaning embodied in Section 7. This is because, as the FTC ALJ in the Illumina/Grail merger said, it seems difficult to believe that Section 7 was supposed to block almost every merger.

This leaves the first definition of “may,” as requiring only a “probability” or “contingency” of a substantial lessening of competition. In light of “may” being used in conjunction with the phrase “be substantially to lessen competition” it is highly unlikely that “may” was meant to encompass mergers that had only a tiny, theoretical chance of substantially lessening competition. The word “may” should not, however, limit the law’s prohibitions to mergers that “are more likely than not” to substantially lessen competition. A low, modest probability should be enough. One could, moreover, define “may” not to prohibit all mergers, but to mean something more strict than the “is likely to” formulation. A court could, for example, interpret it to mean “more than a non-trivial possibility,” or a “modest or low possibility,” and then add “but not necessarily more likely than not.” Such a standard

⁹⁵ *May*, BOUVIER’S LAW DICTIONARY 790 (William Edward Baldwin ed., 1934) (citations omitted).

⁹⁶ See *supra* notes 81–84 and accompanying text.

⁹⁷ See *supra* notes 81–84 and accompanying text. For the opinion that the “absolutist” usage was rare, see *supra* text accompanying notes 81 and 83.

⁹⁸ See *supra* notes 81–84 and accompanying text.

⁹⁹ Cf. *supra* notes 81–84 and accompanying text.

might be difficult to articulate, but nevertheless would more closely reflect Congressional intent.

4. A Textualist Analysis of “Likely”

Since some recent opinions substitute “is likely to” for “may,” we should ask what “is likely to” means today, in order to determine whether it complies with the text of the statute. To ascertain this we should look up “likely” in the twenty-first century dictionaries Justice Scalia considered to be the most useful and authoritative.¹⁰⁰ These include *The Oxford English Dictionary*,¹⁰¹ *The American Heritage Dictionary of the English Language*,¹⁰² and *Merriam-Webster’s Collegiate Dictionary*.¹⁰³ Justice Scalia also cited three twenty-first century law dictionaries as useful and authoritative.¹⁰⁴ These were *Black’s Law Dictionary*,¹⁰⁵ *Merriam Webster’s Law Dictionary*,¹⁰⁶ and *Garner’s Dictionary of Legal Usage*.¹⁰⁷ They all have essentially the same meaning: “probable”; although highly probably and plausible were also given as synonyms.¹⁰⁸

The “may” language in Section 7 means that the merger statute should require only a possibility, a modest probability or contingency that a merger could

¹⁰⁰ See SCALIA & GARNER, *supra* note 1, at 423.

¹⁰¹ *Likely*, OXFORD ENGLISH DICTIONARY ONLINE (2022) (“A. *adj.* II. Probable. 2.a. In predicative use with anticipatory *it* as subject and *that*-clause as complement: having a high chance of occurring; probable. Also in *it is likely* or *as (it) is likely*, used parenthetically. . . . b. With the person or thing affected by the probability as subject of a copular verb followed by infinitive or (in earlier use) *of* and gerund: having a high probability of being or doing something; e.g. *he (etc.) is likely to* = ‘it is likely that he will’. . . . d. Of an event, procedure, state of affairs, etc.: that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable.”).

¹⁰² *Likely*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1014 (4th ed. 2000) (“1. Possessing or displaying the qualities or characteristics that make something probable: *They are likely to become angry with him.* 2. Within the realm of credibility; plausible: *not a very likely excuse.* . . . 4. Apt to achieve success or yield a desired outcome; promising: *a likely topic for investigation.*”).

¹⁰³ *Likely*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 721 (11th ed., 2003) (“[H]aving a high probability of occurring or being true : very probable.”).

¹⁰⁴ See SCALIA & GARNER, *supra* note 1, at 424.

¹⁰⁵ See *Likely*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. Apparently true or real; probable <the likely outcome>. . . 2. Showing a strong tendency; reasonably expected <likely to snow>.”).

¹⁰⁶ *Likely*, MERRIAM-WEBSTER., <https://www.merriam-webster.com/dictionary/likely> [<https://perma.cc/9653-7ZYM>] (last visited Feb. 20, 2023) (defining likely as “1. having a high probability of occurring or being true : very probable. [As in:] rain is *likely* today.”).

¹⁰⁷ GARNER’S DICTIONARY OF LEGAL USAGE 545 (Bryan A. Garner, ed., 3d ed. 2011) (“[L]ikely has different shades of meaning. Most often it indicates a degree of probability greater than five on a scale of one to ten. . . . But it may also refer to a degree of possibility that is less than five on that same scale.”).

¹⁰⁸ Compare sources cited *supra* notes 105–107, with sources cited *supra* notes 101–103.

“substantially lessen competition.” The term “may” is not limited to mergers that are “likely” to substantially lessen competition. A non-trivial but smaller possibility, probability, or contingency should be enough.

D. Efficiency Defense Conclusions

Does the language of Section 7 contain an efficiencies defense, or an exception for efficient mergers? No. Therefore, due to the “tend to monopolize” language, courts should not permit an efficiencies defense, at least in cases involving a merger that tends to create a monopoly.¹⁰⁹

Moreover, in this context “monopoly” should be defined today as it was defined in dictionaries of the period. All of Justice Scalia’s preferred dictionaries define “monopoly” to include not just a firm with the entirety of a market, but also firms that “control” a market.¹¹⁰ This definition of monopoly roughly corresponds to the

¹⁰⁹ A merger from competition or oligopoly to monopoly (or to a different degree of oligopoly) can lead to prices rising. But if the efficiencies are extreme, the merger can lead to prices staying the same or falling. See Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1635–36 (1983).

