Fordham Journal of Corporate & Financial Law

Volume 16 | Issue 2 | Article 2

2011

Lessons For Competition Law From The Economic Crisis: The Prospect For Antitrust Responses To The "Too-Big-To-Fail" Phenomenon

Jesse W. W. Markham, Jr.

Recommended Citation

Jesse W. W. Markham, Jr., *Lessons For Competition Law From The Economic Crisis: The Prospect For Antitrust Responses To The "Too-Big-To-Fail" Phenomenon*, 16 Fordham J. Corp. & Fin. L. 261 (2011).
Available at: https://ir.lawnet.fordham.edu/jcfl/vol16/iss2/2

LESSONS FOR COMPETITION LAW FROM THE ECONOMIC CRISIS: THE PROSPECT FOR ANTITRUST RESPONSES TO THE "TOO-BIG-TO-FAIL" PHENOMENON

Jesse W. Markham, Jr.[*]

"[If] the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs . . . ."

—Robert Pitofsky[1]

ABSTRACT

This article examines whether, and the extent to which, antitrust law could contribute to a broader regulatory effort to control the too-big-to-fail problem. The article begins by exploring the nature of the problem. Against this backdrop, it considers antitrust policy and rules to evaluate whether antitrust might play a meaningful role. The article concludes that antitrust law, if vigorously enforced with an emphasis on avoiding too-big-to-fail problems, can be a useful public policy tool to address the problem. However, it can come nowhere near solving it or preventing recurrences of recent systemic failures.

---

[*] Marshall P. Madison Professor of Law, The University of San Francisco School of Law. A version of this article was presented by the author at the Murphy Conference on Corporate Law at Fordham University Law School, March 12, 2010. The author wishes to express his gratitude to many who contributed to the research and writing of this article in a variety of capacities. Professor Steven Schatz graciously reviewed an early stage of the article. Robin Bennett provided invaluable background research. The University of San Francisco School of Law provided generous support for this project and the law faculty, in numbers too great to thank here individually, offered insightful suggestions at a presentation based on a formative draft.

1. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

I. INTRODUCTION

This article examines whether, and the extent to which, antitrust law could contribute to a broader regulatory effort to control the too-big-to-fail problem. The article begins by exploring the nature of the problem. Against this backdrop, it considers antitrust policy and rules to evaluate whether antitrust might play a meaningful role. The article concludes that antitrust law, if vigorously enforced with an emphasis on avoiding too-big-to-fail problems, can be a useful public policy tool to address the problem. However, it can come nowhere near solving it or preventing recurrences of recent systemic failures. The narrowed focus antitrust developed under the influence of the Chicago School greatly limits its potential utility in this context and it is worth serious reconsideration. Nevertheless, the dynamism of antitrust policy in adjusting to intellectual movements and economic conditions could be harnessed to re-establish the broad reach of antitrust and thus forge a reasonably useful public policy weapon to direct at the too-big-to-fail problem. Antitrust law could make a greater contribution in resolving this public policy problem if Congress enacted or the judiciary forged more robust rules preventing and dismantling unwieldy corporate size in excess of any plausible scale efficiency justification. Such rules would be consistent with the historic purposes of antitrust law: to protect consumers against the output, innovation and price effects of catastrophic failures.

It is worth noting at the outset that the thesis here is not that antitrust law, even if more vigorously interpreted and enforced, could have made much difference in averting any part of the recent global financial crisis. There is no real consensus about the causes of that crisis, but recent changes in the business of global banking and finance beyond the mere size of financial enterprises contributed to a systemic weakness, rather than isolated weakness in one or a few participants. When Bear Stearns was rescued, the intent presumably was to prevent that domino from toppling into others and knocking down too many others. Since holding that domino upright did not prevent systemic failure, it seems probable that the causes do not merely reside in one or a few too-big-to-fail enterprises, but, rather, underlie the system.

Nevertheless, there remains an important public policy issue regarding whether to permit firms to combine where the resulting enterprise exceeds efficient scale and at the same time escapes failure by being too-big-to-fail. If the out-sized firm is not allowed to fail, then allowing it to exist creates a risk to the economy and the treasury. If no offsetting benefit exists, the question then becomes whether there exists an administratively practical way for antitrust law to help contain the size of such enterprises.

This article presupposes the existence of some enterprises in key sectors of our economy whose scale exceeds optimal efficient levels, but that are too big to allow them to fail. These are arguable assumptions that I leave to others to argue about. This article does not seek to resolve those empirical questions, but, rather, to explore whether antitrust should play a role in controlling the too-big-to-fail problem if these assumptions are accurate.

A. The Paradox of Too-Big-to-Fail and Antitrust

It seems paradoxical that antitrust law appears to have had nothing to say about the problem of firms becoming too big to fail. The antitrust laws are uniquely addressed to the problem of maintaining healthy markets against distortion from excessive aggregations of economic power. Yet, antitrust law has not intervened to prevent or redress the recent outbreak of systemic threats caused directly by companies that are too big and too integral to the functioning of markets to allow those firms to function normally without massive governmental infusions of capital. In some instances, these companies have accumulated assets exceeding $1 trillion,[2] and they cut across a broad swath of economic activity, including investment banking,[3] depositary banking,[4] insurance,[5]

---

2. As of September 30, 2008, American International Group, Inc. ("AIG") reported assets exceeding $1 trillion. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT PURSUANT TO SECTION 129 OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008: RESTRUCTURING OF THE GOVERNMENT'S FINANCIAL SUPPORT FOR THE AMERICAN INTERNATIONAL GROUP, INC. 1 (2008), *available at* http://banking.senate.gov/public/_files/CongressionalReportRestructuringFinal.pdf [hereinafter AIG REPORT].

3. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT PURSUANT TO SECTION 129 OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008: BRIDGE LOAN TO BEAR STEARNS COMPANIES THROUGH JP MORGAN CHASE BANK, N.A. (2008), *available at* http://www.federalreserve.gov/monetarypolicy/files/129bearstearns bridgeloan.pdf [hereinafter BEAR STEARNS REPORT].

4. On September 25, 2008, JPMorgan Chase acquired the banking operations of Washington Mutual Bank in a transaction facilitated by the Federal Deposit Insurance Corporation. *See* Press Release, JPMorgan Chase Acquires Banking Operations of

securities,[6] mortgage lending,[7] and automobile manufacturing.[8] All of these industries are subject to antitrust law. Furthermore, nearly all of the firms that have been considered too big to fail grew, in large part, by acquisition activity that is within the reach of antitrust laws and subject to pre-transaction government clearance.[9] Yet, antitrust laws did nothing to intervene to prevent these firms from reaching potentially catastrophic dimensions. The Sherman Act surely was not enacted so that firms could become so big, and so economically and politically powerful, that the mere possibility of their failure would impose unacceptable policy choices on the nation. Why, then, are so many firms too big to fail, and why has antitrust not done its part to prevent the possibility of these catastrophic failures?