A merger that leads to a monopoly and higher prices straightforwardly “tends to create a monopoly,” in violation of Section 7. So does the alternative, a merger to monopoly that leads to lower prices. Suppose a merger leads to a monopoly would also lead to efficiencies are so large that prices decrease. Doesn’t this merger, by turning the merging firms into a monopoly, “tend to create a monopoly”? It’s a net-efficient monopoly, to be sure. But it is still a monopoly, and for this reason the statute should block such a merger.

Because final prices are not determinative, no efficiencies defense should be permitted if the merger will tend to result in a monopoly.

¹¹⁰ *Monopoly*, 6 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 624 (Henry Bradley ed., 1st ed. 1908) (“Exclusive possession of the trade in some article of merchandise . . . Exclusive possession, control, or exercise of something . . . b. In generalized sense.”); *Monopoly*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3843 (William D. Whitney ed., 1st ed. 1897) (“In polit. econ., and as used in a general sense in law, such an exclusive privilege to carry on a traffic, or dealing or control a given class of articles, as will enable the holder to raise prices materially above what they would be if the traffic or dealing were free to citizens generally. In this sense, that exclusive control of a particular kind of product which results from the legitimate ownership of the only land from which it can be obtained . . . is sometimes spoken of as a natural monopoly, in contrast to the artificial monopolies created by state grant . . . 5. The possession or assumption of anything to the exclusion of other possessors: thus, a man is popularly said to have a monopoly of any business of which he has acquired complete control.”); *Monopoly*, WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 1587 (1934) (“Exclusive possession of the trade in some article or exercise of some business . . . exclusive control of the supply of any commodity or service in a given market; hence, often, in popular use, any such control of a commodity, service, or traffic in a given market as enables the one having such control to raise the price of a commodity or service materially above the price fixed by free competition. . . . Exclusive control of traffic constitutes a monopoly in the economic sense.”);

modern requirement of monopoly power, which can be met by firms with as low as a seventy percent market share.¹¹¹ Thus, a merger that does not create a firm with a seventy percent market share, but merely “tends” to create one, should violate Section 7, regardless of efficiencies.

Even if the merger merely leads to a different degree of oligopoly, however, plaintiffs still have the powerful argument that Congress could have included an efficiencies defense in Section 7, but chose not to. Nevertheless, defendants might be able to prove that the merger would lead to efficiencies so large they would lead to lower prices.¹¹² In these cases, defendants could argue that the merger would not “substantially lessen competition” because competition, as it was defined in Scalia’s

Monopoly, 1 FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1605 (rev. ed. 1943) (“The exclusive right, power, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; especially, in political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition.”).

¹¹¹ See *supra* text accompanying note 41.

¹¹² The required efficiencies should, however, be extremely large. See Alan A. Fisher, Frederick I. Johnson & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 792–800 (1989).

approved English language¹¹³ or legal dictionaries¹¹⁴ of the times, would still exist in the market post-merger. In fact, competition would actually be increased due to the lower prices of the post-merger firm. The may “tend to create a monopoly” issue would, however, remain as an obstacle to a merger efficiencies defense in all relevant cases.

CONCLUSION

This Article’s textualist analysis has demonstrated that Section 2 of the Sherman Act should not contain an efficiencies defense. It also has demonstrated that Section 7 of the Clayton Act should be interpreted more strictly: Section 7 should block mergers that “may” substantially lessen competition, not just mergers

¹¹³ “Competition” is defined in Scalia’s four approved dictionaries as follows: *Competition*, 2 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 720 (James A. H. Murray ed., 1st ed., 1893) (“1. ‘The action of endeavouring to gain what another endeavours to gain at the same time’ . . . ; the striving of two or more for the same object; rivalry. . . . b. *Commerce*. Rivalry in the market, striving for custom between those who have the same commodities to dispose of. . . . 2. . . . A contest for the acquisition of something; a match to determine relative excellence; a trial of ability in order to decide the superiority or comparative fitness of a number of candidates.”); *Competition*, 2 THE CENTURY DICTIONARY AND CYCLOPEDIA 1145 (William D. Whitney ed., 1st ed. 1897) (“1. The act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common contest or striving for the same object; strife for superiority; rivalry”); *Competition*, WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 545 (1934) (“1. Act of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time; common strife for the same object; strife for superiority; emulous contest; rivalry, as for approbation, or for a prize; as competition with a person for an object. . . . 3. Com. & Econ. The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms; also the relations between different buyers or different sellers which result from this effort. Where competition does not act at all there is complete monopoly.”); *Competition*, 1 FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 542 (rev. ed. 1943) (“1. The act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; rivalry, as between aspirants for honors or for advance in business, as, competition for promotion is keen. 2. Polit. Econ. & Com. (1) The independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade.”).

¹¹⁴ Only two of Scalia’s approved dictionaries contained useful definitions of “competition.” See *Competition*, 1 LEGAL DEFINITIONS 250 (Benjamin W. Pope ed., 1919) (“The act of seeking or endeavoring to gain at the same time; common strife for the same object.”); *Competition*, BOUVIER’S LAW DICTIONARY 199 (William Edward Baldwin ed. 1934) (“The act or proceeding of striving for something that is sought by another at the same time; or contention of two or more for the same object or for superiority, rivalry, as between aspirants for honors or for advantage in business. In trade, the act or proceeding of striving for trade that is sought by another at the same time. . . . Whatever restrains trade in a particular line, restrains competition in that line.” (citations omitted)).

that are “likely” to substantially lessen competition, or mergers that “will” substantially lessen competition. Section 7 also should block mergers that may “tend to create a monopoly” even if these mergers are efficient.

To the extent recent cases have deviated from Congressional intent, as reflected in the plain language of the antitrust statutes, they should be overturned. If the courts accept the textualist conclusions contained in this Article, this would give rise to a crucial question: How much more vigorous would antitrust enforcement become?

How many filed monopolization or attempted monopolization cases failed solely because the plaintiff was unable to demonstrate that the defendant engaged in anticompetitive conduct? How many relevant cases were never pursued because the plaintiff did not think it would be able to prove anticompetitive conduct? Or because the plaintiff did not have the resources required to do so? How much quicker, simpler, and less costly would these cases have been for both sides, and what difference would these differences have made in the number of plaintiff victories against monopolies and attempts to monopolize?

Other questions could be asked concerning the extent textualism could revitalize merger enforcement. How many mergers have been permitted because the reviewing court used an “is likely to” or “will” standard instead of determining whether the merger “may” substantially lessen competition or tend to create a monopoly?

One could, however, step back and ask: To what extent will conservative Justices and judges who may disagree with the policies embodied in the antitrust statutes be willing to honestly and faithfully implement these statutes as they were written? After all, how could judges have essentially changed “may” be substantially to lessen competition to “is likely to” or even to “will,” if they were just trying to implement congressional intent? Were these judges just being sloppy and inattentive? Or were they deliberately substituting their policy judgement for that of Congress, which, of course, is not their role. If so, some Justices and judges may continue to implement their preferred policy options despite what a textualist analysis of the statute’s original language reveals.

Justice Kagan discussed this possibility in her recent dissent in *West Virginia v. EPA*.¹¹⁵ She stated that the majority of Justices allowed their conservative values to override their allegiance to textualist analysis:

Some years ago, I remarked that “[w]e’re all textualists now.” . . . It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons . . . magically appear as get out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed.”¹¹⁶

¹¹⁵ 142 S. Ct. 2587 (2022).

¹¹⁶ *Id.* at 2641 (Kagan, J., dissenting).

There are many ways a judge or Justice could sidestep or ignore textualist analysis to reach their preferred conclusions in antitrust cases. Suppose, for example, a particular circuit court decided that a textualist reading of Section 2 did not permit an efficiencies defense. Would a district court judge presiding in this circuit who believed that it was unjust for a monopoly not to be permitted to argue an efficiencies defense find another way to dismiss the enforcement action?¹¹⁷ Such a judge could, for example, find a way to artificially broaden the definition of the market and thereby reduce defendant's market share dramatically. Or the judge could find, on the basis of a paucity of evidence, that entry was easy and the defendant had no monopoly power.

Congress intended both Section 2 of the Sherman Act and Section 7 of the Clayton Act to be aggressive antitrust statutes. Sadly, these laws have to a great extent been rendered much less effective than Congress intended by decades of unwise judicial interpretation, as reflected in opinions that ignore these statutes' original language and the intent of Congress.

The Supreme Court's recent embrace of textualism, however, provides a possible path for returning these laws to their original meaning and purpose. It is an opportunity for plaintiffs to highlight the statutes' original wording and to freshly argue, using a method of analysis usually thought of as being conservative, that the courts should re-examine precedent—precedent they normally might simply be following without giving it much thought.

It is a safe conclusion that a textualist reading of Section 2 of the Sherman Act and Section 7 of the Clayton Act should not cause anxiety for those who believe in vigorous antitrust enforcement. But it is impossible to predict whether stricter enforcement will result from courts' frequent embrace of textualism.

¹¹⁷ Professor William Kovacic pointed out that courts may find ways to evade statutory requirements they disapprove of. *See* Public Statement, William E. Kovacic, Former Chairman, Private Participation in the Enforcement of Public Competition Laws May 15, 2003), <https://www.ftc.gov/news-events/news/speeches/private-participation-enforcement-public-competition-laws> [<https://perma.cc/LCF3-WV6X>]. For example, “[A] court might fear that the U.S. statutory requirement that successful private plaintiffs be awarded treble damages runs a risk of over-deterrence. A court might seek to correct such perceived infirmities in the antitrust system by recourse to means directly within its control—namely, by modifying doctrine governing liability standards or by devising special doctrinal tests to evaluate the worthiness of private claims.” *Id.* “My intuition is that courts . . . were ill at ease with the possibility that a finding of illegal monopolization would trigger the imposition of massive damage[s] . . . The courts in these matters could not refuse to treble damages[,] . . . but they could interpret the law in ways that resulted in . . . no liability.” *Id.*

APPENDIX I: CIRCUIT-BY-CIRCUIT APPROACHES TO THE “MAY BE
SUBSTANTIALLY LIKELY TO LESSEN COMPETITION” ISSUE¹¹⁸

It often is difficult to determine the law of a circuit because the cases within a circuit are not always consistent with one another. Indeed, sometimes different approaches are suggested within the same opinion. The following should be considered only as a guide.