This paradox begins to unravel when one considers the ever-narrowing reach of modern antitrust law. As currently interpreted by the courts, U.S. antitrust law is a shadow of its original self. Whatever animated their enactment, antitrust laws no longer concern themselves with preventing bigness, and indeed tend instead to encourage large-scale enterprise for efficiency's sake. Beginning with *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[10] the antitrust laws in the United States began a steady process of judicial erosion to eliminate multiple and possibly conflicting policy objectives, distilling in their place the exclusive purpose of promoting consumer welfare through allocative and dynamic

---

Washington Mutual: FDIC Facilitates Transaction that Protects All Depositors and Comes at No Cost to the Deposit Insurance Fund (Sept. 25, 2008), *available at* http://www.fdic.gov/news/news/press/2008/pr08085.html.

5. AIG REPORT, *supra* note 3.

6. *See*, BEAR STEARNS REPORT, *supra* note 4.

7. "On Saturday, September 6, 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorships." *See*, *Turmoil in the U.S. Credit Markets: Examining Recent Regulatory Responses: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 110th CONG. 2 (2008) (statement of James B. Lockhart, III, Director, Federal Housing Finance Agency), *available at* http://www.fhfa.gov/webfiles/120/revisedtestimonySBC102308.pdf.

8. Robert Marko, Note, Road Closed: The Inequitable Treatment of Pre-Closing Products Liability Claimants Under the Auto Industry Bailout, 4 BROOK. J. CORP. FIN. & COM. L. 353, 353 (2010).

9. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires pre-transaction notification to the federal antitrust authorities of most mergers and acquisitions where the parties and transaction meet certain inflation-adjusted size thresholds. 15 U.S.C. § 18a (1976).

10. 433 U.S. 36 (1977).

efficiency. With marginal and mostly theoretical exceptions, the efficient allocation of society's scarce resources through the use of existing technologies and the production of goods and services more efficiently using innovative new ones, comprise the sum total of the residual policy underpinnings of modern antitrust law.[11] In light of these modern movements in antitrust law, it is perhaps not entirely surprising that antitrust law has not prevented the too-big-to-fail problem, since consumer welfare may be enhanced, rather than harmed, by permitting firms to become big and even indispensible.

However, the paradox is not altogether attributable to the narrowing focus of modern antitrust law. Although at one time antitrust law

---

11. It has been argued that "[t]o this day, the Supreme Court has not come close to saying that economic efficiency is the exclusive concern of the antitrust laws . . ." HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 69 (3d ed. 2005). However, no Sherman Act case since *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), has even arguably turned on the policies of personal freedom to pursue economic opportunity, or the statutory policy of policing fairness in the marketplace, although those policies were frequently echoed in early antitrust cases. Aside from cases decided under the Robinson-Patman Act, 15 U.S.C. §§ 13a-13b, 21a (2000), no recent antitrust case turned on the policy of favoring small enterprise for its own sake, also frequently given voice on in an early generation of Sherman Act decisions. More to the point, however, there has been an outright abandonment of what once was central antitrust policy favoring fragmented markets populated by small businesses, even at some expense in the form of efficiency. Recent decisions make no mention of any general antipathy for big business nor preference for smaller enterprise, such as Judge Hand invoked in *United States v. Aluminum Co. of America*:

> "[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of [the Sherman Act, the Surplus Property Act and the Small Business Mobilization Act] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small unites which can effectively compete with each other."

148 F.2d 416, 428-29 (2d Cir. 1945). Since *Brown Shoe v. United States*, there has been no serious mention by the high court of any preference for small enterprise for its own sake. 370 U.S. 294, 344 (1962) ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned, businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). The most recent reference by the Supreme Court to the preference for "keeping a large number of small competitors in business" was the much excoriated *United States v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966).

considered the emergence of very large corporations to present unacceptable risks to the public, the risks that were of concern did not include the too-big-to-fail problem. Instead, antitrust law in an earlier era was concerned about the threat of harm out-sized enterprise posed to others by its sheer power, rather than its vulnerability to collapse. Thus, there remains a perplexing aspect to this paradox: even the more robust antitrust regime that was overrun by the modern law and economics movement seems to have been unconcerned with preventing systemic failure by constraining firms from becoming too big to fail.

Curiously, though, the older antitrust regime was very much concerned with bigness for reasons that apply to the too-big-to-fail firm. Before the courts rewrote them, United States antitrust laws were understood as providing the public with protection against behemoth economic enterprises not only because of their tendency toward market dominance, but also because of their power to paralyze or control democratic institutions through their vast wealth. Nearly 100 years ago, Justice Harlan described the Sherman Act as arising from a universal conviction that "the country was in real danger from another kind of slavery . . . that would result from the aggregations of capital in the hands of a few."[12] As recently as 1979, near the onset of the Chicago School antitrust revolution, Robert Pitofsky wrote:

> It is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws. By 'political values,' I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and, second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.[13]

Of course, this final prediction could not have been more accurate. The ungainly size and perceived indispensability of "too-big-to-fail" enterprises has recently forced the government to become the largest

---

12. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part).

13. Pitofsky, *supra* note 2, at 1051.

investor in the U.S. automobile industry,[14] a controlling owner of some of the largest lenders in the country, including Freddie Mac and Fannie Mae,[15] and to inject hundreds of billions of dollars into the financial services sector through equity investments, loans and loan guarantees.[16] The government also has infused federal funds into the home mortgage refinance marketplace to forestall foreclosures.[17] At least some of this government intervention was at least arguably a consequence of these sectors of the economy being "dominated by a few corporate giants." Moreover, government intrusion into the private sector in response to the too-big-to-fail issue appears to be nowhere near an end. Additional government intervention of a more durable sort seems inevitable as Congress considers enacting new laws to try to forestall in the future what existing regulatory law did not. Federal and state regulation has been enacted or is under consideration addressing dozens of areas of economic activity including real estate mortgage lending practices, trading in derivatives and other securities, solvency of financial institutions, management compensation, corporate governance, and even the permissible maximum size and investment activity of banks.

From its origins, antitrust law has been concerned with preventing the accumulation and exercise of economic power in big enterprises, rather than the vulnerability of the public to potential widespread economic disruption from the inherent vulnerability of big enterprises.[18] It has never concerned itself with firms being too big to fail. Indeed, the events that began in the second half of 2007 have led to a good deal of reflection about the extent to which antitrust law has weakened in recent decades and whether its focus has become too narrow. However, as various alternative regulatory strategies are considered to address the problem, antitrust law has emerged as having at least some potential to promote a healthier economy that relies less on the economic stability of a small number of very large firms. There is renewed interest in

---

14. U.S. GOV'T ACCOUNTABILITY OFFICE, SUMMARY OF GOVERNMENT EFFORTS AND AUTOMAKERS' RESTRUCTURING TO DATE 1 (2009).

15. MARK JICKLING, CONG. RESEARCH SERV., CONTAINING FINANCIAL CRISIS 16-20 (2008).

16. EDWARD V. MURPHY, CONG. RESEARCH SERV., FINANCIAL MARKET INTERVENTION FAQ 2-4 (2008).

17. *See, e.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.).

18. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (Harlan, J., concurring in part and dissenting in part).

reinvigorating antitrust law to address the too-big-to-fail problem by invoking its original underlying policy concerns.

Federal Trade Commissioner J. Thomas Rosch has advanced the view that a merger with the potential for catastrophic effects on a market as a whole can be challenged under the Clayton Act or the Federal Trade Commission Act for its tendency to destroy competition and harm consumers. He has also opined that amendments to antitrust laws are not needed to bring these Acts to bear in preventing undesirable growth of enterprises.[19] That view, though admittedly controversial, is an important one because it suggests the possibility of expanding existing analytical approaches, rather than necessarily amending the antitrust laws or turning exclusively to regulatory law instead. Assistant Attorney General for antitrust Christine Varney has also suggested that the relaxation of antitrust enforcement played a role in creating conditions that led to the economic collapse in 2008, which similarly suggests that enforcement of existing law could contribute to broader efforts to prevent catastrophic business collapses.[20]

While these official views may be correct, antitrust law might surely play an even more important role if it were reinvigorated. Although there is no precedent for applying antitrust sanctions to block corporate expansion for the reason that a company *might* catastrophically fail to the detriment of the nation's economy as a whole, there is no reason in principle why antitrust law could not respond to the emergence of such growth in the future. Of course, it may be that some too-big-to-fail companies got there without any possibility of antitrust intervention, at least not as antitrust is currently understood. Indeed, if

19. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the New York Bar Association Annual Dinner: Implications of the Financial Meltdown for the FTC (Jan. 29, 2009) [hereinafter, Rosch] ("The Clayton Act is inherently prospective and the current standard prevents anticompetitive harm in its incipiency. Hence, if a merger creates a firm whose failure is likely to have a catastrophic effect on the market as a whole, because it is so integral to the market, the end result may be a substantial lessening of competition.").

20. *See* Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks as Prepared for the United States Chamber of Commerce: Vigorous Antitrust Enforcement in This Challenging Era (May 12, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245777.htm ("This country's prior experience raises the question of whether current economic challenges reflect a 'failure of antitrust.' In other words, could United States antitrust authorities have done more? As many observers agree, in past years, with the exception of cartel enforcement, the pendulum swung too far from Thurman Arnold's legacy of vigorous enforcement.").

one considers the recent failures of companies like AIG and Citigroup, which grew via conglomerate rather than horizontal accretion, even a clairvoyant prediction of the catastrophe that these companies precipitated would not have drawn antitrust intervention under the existing approach. However, other accumulations of corporate size, such as the mergers of financial institutions that were already too-big-to-fail, might be an appropriate target for antitrust law. Thus, the potential that antitrust law could prevent some ultimately catastrophic combinations or even force break-ups of companies that become too big merits at least some consideration.

This article argues that modern antitrust law can contribute more than it has to reigning in the causes of long-run systemic instability represented by the too-big-to-fail problem. Post-Chicago antitrust law narrowly focuses on allocative efficiency, which is rarely directly threatened by the sorts of risky conduct that give rise to systemic failures. However, antitrust law and policy have shown impressive adaptability and dynamism over the 120 years since the enactment of the Sherman Antitrust Act in 1890.[21] Indeed, despite the evolution of antitrust law in recent decades, the broad array of policies that represented the foundations of antitrust for roughly a century have begun to rekindle interest among scholars and policymakers – and antitrust law reinvigorated by a revival of the original broader policy underpinnings that predated the law and economics movement might have at least a less modest role to play.

This article explores the potential application of such a revived antitrust law to the problem of the too-big-to-fail enterprise. It argues that a combination of reinvigorated existing law in conjunction with new antitrust legislation, could contribute significantly to the public policy arsenal of weapons for confronting this problem without offending the fundamental objectives of antitrust law. Part II of this article defines the problem of "too-big-to fail" and identifies some of its essential characteristics. Part III examines the limited reach of modern U.S. antitrust law, particularly how it largely fails to address the essential characteristics of too-big-to-fail firms. Part IV then explores whether new or revived antitrust rules might provide some traction in addressing the policy problem presented by threats of catastrophic market failures. Part V concludes by advocating a modest proposal for reform.

21. *See, e.g.*, 15 U.S.C. §§ 1-2 (2004).

II. DEFINING THE PROBLEM: SOME ELEMENTS OF THE "TOO-BIG-TO-FAIL" PROBLEM

A. THE PUBLIC POLICY DILEMMA – DAMNED EITHER WAY

Applying antitrust concepts to the too-big-to-fail problem would seek to prevent or soften a public policy dilemma that has recently forced difficult choices on the nation. The prospect of protecting a company against failure presents a deeply troublesome public policy dilemma. If a firm's failure will cause a wave of failures in a large enough segment of the economy as a whole, one policy option is to provide public infusions of capital to stave off unacceptable outcomes that would follow the failure, such as widespread economic disruption. The bailout policy choice, however, carries with it another unacceptable outcome in addition to the taxpayer burden: moral hazard. Public rescue distorts future rational economic calculations of decision makers throughout the economy. Economic actors can be expected to take greater risks if they believe that they will be protected against adverse consequences. Furthermore, the bailout prospect for only the largest firms creates a potentially undesirable incentive for firms to grow in order to attain that protection. If a firm can become "too big to fail," it can more freely run risks with the expectation that the attendant risks will shift to the treasury rather than shareholders and managers. The risk-assessment incentive structure created by the likelihood of bailouts thus encourages firms to position themselves precariously and to take risks that would otherwise be irrational.[22] Therefore, a bailout may solve one failure by inviting others later on.

Another public policy dilemma created by a threatened systemic failure is presented when a government with finite resources must choose which among competing failures to cure via bailout funding. In the recent crisis, the federal government elected to preserve one investment bank, but not another. In March, 2008, Bear Stearns advised federal regulatory agencies that its liquidity position was so depleted that it would need to file for bankruptcy the next day absent an infusion of capital.[23] Within days, the Federal Reserve and the Treasury

22. *See* GARY H. STERN & RON J. FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS 11 (2004).