Circuit	Approach	Language
First Circuit	“may”	<i>Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge No. 1821 v. Verso Paper Corp.</i> , 80 F. Supp. 3d 247, 279 (D. Me. 2015) (“Thus, ‘[t]he core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger’s impact on competition, present and future The section can deal only with probabilities, not with certainties.” (alterations in original) (quoting <i>F.T.C. v. Procter & Gamble Co.</i> , 386 U.S. 568, 577 (1967))).
Second Circuit	“was,” “will,” or “likely to be”	<i>Geneva Pharma. Tech. Corp. v. Barr Labs. Inc.</i> , 386 F.3d 485, 510 (2d Cir. 2004) (“[W]e hold that plaintiffs have failed to demonstrate that the acquisition itself was likely to impair competition.”); <i>In re Zinc Antitrust Litig.</i> , No. 14-CV-3728 (KBF), 2016 WL 3167192, at *23 (S.D.N.Y. June 6, 2016) (“[T]he SAC fails to plausibly allege that the effect of the acquisition was to substantially lessen competition. . . . There is no plausible allegation that competition was lessened or likely to be lessened in the relevant sense. This is simply not the sort of vertical merger that Section 7 was intended to prohibit.”); <i>Fjord v. AMR Corp. (In re AMR Corp.)</i> , 625 B.R. 215, 244–46 (Bankr. S.D.N.Y. 2021) (“Any analysis performed under Section 7 is immersed in a realm of <i>probabilities</i> , not certainties or possibilities. . . . [Under the

¹¹⁸ The Author is grateful to Cherie Correlli for the exceptionally high-quality research that produced this Appendix.

		burden-shifting framework] a plaintiff must first make a showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area which establishes a presumption that the transaction will substantially lessen competition. . . . Once a plaintiff makes its <i>prima facie</i> case, the burden then shifts to a defendant to rebut the presumption . . . by making an affirmative showing why a given transaction is unlikely to substantially lessen competition.” (citations omitted) (internal quotation marks and alterations omitted)).
Third Circuit	“is likely to”	<i>FTC v. Hackensack Meridian Health, Inc.</i> , 30 F.4th 160, 166 (3d Cir. 2022) (“To establish a <i>prima facie</i> case the [plaintiff] must . . . show that the effect of the merger in that market is likely to be anticompetitive.” (quoting <i>FTC v. Penn State Hershey Med. Ctr.</i> , 838 F.3d 327, 338 (3d Cir. 2016))).
Fourth Circuit	“greater than fifty percent”	<i>United States v. Daily Gazette Co.</i> , 567 F. Supp. 2d 859, 865 (S.D.W. Va. 2008) (holding the United States satisfied its pleading requirement when it plead that the defendant’s acquisition that created a greater than fifty percent market share lessened competition).
Fifth Circuit	“the probability of”	<i>David B. Turner Builders LLC v. Weyerhaeuser Co.</i> , 603 F.Supp.3d 459, 466 (S.D. Miss. 2022) (“To state a claim under Section 7, a complaint must define the relevant market and demonstrate the probability of anticompetitive results flowing from the challenged merger or acquisition. A Section 7 plaintiff can make a <i>prima facie</i> showing of probable anticompetitive impact in one of two ways: (1) by showing that the size of the entities involved ‘makes them inherently suspect in light of Congress’ design to prevent undue [economic] concentration,’ thereby resulting in a ‘significant’ increase in market share and an ‘undue’ market concentration; or (2) by showing that the other characteristics of

		the market make the merger or acquisition more economically harmful than the bare market share and market concentration statistics otherwise indicate.” (alteration in original) (citations omitted) (quoting <i>Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.</i> , 732 F.2d 480, 492 (5th Cir. 1984)).
Sixth Circuit	“probabilities, not certainties”	<i>In re Cast Iron Soil Pipe & Fittings Antitrust Litig.</i> , No. 1:14-md-2508, 2015 WL 5166014, at *15 (E.D. Tenn. June 24, 2015) (“The Sixth Circuit has described Section 7 of the Clayton Act as dealing in ‘probabilities, not certainties’ because of Congress’s inclusion of the term ‘may’ when discussing the effect of an acquisition.” (quoting <i>ProMedica Health Sys., Inc. v. F.T.C.</i> , 749 F.3d 559, 564 (6th Cir. 2014))).
Seventh Circuit	“may”	<i>In re Northshore Univ. HealthSystem Antitrust Litig.</i> , No. 07-cv-4446, 2018 WL 238098, at *4 (N.D. Ill. Mar. 31, 2018) (The same goes for a claim under Section 7 of the Clayton Act, which generally speaking bans any corporate acquisition that substantially reduces competition. That section makes it unlawful . . . “[if] the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.” (quoting 15 U.S.C. § 18)).
Eighth Circuit	“a threat or possibility”	<i>Ginsburg v. INBEV NV/SA</i> , 649 F. Supp. 2d 943, 947 (E.D. Mo. 2009) (“A violation of Section 7 ‘can occur when there is a threat or possibility of substantially lessening competition or creating a monopoly.’ (quoting <i>Midwestern Mach., Inc. v. Northwest Airlines, Inc.</i> , 167 F.3d 439, 442 (8th Cir. 1999))).
Ninth Circuit	“will probably”	<i>St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.</i> , 778 F.3d 775, 785 (9th Cir. 2015) (“Once the relevant geographic market is determined, a prima facie case is established if the plaintiff