23. Robin Sidel et al., *The Week That Shook Wall Street: Inside the Demise of Bear*

Department moved to fund approximately $30 billion to JPMorgan Chase to allow the commercial bank to acquire the failing investment bank.[24] Six months later, the Federal Reserve Bank of New York was confronted with the failure of another investment bank, Lehman Brothers.[25] Although the Fed again considered a bridge solution via Bank of America and Barclays, and those banks declined, ultimately the Federal Reserve participated in a decision about how far it would go to preserve both investment banks.[26] Lehman Brothers is gone, Bear Stearns was saved. Regulators themselves concede that they should not be making this sort of choice:

> Normally the market sorts out which companies survive and which fail, and that is as it should be . . . To prevent a disorderly failure of Bear Stearns and the unpredictable but likely severe consequences for the market functioning and broader economy, the Federal Reserve, in close consultation with the Treasury Department, agreed to provide funding to Bear Stearns through JPMorgan Chase.[27]

The different contexts in which the two decisions were made may very well explain and even justify the Fed's different approaches to Bear Stearns and Lehman Brothers. A decision in November 2008 to salvage Lehman Brothers would have been made by a Fed that was already buried in political fallout from its earlier rescue of Bear Stearns and in an economic environment that was going to require considerably more Fed assistance than was politically realistic. Something had to give way, and it turned out to be an investment bank. The demise of Lehman Brothers seems to have been forced by the many too-big-to-fail crises looming over the Fed as it made its decision.

Therefore, the too-big-too-fail dilemma is twofold. First, the prospect of such a failure forces the government to choose between unacceptable immediate economic risks and long-term moral hazard.

Stearns, WALL ST. J., March 18, 2008, at A1.

24. *Id.*

25. Damian Paletta et al., *Lehman Fate Spurs Emergency Session --- Wall Street Titans Seek Ways to Stem Widening Crisis*, WALL ST. J., Sept. 13, 2008, at A1.

26. Jon Hilsenrath et al., *Crisis Mode: Paulson, Bernanke Strained for Consensus in Bailout*, WALL ST. J., Nov. 10, 2008, at A1.

27. *Developments in the Financial Markets: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 110th Cong. (2008) (statement of Ben S. Bernanke, Chairman, Federal Reserve System), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20080403a.htm.

Second, it can involve the government in making decisions that are generally left to marketplace dynamics and outside the normal provinces of regulatory intervention, which runs contrary to the fundamental structure of a capitalist economic system.

B. BIGNESS

Before turning to the antitrust law issues, it is worth pausing to examine the phenomenon of systemic failure and the characteristics of firms that create the threat. "Too-big-to-fail" is shorthand and widely agreed to be a misnomer because "bigness" alone is not the problem. Very big firms in a number of industries have failed without provoking serious discussion of public bailout to avoid broader economic systemic failures.

For example, Enron failed in late 2001, at a time when it employed approximately 22,000 people and claimed to have revenues exceeding $100 billion.[28] Based on reported revenues, Enron ranked 7th on the Fortune 500 list in 2001.[29] Its failure was not attended with any serious consideration of bailing it out, despite the enormous hardships that its demise visited upon tens of thousands of citizens. Enron was big, but not "too big to fail," and indeed the Chairman of the Federal Energy Regulatory Commission reported to Congress a few months later that "Enron's collapse has not caused significant damage to the nation's energy trading or energy supplies."[30]

Similarly, WorldCom was ranked the 42d largest company in America when it failed in 2001 with $39.2 billion in reported revenues and 85,000 employees.[31] WorldCom was not simply big, it was far flung, having acquired MCI in 1998 to become the second largest U.S. long-distance carrier, and also having acquired UNet, CompuServe, and America Online's data network to become a leading internet

28. GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED 83 (2010).

29. MARK JICKLING, CONG. RESEARCH SERV., THE ENRON COLLAPSE: AN OVERVIEW OF FINANCIAL ISSUES 1 (2002).

30. *The Effect of the Bankruptcy of Enron on the Functioning of Energy Markets: Testimony Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 107th Cong. 32 (2002) (statement of Hon. Patrick H. Woods III, Chairman, Federal Energy Regulatory Commission).

31. BOB LYKE & MARK JICKLING, CONG. RESEARCH SERV., WORLDCOM: THE ACCOUNTING SCANDAL 2, 4 (2002).

infrastructure operator.[32] Its market capitalization dropped precipitously by nearly $150 billion by early July 2002 as a consequence of revelations about accounting irregularities and also due to the vast oversupply in the market for telecommunications capacity.[33] On July 21, 2002, WorldCom filed what was at the time the largest bankruptcy in the nation's history.[34] No public policy debate emerged over whether to bail WorldCom out of its difficulties despite the extensive hardships and economic disruption its failure prompted.

C. INTERRELATEDNESS WITH THE ECONOMIC ECOSYSTEM: UNUSUAL DEPENDENCIES

The firm that is too-big-to-fail is really both big and integral to one or more industries of critical importance to the overall economy (or as one observer nicely put it, the "business ecosystem").[35] American Insurance Group, Inc. ("AIG") provides an instructive example of a company that was determined to "be too big to fail" based not only on its size, but on other factors as well. It certainly was very big. AIG operated in four major business lines: (i) general property and casualty insurance, (ii) life insurance and retirement services, (iii) financial services, and (iv) asset management. As of September 30, 2008, AIG reported consolidated total assets in excess of $1 trillion and stockholders' equity of approximately $71 billion. In 2007, AIG's life and health insurance businesses ranked first in the United States measured by net premiums written ($51.3 billion) and third in terms of total assets at year-end ($364 billion). For the same period, AIG's property and casualty insurance businesses ranked second in the United States measured by net premiums written ($35.2 billion) and third based upon total assets at year-end ($124.5 billion).[36] It has been argued that

---

32. *Id.* at 2.

33. *Id.*

34. *Id.* at 1.

35. *See Too Big To Fail? The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 110th Congress 9 (2009) (statement of Albert A. Foer, President, American Antitrust Institute).

36. Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Restructuring of the Government's Financial Support to the American International Group, Inc. (Nov. 10, 2008), *available at* http://www.federalreserve.gov /monetarypolicy/files/129aigrestructure.pdf.

the solution to the to-big-to-fail problem, at least in the financial services sector, should include limiting the size of firms like AIG so that any single firm's failure would present less systemic risk.[37]

However, AIG's size alone does not explain the perceived need for its rescue, which, instead, stemmed from its vast commitments throughout the global financial markets. It was feared that a default on AIG's commitments would have created a shock-wave effect across a broad swath of economic activity. Those who were at risk from a failure of AIG included large investors, small investors in money market mutual funds (including retirement accounts), insurance policyholders and claimants, state and local governments that had extended credit to AIG, global commercial banks, investment banks, and other financial institutions, as well as subsidiaries of AIG itself. AIG was a major participant in the derivatives markets, as well as a significant counterparty to a large number of major national and international financial institutions. Out of credit swaps that had been sold by an AIG division having a notional value of $372 billion, approximately $250 billion represented transactions designed to provide financial institutions with regulatory capital relief.[38] AIG's failure would have impaired or even gutted the capital bases of many of the world's largest financial institutions. Federal Reserve Board Chairman Benjamin Bernanke concluded, along with the Treasury Department, that:

> At best, the consequences of AIG's failure would have been a significant intensification of an already severe financial crisis and a further worsening of global economic conditions. Conceivably, its failure could have resulted in a 1930s-style global financial and

37. *See, e.g.*, *Systemic Risk*: *Are Some Institutions Too Big To Fail And If So, What Should We Do About It?: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. 60 (2009) (statement of Simon Johnson, Ronald Kurtz Professor of Entrepreneurship, MIT Sloan School of Management; Senior Fellow, Peterson Institute for International Economics) ("[S]ome will complain about 'efficiency costs' from breaking up banks, and they may have a point. But you need to weigh any such costs against the benefits of no longer having banks that are too big to fail. *Anything that is 'too big to fail' is now 'too big to exist.'*") (emphasis added).