		proves that the merger will probably lead to anticompetitive effects in that market.”).
Tenth Circuit	“reasonable probability”	<i>United States v. First Nat’l Bancorporation, Inc.</i> , 329 F. Supp. 1003, 1010–11 (D. Colo. 1971) (“In a case alleging violation of Section 7 of the Clayton Act, the government has the burden of proving the ‘reasonable probability’ of a substantial lessening of competition.”).
Eleventh Circuit	“which produces a firm controlling an undue percentage”	<i>Polypore Int’l, Inc. v. FTC</i> , 686 F.3d 1208, 1212–14 (11th Cir. 2012) (“[In <i>Philadelphia National</i>], the Court stated[:] ‘a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market . . . must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.’ . . . To overcome the <i>Philadelphia National</i> presumption, [the defendant] would need to show that the merger to duopoly did not have an anticompetitive effect.” (quoting <i>United States v. Phila. Nat’l Bank</i> , 374 U.S. 321, 363 (1963))).
D.C. Circuit	“is likely to”	<i>U.S. v. UnitedHealth Grp. Inc.</i> , Civil Action No. 1:22-cv-0481 (CJN), 2022 U.S. Dist. LEXIS 170934, at *19–21 (D.D.C. Sep. 19, 2022) (“As the statutory text makes clear, Section 7 does not require the Government to prove that a merger is <i>certain</i> to cause competitive harm. But just as Section 7 allows for less than an absolute certainty of competitive harm, it also requires more than a ‘mere possibility’ of such harm. To prove a Section 7 violation, ‘the government must show,’ by a preponderance of the evidence, ‘that the proposed merger is likely to <i>substantially</i> lessen competition, which encompasses a concept of reasonable probability.’” (citations omitted) (quoting

		<i>United States v. AT&T, Inc.</i> , 916 F.3d 1029, 1032 (D.C. Cir. 2019)).
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APPENDIX II: FULL ENGLISH LANGUAGE AND LEGAL DICTIONARY DEFINITIONS OF “MAY” (WITH EXAMPLES OMITTED)¹¹⁹

A. Full English Language Dictionary Definitions of “May” 1901 to 1950

For the 1901 to 1950 period, Justice Scalia called four English language dictionaries “useful and authoritative”: *The Century Dictionary and Cyclopaedia* (1903), *The Oxford English Dictionary* (1933), *Webster’s Second New International Dictionary* (1934), and *Funk & Wagnalls New Standard Dictionary of the English Language* (1943).¹²⁰

1. The Century Dictionary and Cyclopaedia (1903):

A. As an independent verb, or as a quasi-auxiliary: To have power; have ability; be able; can. In the absolute original use, ‘can,’ now rare (being superseded by can) except where a degree of contingency is involved, when the use passes insensibly into the later uses. The uses of may are much involved, the notions of power, ability, opportunity, permission, contingency, etc., passing into each other, and may in many constructions being purposely or inevitably used with more or less indefiniteness. The principal uses are as follows: (a) To indicate subjective ability, or abstract possibility: rarely used absolutely (as in the first quotation), but usually with an infinite (not, however, as a mere auxiliary). . . . (b) To indicate possibility with contingency. . . . In this sense, when a negative clause was followed by a contingent clause with *if, may* in the latter clause was formerly used elliptically, *if I may* meaning ‘if I can control it’ or ‘prevent it.’ . . . Sometimes *may* is used merely to avoid a certain bluntness in putting a question, or to suggest doubt as to whether the person to whom the question is addressed will be able to answer it definitely. . . . (c) To indicate opportunity, moral power, or the absolute power residing in another agent. . . . (d) To indicate permission: the most common use. . . . (e) To indicate desire, as in prayer, aspiration, imprecation, benediction, and the like. . . . (f) In *law, may* in a statute is usually interpreted to mean *must*, when used not to confer a favor, but to impose a duty in the exercise of which the statute shows that the public or private persons are to be regarded as having an interest. **B.** As an auxiliary: In this use notionally

¹¹⁹ Examples cited in each dictionary, *see, e.g., May*, 6 THE OXFORD ENGLISH DICTIONARY 257 (1961 repr.) (1933) (“1833 Tennyson *Two Voices* 303 He knows a baseness in his blood At such strange war with something good, He may not do the thing he would.”), have been omitted for brevity, as they merely illustrate the definitions provided.

¹²⁰ SCALIA & GARNER, *supra* note 1, at 419, app. at 422.

identical with *may* in the contingent uses above, in A(b), but serving to form the so-called compound tenses of the subjunctive or potential mode, expressing contingency in connection with purpose, concession, etc. *May* is so used—(1) In substantive clauses, or clauses that take the place of or are in apposition with the subject or object or predicate of a sentence: introduced by *that*. . . . (2) In conditional clauses [Rare, except in clauses where permission is distinctly expressed.] . . . (3) In concessive clauses. . . . (4) In clauses expressing a purpose.¹²¹

2. The Oxford English Dictionary (1933):

“The primary sense of the verb is to be strong or able, to have power.”¹²² The following is a list of forms of *may* with no definitions—various spellings of each form have been omitted.

A. Inflectional Forms. 1. *Infinitive.* *Obs.* . . . 2. *Indicative Present.* . . . 3. *Subjunctive Present.* . . . 4. *Indicative and Subjunctive Past.* . . . 5. *Present Participle.* *Obs.* . . . 6. *Past Participle.* *Obs.* . . . 7. *Verbal sb.* . . . **B. Signification and uses.** **I.** As a verb of complete predication. **1.** *intr.* To be strong; to have power or influence; to prevail (*over*). With adv., (*it*) *may well with:* (*it*) can well support or endure. *If I may:* if I have any power in the matter; hence, if I can avoid or prevent it. *Obs.* . . . **b.** With cognate obj. (*might, power*). *Obs.* . . . **II.** As an auxiliary of predication; with a following simple inf., or with ellipsis of this. . . . **2.** Expressing ability or power; = CAN. . . . **3.** Expressing objective possibility, opportunity, or absence of prohibitive conditions; = CAN Now with mixture of sense 5. **4.** Expressing permission or sanction: To be allowed (to do something) by authority, law, rule, morality, reason, etc. . . . **b.** *Law.* In the interpretation of statutes, it has often been ruled that *may* is to be understood as equivalent to *shall* or *must*. . . . **5.** Expressing subjective possibility, i.e. the admissibility of a supposition. **a.** (with pres. Inf.) In relation to the future (*may* = ‘perhaps will’). . . . **b.** (with pres. inf.) In relation to the present (*may be* or *do* = ‘perhaps is’ or ‘does’). . . . **c.** In the 18th c. it was common to use *might be* or *do* in the sense of ‘perhaps was’ or ‘did.’ This is now rare. The now current form *may have been* or *done* . . . is more logical, as the subjective possibility is a matter of the speaker’s present. . . . **d.** (with perf. inf.) In relation to the past *may have been* or *done* = ‘perhaps was’ or ‘did,’ ‘perhaps has been’ or ‘done’). . . . **6.** Uses of the pa. t. subj. (in any of the senses 2–5) in the statement of a rejected hypothesis (or a future contingency deemed improbable) and its consequences. **a.** in the protasis (In poetry, sometimes with inversion:

¹²¹ *May*, 5 THE CENTURY DICTIONARY AND CYCLOPEDIA 3667–68 (William Dwight Whitney ed., 1904 rev.) (brackets in original).

¹²² *May*, 6 THE OXFORD ENGLISH DICTIONARY 256 (1961 reprt.) (1933).

might I = if I might.) . . . **b.** in the apodosis, *might* = would be able to, would be allowed to, would perhaps. . . . **c.** with suppressed protasis. . . . **d.** In the perfect tense *have* was sometimes dropped. . . . **7.** In questions, *may* with inf. is sometimes substituted for the indicative of the principal vb. to render the question less abrupt or pointed. . . . **b.** Similarly *might*. . . . **8.** As an auxiliary of the subjunctive mood. **a.** Since the desire for an end involves the desire for the possibility of the end, *may* in sense 3 in combination with an inf. is used, in clauses involving the idea of purpose or contemplated result, to express virtually the same meaning as the subjunctive of the principal verb. Hence this combination has come to serve as a periphrastic subjunctive, which has in ordinary prose use superseded the simple subjunctive in final clauses. (*a*) in final clauses introduced by *that* or *lest*; also occas. with ellipsis of *that* (e.g. after *to the end*). . . . (*b*) in relative clauses with final meaning. . . . (*c*) in clauses depending on such vbs. as *wish*, *demand*, *desire*, *beseech*, and their allied sbs. . . . (*d*) in clauses (introduced by *that*, *lese*) depending on *fear* vb. or sb., *afraid*, and the like. . . . **b.** In exclamatory expressions of wish, *may* with the inf. is synonymous with the simple pres. subj., which (exc. *poet* and *rhet.*) it has superseded. . . . **c.** *Might* is also used to express a wish, esp. when its realization is though hardly possible. . . . **d.** *May* with the inf. of a vb. is used (instead of the simple indicative or subjunctive) to emphasize the uncertainty of what is referred to: (*a*) in indirect questions depending on such verbs as *ask*, *think*, *wonder*, *doubt*, and their allied sbs. . . . (*b*) in clauses introduced by an indef. relative. . . . **9.** With ellipsis of the infinitive. **a.** In independent sentences, where the inf. is to be supplied from a prec. sentence; or (more freq.) in subord. clauses, where the inf. is to be supplied from the principal clause. . . . **b.** With ellipsis of a vb. of motion. Chiefly *poet.* . . . **c.** With ellipsis of *do* or *be*. Also in the phr. *I may not but* = There is nothing for me to do but. . . . **10.** For *may well*, *may as well* **11.** as *sb.* An instance of what is expressed by the vb. *may*; a possibility. . . . **12.** In advb. phrases of the same type as and equivalent to meaning MAYHAP: *may chance*, *may-fall*, *may-fortunate*, *may-tide*. *Obs.*¹²³

3. Webster's Second New International Dictionary (1934):

1. [*Intransitive.*] To have power; to be able; sometimes specif., to have power to prevent. *Obs.* **2.** As an auxiliary verb, followed by the infinitive without *to*, qualifying the sense of another verb by adding that of: **a.** *Archaic.* Ability; competency;—now expressed by *can*. . . . **b.** Liberty; opportunity; permission; possibility; as, he *may* go; you *may* be right. It is sometimes used to avoid bluntness in a question or remark. . . . **c.** Desire or wish, as in prayer, imprecation, benediction, and the like, the

¹²³ *Id.* at 256–59.

subjunctive *might* denoting wish without expectation of fulfillment. . . .
d. Contingency;—used, esp. in clauses of purpose, result, concession, indirect question, in indefinite relative clauses, and the like, to form a periphrastic subjunctive; as, he flatters that he *may* win favor; though the chain *may* break; whatever *might* befall.

May is often used with an ellipsis of the infinitive, esp. where it is readily supplied from the context. . . .

Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force.