38. AIG REPORT, *supra* note 3, at 2,3; BD. OF GOVERNORS OF THE FED. RESERVE SYS., PERIODIC REPORT PURSUANT TO SECTION 129(B) OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008: UPDATE ON OUTSTANDING LENDING FACILITIES AUTHORIZED BY THE BOARD UNDER SECTION 13(3) OF THE FEDERAL RESERVE ACT, at 7,8 (2009), *available at* http://www.federalreserve.gov/monetarypolicy/files/129periodicupdate02252009.pdf.

> economic meltdown, with catastrophic implications for production, income, and jobs.[39]

On September 16, 2008, the Federal Reserve and Treasury agreed to extend $85 billion in secured loans to AIG, an amount that subsequently increased to more than double that amount.[40] The objective was not merely to protect AIG from the normal processes of bankruptcy, but to prevent a downward spiraling of the entire financial services sector in the United States and globally. AIG's elaborate, unregulated and risky commitments cast a dark shadow across a network of counterparties whose contractual interrelationships had created mutual dependencies on a vast scale.

Interrelatedness is thus a characteristic of the too-big-to-fail firm, whose mutual interdependencies are substantial in scope and incapable of satisfactory resolution through bankruptcy. The extent of these interdependencies seems important in distinguishing between firms that are too big to fail and firms whose failures result in harsh but acceptable consequences. Many large companies maintain interdependent relationships with many others, but only some of these reach levels that can draw entire economic systems into potential collapse. Enron, for example, was intricately interconnected and certainly was not in its own solitary orbit when it failed. It was deeply interrelated in energy markets, and its failure caused serious problems in entirely unrelated markets, as well as in the natural gas market, where the prospect of Enron's contracts going unhonored sent shock waves through that particular market. More immediately, its demise cost over 28,000 employees at Arthur Andersen's U.S. operations their jobs and 1,750 Andersen partners lost most of their entire life savings.[41] However, the extent of economic harm from Enron's demise was contained without government bailouts, and no threat across the economy as a whole was perceived. Thus, a firm that is too-big-to-fail is one whose interdependencies extend so far that failure of the firm spells broader

39. Ben S. Bernanke, Chairman, Fed. Reserve, Testimony Before the H. Comm. on Fin. Servs. (March 24, 2009), *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20090324a.htm.

40. Aaron Smith & David Goldman, *Fed Reduces AIG's Debt By $25 Million*, CNNMONEY.COM (Dec. 1, 2009, 9:47 AM), http://money.cnn.com/2009/12/01/news/companies/aig/index.htm.

41. *See* Cassell Bryan-Low, *Andersen Layoff to Hit Support Staff Hardest*, WALL ST. J., Apr. 8, 2002, at C1.

failures that could harm the economy as a whole. Enron's failure might have brought about failures of a large number of natural gas traders, for example, but the emanations for *those* failures would not have been anything comparable to the global bank failures that would apparently have resulted from a failure to rescue AIG.

C. SURROUNDING ECONOMIC CONTEXT

Defining a firm as too big to fail also requires consideration of context, particularly the economic conditions surrounding the potential failure. By the time AIG stood at the edge of failure, the financial system, especially the credit markets, were already deeply troubled. AIG's counterparties included a significant part of the world's credit markets, and they in turn were very much at risk of collapse if AIG's commitments to them turned out to be worthless. Furthermore, AIG was not alone in its perilous condition, and many of its largest counterparties were weak or had already failed. When the United States loaned AIG $85 billion on September 16, 2008, credit markets were already in turmoil from the government's takeover of Fannie Mae and Freddie Mac ten days earlier, and from the Lehman Brothers' bankruptcy filing on September 15, 2008.[42] Other major financial institutions were under stress, including, among others, Bear Stearns and Merrill Lynch.[43] The risks of allowing AIG to file for bankruptcy in this context were perceived as too great. As Chairman Bernanke testified before Congress, the decision to invest in AIG was driven not just by AIG's role in the broader economic ecosystem, but by the economic context in which the failure of AIG would have occurred absent government intervention:

> It was an extraordinary time. Global financial markets were experiencing unprecedented strains and a worldwide loss of confidence. Fannie Mae and Freddie Mac had been placed into conservatorship only two weeks earlier, and Lehman Brothers had filed for bankruptcy the day before. We were very concerned about

---

42. *Oversight of the Federal Government's Intervention at American International Group: Before the H. Comm. On Fin. Servs*., 111th Congress 10 (2009) (statement of Ben S. Bernanke, Chairman, Federal Reserve System).

43. MURPHY, *supra* note 17, at 3-4.

a number of other major firms that were under intense stress.[44]

It follows from this testimony that the public policy makers who decided that the government needed to invest in AIG probably would not have taken that step in some other economic climates. Had credit markets not already been strained, had Fannie Mae, Freddie Mac, Lehman Brothers, Bear Sterns, Merrill Lynch, Citigroup, Wachovia and many other financial behemoths not been imperiled at the same moment, there exists reason to doubt whether AIG failing all by itself would have threatened the economy as a whole as it did. Thus, a company is not simply too-big-to-fail in the abstract, but poses broader risks in some contexts than others – some of these presenting unacceptable risks.

III. POST-CHICAGO ANTITRUST LAW AND THE "TOO-BIG-TO-FAIL" PROBLEM

The foregoing is not intended as an empirical study of the problem, which would certainly be a worthy, but different, undertaking.[45] Rather, identifying certain characteristics of firms whose failures presented unacceptable consequences focuses the consideration on the problems that antitrust would need to address to help mitigate or avoid the public policy dilemmas posed by these impending business failures. It is with this in mind that the partial list above was fashioned. Again, these

44. Oversight, *supra* note 43, at 71 (statement of Ben S. Bernanke, Chairman, Federal Reserve System).

45. Nor is this analysis exhaustive. For example, another characteristic of a firm that presents a too-big-to-fail problem might be the absence of certain types of culpability. Public bailouts are unlikely to be considered in response to a failure brought about by criminal misconduct on the part of corporate management. "Too-big-to-fail" problems often result from risky conduct, and indeed the problem is essentially one of loss-shifting to the treasury and away from the corporate actors who took the risks. When the risks that precipitate corporate collapse are substantially aggravated by illegal or fraudulent conduct, however, relief sought from the government meets with an additional layer of political resistance. Enron and WorldCom failed as a direct consequence of conduct that was highly risky *and* which was unlawfully and deliberately concealed in violation of civil and criminal securities laws, among others. Fraud concealing their financial downturn allowed the risky conduct to persist until its cumulative effects brought about irreversible failures. No serious consideration was given to public bailouts. If criminality brings on a business collapse with devastating collateral damage to the economy or investors, however, the resulting problem is more directly addressed by means other than antitrust law.

characteristics include: (1) size; (2) interrelatedness in the economic ecosystem; and (3) surrounding economic context or events. Having identified some common elements of the too-big-to-fail problem, it begins to emerge why United States antitrust law as it is currently understood and enforced might have, at most, very limited application to help avert or solve future too-big-to-fail problems.