Syn.—MAY, CAN. So far as *can* and *may* come into comparison, CAN expresses ability, whether physical or mental; MAY implies permission or sanction; as he will do it, if he possibly *can*; I shall call tomorrow if I *may*¹²⁴

4. Funk & Wagnalls New Standard Dictionary of the English Language (1943):

1. To have permission; be allowed; have the physical or moral opportunity; as, you *may* go; you *might* have seen his love in what he did. . . . **2.** To be contingently possible; as it *may* be; you *may* get off, altho you do not deserve it. In this contingent sense of the word *may*, it is frequently used to form the compound tenses of the subjunctive or potential modes of other verbs. (1) In substantive clauses, preceded by *that*; as, I feared *that* he *might* have met with an accident. (2) [Rare.] In conditional clauses; as, I care not what the cost, so you *may* live. (3) In concessive clauses; as, you *may* possess the skill, for all I know. (4) In clauses expressing a purpose; as, he died that we *might* live. (5) In exclamatory use, expressing a benediction, wish, etc.; as, *may* you live long! . . . **3.** To chance, or be by chance: used elliptically; as, be the pain what it *may* (or *may* happen to be), the operation must still proceed. In this use the word is often employed to soften the bluntness of a direct remark or question; as, what *may* be your name? **4.** To have power or ability; be competent: used in this sense with the meaning *can*, a word frequently substituted; as, fight as best you *may*, the victory will be his; *might* I but tell you as a friend! . . . **5.** To desire earnestly: used in apostrophes and exclamations; as, *may* success be yours! . . . **6. Law.** To have liberty or power to: often (in the construction of statutes) held to mean *must*, as imposing obligation, tho in every other use *may* has only a permissive or discretionary connotation.¹²⁵

¹²⁴ *May*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1517 (1934).

¹²⁵ *May*, 1 FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1531 (rev. ed. 1943).

B. Full Legal Dictionary Definitions of “May” 1901 to 1950

For the 1901 to 1950 period Justice Scalia called five legal dictionaries “reliable and authoritative.”¹²⁶ Of those five, four included definitions of the word “may.”

1. The Cyclopedia Dictionary of Law (1901):

Is permitted to; has liberty to. The term is ordinarily permissive (52 N.Y. 96; 107 Mass. 196), but in order to carry out the intention of a statute (2 Pet. [U.S.] 64), or of a contract (84 Ill. 471; 44 Conn. 534), it will be held to be mandatory.¹²⁷

2. Black’s Law Dictionary (1910):

“MAY,” in the construction of public statutes, is to be construed “must” in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. *Minor v. Mechanics’ Bank*, 1 Pet. 46, 64, 7 L. Ed. 47; *New York v. Furze*, 3 Hill (N.Y.) 612, 615.¹²⁸

3. Legal Definitions by Benjamin Pope (1920):

Construction Generally.

In general, enabling words, such as “may” are construed as compulsory whenever the object of the power given is to effectuate a legal right: and if the object of the power is to enable the donee to effectuate a legal right, then it is the duty of the donee of the power to exercise it when those who have the right to call upon him to do so. To this effect see *Julius v. Bishop of Oxford*, 49 L. J. Q. B. 577, which is regarded as the leading English case on the construction of the word “may” and words and phrases of similar import—in their ordinary meaning merely enabling—, when such words or phrases are employed in statutes. Lord Cairns in that case states the controlling principles as follows:

“Where a power is deposited with a public officer for the purpose of being used for the benefit of persons (1) who are specifically pointed out, and (2) with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised.” And of the class of expressions under consideration he further says: “They confer a faculty or power, and they do not of themselves do more,” so

¹²⁶ See SCALIA & GARNER, *supra* note 1, at 419, app. at 422.

¹²⁷ *May*, THE CYCLOPEDIA OF LAW 587 (Walter A. Shumaker & George Foster Longsdorf eds., 1901).

¹²⁸ See *May*, BLACK’S LAW DICTIONARY 767 (2d ed. 1910).

that, when the point in controversy is not covered by authority, “it lies upon those who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which * * * creates this obligation.”

The word “may” and like expressions give, in their ordinary meaning, an enabling and discretionary power. “They are potential and never (in themselves) significant of any obligation.” Per Lord Selborne, *Julius v. Bishop of Oxford*, 49 L. J. Q. B. 585.

“May,” in the construction of public statutes, is to be construed “must” in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. 1 Peters’ R. 46, 64. 3 Hill’s (N.Y.) R. 612, 615. See 9 Grattan’s R. 391. The word “may,” in a statute, means must or shall, when the public interest or rights are concerned, or the public, or third persons, have a claim, de jure, that the power shall be exercised. 1 Vern. 153. 1 Kent’s Com. 467, note.

When a statute declares that something “may” be done, the language is, as a general rule, permissive. No doubt in many cases the phrase “shall and may be lawful” has been construed as imperative by the Courts, having regard to the object of the provision and to the context and the rule above mentioned, and it seems that they have so construed the word “may” standing alone, as in *Reg. v. Barclay* (1881), 8 Q. B. D. 306; 51 L. J. M. C. 27. *Davies v. Evans* (1882), 9 Q. B. D. 238; 51 L. J. M. C. 132.

In the construction of a statute, the word “may” is sometimes equivalent to the word “must” in its ordinary acceptation. But such construction should not be given when inconsistent with the manifest intention of the legislature, or repugnant to the text of the statute. *State v. Hortman*, 122 Ia. 104.

The primary or ordinary meaning of the word “may” is undoubtedly permissive and discretionary and in the statute or ordinance it can be construed in a mandatory sense only “when such construction is necessary to give effect to the clear policy and intention” of the enacting body. *Kelley v. Cedar falls*, 123 Ia. 660.

The word “may” in a statute is sometimes mandatory, but not necessarily so. *Downing v. Oskaloosa*, 86 Ia. 352.

The word “may” implies a discretion. *Commonwealth v. Chance*, 174 Mass. 245.

The word “may” is to be construed as must where the evident purpose of the statute so requires. *State v. Goodsell*, 136 Ia. 445.

“I think that great misconception is caused by saying that in some cases ‘may’ means ‘must.’ It never can mean ‘must,’ so long as the English language retains its meaning; but it gives a power. * * * There is given by the word ‘may’ a power as to the exercise of which there is a discretion.” Cotton, L. J. in *In re Baker*, 44 Ch. D. 270.

“May” means ‘must’ where a power is given in the interest of public justice. *Arguendo*. Per Lord Esher, M. R., in *Kirkheaton v. Ainley* (1892), 2 Q. B. 274.

May means must in a statute only when the rights or interests of the public are concerned, or where the public or third persons have a claim de jure that the power given should be exercised. *Market Nat. Bank v. Hogan*, 21 Wis. 317.

In the absence of controlling consideration the word “may” is not to be construed as mandatory. *Stewart v. Gosham*, 122 Ia. 669.

Where the public interest or private right requires that the thing should be done, then the word “may” is generally construed to mean the same as “shall.” *People v. Supervisors*, 68 N.Y. 119.

Where persons or the public have an interest in having the act done by a public body, “may,” in such a statute, means “must.” *Phelps v. Hawley*, 52 N.Y. 27.

The words “may” or “shall,” when used in a statute, may be read interchangeably, as will best express the legislative intention. *Fowler v. Pirkins*, 77 Ill. 273; *O’Donoghue v. St. Louis S.W. Ry. Co.*, 181 Ill. App. 290; *Manufacturers’ Bldg. Co. v. Landay*, 219 Ill. 174.

The ordinary meaning of the term may, in a statute, when it concerns the public interest, or the rights of individuals, is must, or shall; and is obligatory, or mandatory, on the judge, or officer, to whom it is addressed. *Hill v. Barge*, 12 Ala. 693.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as the word shall. *Rex. v. Barlow*, 2 Salk. 609; *Pierson v. People*, 204 Ill. 462; *Chicago & A. R. Co. v. People*, 163 Ill. 620; *Silvey v. United States*, 7 Court of Claims R. 334.

The word “may,” in a statute, will be construed to mean “shall” whenever the rights of the public or of third persons depend on the exercise of the power or the performance of the duty to which it refers, and such is its meaning in all cases where the public rights and interests are concerned, or a public duty is imposed on public officers, and the public or third persons have a claim de jure that the power shall be exercised. *Brokaw v. Commissioners of Highways*, 130 Ill. 490; *Chicago & A. R. Co. v. Howard*, 38 Ill. 417. *Kane v. Footh*, 70 Ill. 590; *People v. Commissioners of Highways*, 270 Ill. 145.

The word may means must or shall only in cases where public interests and rights are concerned, and the public or third persons have a claim de jure that the power shall be exercised. *Fowler v. Perkins*, 77 Ill. 273; *Central Land Co. v. Bayonne*, 56 N.J.L. 300, citing *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 112, *Seiple v. Elizabeth*, 3 Dutcher 407; *Lovell v. Wheaton*, 11 Minn. 101; *Schuyler Co. v. Mercer Co.*, 9 Ill. 20.

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—**Anti-Trust Act.**

Section 7 of the Anti-Trust Act of 1891, providing that the fine imposed for violation thereof “may be recovered in an action of debt” uses the word “may” in a permissive sense, the state having the right either to prosecute by indictment or to bring an action of debt to recover the fine imposed. *Chicaco, etc., Co. v. People*, 214 Ill. 447.¹²⁹

4. Bouvier’s Law Dictionary (1934):

MAY. Is permitted to; has liberty to. In interpreting statutes the word *may* should be construed as equivalent to *shall* or *must* in cases where the good sense of the entire enactment requires it; 22 Barb. 404; 50 Kan. 739; or where it is necessary in order to carry out the intention of the legislature; 1 Pet. 46; 4 Wall. 435; 3 Neb. 224; or where it is necessary for the preservation or enforcement of the rights and interests of the public or third persons; 18 Ind. 27; 61 Me. 566; 48 Mo. 167; 107 Mass. 194, 197; 12 How. Pr. 224; but not for the purpose of creating or determining the character of rights; 28 Ala. 28; 39 Mo. 521. Where there is nothing in the connection of the language or in the sense and policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary; 24 N. Y. 405; 77 Ill. 271; 27 N. J. L. 407; 8 Misc. Rep. 256; 7 *id.* 15; 107 Mass. 196; 30 Fed. Rep. 52. See 53 Me. 438; 48 Mo. 167; 125 Mass. 198; 52 Kan. 18; 40 La. Ann. 756; 125 Mass. 199; 46 Ia. 162.¹³⁰

¹²⁹ See *May*, 2 BENJAMIN W. POPE, LEGAL DEFINITIONS 942–44 (1920).

¹³⁰ See BOUVIER’S LAW DICTIONARY 790 (William Edward Baldwin ed. 1934).