A. THE NARROW MODERN FOCUS OF U.S. ANTITRUST POLICY

The current state of antitrust law is often referred to as embracing "Post-Chicago School" economic theory. Post-Chicago School antitrust is the stepchild of Chicago School antitrust, which represented a radical departure from historic antitrust policy. As discussed later in this article, antitrust policy (and thus antitrust law itself) has had a dynamic history, changing rather dramatically in response to intellectual developments in the field of economics and to changes in the economy itself. Early antitrust decisions embraced a sweeping array of economic, political and social policies.[46] A turn toward a less value-laden antitrust law began to take shape in the 1970s, promoted by intellectual descendants of Oliver Wendell Holmes.[47] Lawyers for corporate interests and industrial organization economists of the Chicago School mounted an organized effort that succeeded in persuading the federal courts to adopt a far narrower view of antitrust that has as its single objective the avoidance of economically inefficient transactions, referred to by economists as "allocative efficiency."[48] In the last two decades of the Twentieth Century, antitrust law embraced this narrow, Chicago School, doctrinal approach to antitrust law and accepted the optimization of allocative efficiency of firms and markets as the dominant antitrust policy.[49] This

---

46. *See infra* Part 3.b.

47. For an interesting historical treatment of the legacy of Oliver Wendell Holmes, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

48. *See*, Pitofsky, *supra* note 2, at 1051; Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 349 (1982); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 13 (1977).

49. Allocative or economic efficiency of markets refers to the situation in which it is impossible to generate a larger total societal welfare from the available resources without technological advancement. Allocative efficiency differs from distributive values or fairness. Chicago School proponents argue that economics should concern

objective was advocated in some influential quarters as the *exclusive* policy of the Sherman Act. For example, a leading proponent of the Chicago School argued that the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[50] In the earliest phase of this revision and reconstruction of antitrust law, Chicago School adherents persuaded courts not only to restrict antitrust to the enforcement of efficient markets, but, more radically, also persuaded them that markets whose allocative efficiency is distorted by monopolistic or conspiratorial misconduct tend to self-correct without great cost to society and, thus, take greater benefit from judicial restraint than from costly and error-prone judicial intervention.[51]

The Chicago School came to dominate judicial and federal agency interpretations of the law, and played a central role in a string of

---

itself only with aggregate welfare rather than distributive welfare – i.e., how much society produces at what cost, but not who gets it. The founder of the Chicago School articulated its value-barren approach:

> Why do economists object to monopoly? The purely 'economic' argument against monopoly is very different from what noneconomists might expect. Successful monopolists charge prices above what they would be with competition so that customers pay more and the monopolists (and perhaps their employees) gain. It may seem strange, but economists see no reason to criticize monopolies simply because they transfer wealth from customers to monopoly producers. That is because economists have no way of knowing who is the more worthy of the two parties—the producer or the customer. Of course, people (including economists) may object to the wealth transfer on other grounds, including moral ones. But the transfer itself does not present an 'economic' problem. Rather, the purely 'economic' case against monopoly is that it reduces aggregate economic welfare (as opposed to simply making some people worse off and others better off by an equal amount). When the monopolist raises prices above the competitive level in order to reap his monopoly profits, customers buy less of the product, less is produced, and society as a whole is worse off. In short, monopoly reduces society's income.

George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1 (1982). By defining economics as "value neutral," and then pressing for purely economics-driven antitrust law interpretations, the Chicago School sought to strip antitrust of any role as referee over the fairness of markets or the distributive fairness of the economy as a whole.

50. ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1993).

51. *See* Bell Atl. Corp., v. Twombly, 550 U.S. 544, 567-68 (2007); Credit Suisse Sec., LLC v. Billings, 551 U.S. 264, 285 (2007); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2003).

Supreme Court decisions overturning more liberal, time-worn, precedents.[52] The elevation of allocative efficiency as the central goal of antitrust became widely accepted, so much so that courts and commentators often seem to believe that this had always been antitrust's exclusive concern.[53] Allocative efficiency is equated with consumer welfare in the sense that consumers are best off in a market that achieves optimum allocative efficiency – prices in such markets send accurate signals to producers and innovators to yield optimum outcomes for consumers. While the most extreme position, that no other policies aside from consumer welfare have any relevance, was not adopted by the courts, economic efficiency came to predominate to a large extent and effectively displaced other policy objectives that at one time or another were considered important considerations in the application of antitrust law. During this Chicago School phase, antitrust enforcement at the federal level was largely confined to unambiguous cartel activity and blatantly problematic mergers, leaving more subtle misconduct to marketplace self-corrections that the Chicago School doctrine anticipated would always or nearly always solve problems better than

---

52. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1120-21 (2009) (overturning the price squeeze prohibition in United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), based on "developments in economic theory and antitrust jurisprudence since *Alcoa*"); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)); State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (overruling Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967)); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47 n.12 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

53. As a senior economist at the United States Department of Justice Antitrust Division put it succinctly: "efficiency is the goal, competition is the process." Kenneth Heyer, Address before the Merger Task Force of the European Commission's Directorate General for Competition (Apr. 9, 2002); *see also* Lawrence Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001), ("[I]t needs to be remembered that the goal is efficiency, not competition. The ultimate goal is that there be efficiency."). The efficiency-oriented policy of competition law has also gained favor in international circles largely at the insistence of United States policy makers and scholars. For example, a 1996 report of the Organization for Economic Cooperation and Development affirmed that "the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources -- and thus efficient market outcomes -- in free market economies." OECD, *Competition Policy and Efficiency Claims in Horizontal Agreements*, at 5, OECD/GD Doc. (96)65 (1996).

antitrust courts.[54]

Critics of the Chicago School found a number of flaws in the theory, and also cautioned against elevating theory over facts in deciding antitrust issues. Markets do not tend to follow theory neatly, and market imperfections can confound the application of theory to the complex factual settings that typically are encountered in antitrust matters.[55] A new, more moderate "Post-Chicago School" approach thus emerged in the early 1990s,[56] and eventually succeeded in establishing a somewhat more tempered approach. Post-Chicago antitrust theory continues to adhere to the limited objective of economic efficiency, but relies with less assurance on market forces to correct interferences with market competition.[57] Although somewhat tempered as measured against the early Chicago School, "Post-Chicago" antitrust theory departs from the Chicago School views mostly around the margins. Post-Chicago antitrust theory does not regard market concentration as an ill, let alone an evil, in the absence of entry barriers;[58] it scrupulously distinguishes abuse of monopoly power from vigorous successful competition by dominant firms;[59] it broadly tolerates vertical price and non-price restraints;[60] it regards predatory pricing as an unlikely source of

---

54. *See* Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

55. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Serv., Inc., 504 U.S. 451, 473 (1992).

56. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 230-49 (1986).

57. J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Address at the International Bar Association Antitrust Section Conference: I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, Is It the Economics? (Sept. 8, 2007), *available at* http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf.

58. *See e.g.*, JOHN S. MCGEE, IN DEFENSE OF INDUSTRIAL CONCENTRATION (1971).

59. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'") (citing United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)).

60. *See e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 890 (2007) ("The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition -- the competition among manufacturers selling different brands of the same type of product -- by reducing intrabrand competition -- the competition among retailers selling the same brand. The promotion of interbrand competition is important

consumer harm.[61] Under this theory, antitrust has retained as its primary targets the more virulent forms of cartel activity and certain obviously problematic merger activity.

Although "Post-Chicago" confidence in the self-correcting tendencies of markets has dampened, it remains a persistent theme. Recently, Joseph Schumpeter's 1942 treatise *Capitalism, Socialism and Democracy*, which predicted the self-destruction of capitalism, has enjoyed a surprising and influential revival, at least as to its metaphorical description of the "gales of creative destruction."[62] According to Schumpeter and his modern adherents, market participants are understood to be, in many cases, competing for the market, rather than within it, and competition on the basis of price is a poor heuristic to explain how markets actually function.[63] Citing Schumpeter for a position that is broadly tolerant of monopoly power as a lure toward innovation, the (now former) Assistant Attorney General for antitrust remarked in 2006 that "[t]he existence of firms with large market shares does not necessarily or even typically reflect competitive harm—to the contrary, firms typically obtain large market shares by offering products that consumers prefer over other firms' offerings."[64]

Thus, Post-Chicago antitrust theory remained skeptical of antitrust intervention, but marginally less so than its more radical precedent in the Chicago school. However, current antitrust law has been blunted by concerns about so-called "Type One error" or over-enforcement of

---

because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" (citations omitted).

61. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993). "As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high. '[T]he mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" (citations omitted).

62. *See e.g.*, Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, Opening Remarks before the Antitrust Division and Federal Trade Commission: The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act (June 20, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/216738.htm.

63. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82-85 (1975).

64. *Id.* at 6.

antitrust rules.

B. INHERENT LIMITATIONS OF POST-CHICAGO ANTITRUST AS A PUBLIC POLICY TOOL TO ADDRESS TOO-BIG-TO-FAIL PROBLEMS

A preliminary consideration is thus whether current Post-Chicago economics and antitrust policy could conceivably be applied to prevent or unwind the existence of a too-big-to-fail firm, or to prevent its actual or impending failure. On its face, this seems a doubtful proposition. The central purpose of modern antitrust law is the protection of consumer welfare, specifically price, output and innovation.[65] It has been suggested that the actual or even potential collapse of a too-big-to-fail firm implicates consumer welfare,[66] and does so in a manner that existing antitrust law principles might address by application of Section 7 of the Clayton Act[67] to the mergers and other business combinations that create these behemoths, or perhaps by application of Sections 1 or 2 of the Sherman Act.[68]

For example, Commissioner J. Thomas Rosch of the Federal Trade Commission ("FTC") has speculated that "mergers should arguably be examined with an eye toward whether they are creating a merged entity that is 'too big to fail.' If so, the transaction may violate Section 7 (or Section 1)."[69] Commissioner Rosch's point was not the trivial one that some mergers that create very big combinations may violate the standards set forth in existing law or policy statements by exceeding tolerable concentration levels.[70] Instead, Commissioner Rosch articulated the view that it is at least possible, without amending the law, to interpret existing antirust law to protect against some instances of the sorts of business collapse that result in traditional forms of consumer

---

65. *See Brooke Grp.*, 509 U.S. at 221 (noting the antitrust laws' "traditional concern for consumer welfare and price competition"); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))).

66. *See* Rosch, *supra* note 20.

67. 15 U.S.C. § 18.

68. 15 U.S.C. §§ 1-2.

69. *See* Rosch, *supra* note 20.

70. *See, e.g.*, U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (1997), *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter MERGER GUIDELINES].

harm, such as reduced output, when an entire industry is hobbled.

Furthermore, since antitrust laws addressing mergers are prophylactic, the argument extends not only to cleaning up a too-big-to-fail problem, which comes too late to protect consumers, but, more ambitiously, to prevent the problem before it bubbles up. Since the failure of a too-big-to-fail firm would unavoidably reduce economic activity, and thus output, for a protracted period of time and might also eliminate or restrict investments in R&D (so goes the argument),[71] antitrust policy should address itself to this general area of public concern. That is, if the failure of a too-big-to-fail firm could bring about the sorts of consumer harm that the antitrust laws protect against, then antitrust law might be implicated by the emergence of such firms in the first place, before they fail.

The argument is appealing, but has apparent limitations. First, not all consumer harm in the form of higher prices, reduced output or diminished innovation implicates antitrust policy because these harms sometimes are brought about by mechanisms that antitrust is not concerned with. Consumers have certainly suffered a variety of hardships from the financial meltdown, including evictions from their homes,[72] loss of jobs,[73] disappearing retirement savings,[74] higher prices for certain types of credit,[75] and generally diminished output throughout the economy.[76] These harms were, to a large degree, precipitated by the mismanagement of too-big-to-fail banks and other financial institutions. However, are these *antitrust* harms? Not obviously, anyway, and antitrust law deliberately has been limited to avoid extending antitrust remedies to every sort of conduct that may harm consumers – they must be harmed in particular ways that are quite narrow. For example, consumers also suffered economic harms when the attacks on September 11, 2001 led to (among other more horrible consequences) the

---

71. Rosch, *supra* note 20.

72. John Leland, *As Owners Feel Mortgage Pain, So Do Renters*, N.Y. TIMES, Nov. 18, 2007, at A1.

73. JANE G. GRAVELLE ET AL., CONG. RESEARCH SERV., UNEMPLOYMENT: ISSUES IN THE 112TH CONGRESS 1 (2011).

74. Kelly Evans, *U.S. News: Ranks of Older Workers Swell as Losses Shorten Retirement*, WALL ST. J., May 9, 2009, at A2.

75. CONGRESSIONAL OVERSIGHT PANEL, MAY OVERSIGHT REPORT: THE SMALL BUSINESS CREDIT CRUNCH AND THE IMPACT OF THE TARP 15-17 (2009), *available at* http://cop.senate.gov/documents/cop-051310-report.pdf.

76. GRAVELLE ET AL., *supra* note 74, at 3.

immediate grounding of all air traffic within the United States, thus reducing output in the air transportation markets[77] – but no one could argue that Khalid Sheikh Mohammed violated the antitrust laws by restraining trade in those markets. The *mechanism* by which output was affected by terrorist attacks was different from the sort of activity that antitrust is intended to prevent.[78]

Antitrust law seeks to prevent antitrust injury, and courts have narrowly construed the "antitrust injury" element of an antitrust case to mean injury flowing from conduct that violates antitrust rules of conduct, which prohibit, for example, price fixing.[79] On this basis, courts have limited antitrust remedies to redress only certain types of reasonably well-understood categories of marketplace misconduct, so that flying an airplane into the World Trade Center does not count regardless of its intended and actual consequences for the economy. Thus, one challenge with addressing antitrust law to the too-big-to-fail problem is to connect the requisite sorts of consumer harm with the sorts of anticompetitive mechanisms that antitrust law cares about. Being big or about to fail are not obviously among these anticompetitive mechanisms since antitrust is not a status offense. Beyond that, even being very big and taking what turn out to be poorly considered risks are not obviously antitrust offenses either because that is not the sort of conduct antitrust seeks to prevent – at least not under Post-Chicago antitrust. Thus, as a starting point, antitrust intervention to prevent too-big-to-fail problems could not prevent the collapse of a firm that would not cause any sort of antitrust injury to consumers or that caused such harm via the wrong mechanisms.

An additional limitation of Post-Chicago antitrust is its preoccupation with so-called Type One errors, or over-deterrence. For example, in *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, the Supreme Court was centrally motivated by its desire to avoid

---

77. Ryan Tam & R. John Hansman, *Impact of Air Transportation on Regional Economic and Social Connectivity in the United States* 1 (American Institute of Aeronautics and Astronautics, Inc., 2002), *available at* http://dspace.mit.edu/bitstream/handle/1721.1/35884/atio_tamhansman.pdf?sequence=1.

78. *See generally*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

79. *See* FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990).

punishing price cutting behavior that *might be* predatory, coupled with any perceivable risk of simultaneously discouraging price cutting that is competitive, when it redefined, and all but eliminated, the offense of predatory pricing. It found that "[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting."[80]

Such preoccupation with Type One errors also reaches other antitrust cases beyond the predatory pricing context. The case that extended the *Brooke* rule to predatory bidding evoked an *amicus* brief from the Antitrust Division that, along with several of its other *amicus briefs*, evidenced the same preoccupation with the "false positive" problem and over-deterrence.[81] In that case, the Supreme Court agreed with the Justice Department, again reciting "intolerable risks of chilling legitimate procompetitive conduct."[82] Most recently, the Court introduced a new rule to bar most "price squeeze" claims, again citing this same "intolerable risk" of false positives, and again supported by the Antitrust Division's refrain that "the risk of imposing liability in cases involving procompetitive price-cutting, and 'the costs of [such] an erroneous finding of liability are high,'. . . because such errors (or 'false positives') would 'chill the very conduct the antitrust laws are designed to protect.'"[83] In another decision that recites this same policy basis, the Court all but eviscerated the essential facilities doctrine along with the Second Circuit's "monopoly leveraging" rule. It reasoned that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[84] Here too, the Antitrust Division, along with

80. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

81. "[A] broader rule could lead to 'false positives' and thereby 'chill the very conduct the antitrust laws are designed to protect.'" Brief for the United States as Amicus Curiae, Weyerhaueser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (No. 85-381).

82. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007).

83. Brief for the United States as Amicus Curiae Supporting Petitioners at 26, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009) (No. 07-512).

84. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S.

the Federal Trade Commission, encouraged the result, urging that the doctrine "encourages litigants to seek antitrust remedies for ordinary commercial and regulatory disputes" – in other words, the doctrine chills competitive conduct.[85] From this policy perspective, a number of antitrust rules have been relaxed or even eliminated.

When one considers the conduct that Post-Chicago antitrust prohibits against the backdrop of the characteristics of a too-big-to-fail firm, it becomes apparent that current antitrust principles have very limited application to the problem. This is not to say there is *no* room for productive antitrust intervention, but, realistically, there is very little.

C. Specific Problems with the Application of Existing Antitrust Rules to the Too-Big-to-Fail Firm

Among the attributes of a too-big-to-fail company identified above, the "bigness" attribute seems the most obvious subject for antitrust policy. There are three main impediments in the way of applying modern antitrust law to prevent bigness of the too-big-to-fail sort. First, allocative efficiency tends to favor or, at most, be neutral to bigness. Since the vast scale of the too-big-to-fail enterprise is an essential ingredient of the problem, antitrust's modern ambivalence or outright resistance to controlling bigness poses one problem. A second problem is that of the self-inflicted wound: antitrust opposes monopolistic misconduct, mergers or collusion, but it does not oppose the *self-destruction* of a dominant firm, even where the same sort of consumer harm or allocative inefficiency results. Third, prophylactic antitrust rules are timid about speculating, and the too-big-to-fail problem is layered in just the sort of contingencies that antitrust precedents resist to predict. If antitrust is to have a meaningful role in containing the problem of catastrophic business failures, it will need to overcome these three problems.

1. The Bigness Problem

The approach that antitrust law currently takes toward bigness

---

398, 414 (2004).

85. Brief for the United States and the FTC as Amici Curiae Supporting Petitioner, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).

creates the first of these limitations. Antitrust as currently understood has no particular antipathy towards large-scale enterprise. In fact, on balance, antitrust tends to encourage large-scale enterprise. It recognizes that the potential economies of scale attainable by large enterprises may create increased efficiencies, which can benefit consumers.[86] Thus, where economies of scale may be involved, modern antitrust law exercises caution before condemning large enterprises.[87]

For example, economies of scale may (like other efficiencies) constitute a defense to a merger challenge.[88] In evaluating a hospital merger under the Clayton Act,[89] an appellate court noted that the "evidence shows that a hospital that is larger and more efficient . . . will provide better medical care than either of [the merging] hospitals could separately. The merged entity will be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care . . . The evidence shows that the merged entity may well enhance competition."[90] Of course, it was of no consequence in that case that the merged firm's ability to attract the best doctors might adversely affect other hospitals, or that its size might make the firm indispensible to the community so that its failure could never be tolerated. In the context of a single firm with monopoly power, antitrust law does not inhibit its taking advantage of economies of scale even where smaller rivals are disadvantaged as a result.[91]

---

86. *See, e.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 287 (1985) ("The cooperative arrangement thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them.").

87. *Id.* (collusion and joint ventures)*; see also*, MERGER GUIDELINES, supra note 71; FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999) (scale economies recognized as a cognizable efficiency in antitrust merger analysis).

88. *See* MERGER GUIDELINES, supra note 71; United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997).

89. Section 7 of the Clayton Act prohibits certain mergers and acquisitions whose effects may be to substantially lessen competition in any line of commerce. 15 U.S.C.A. § 18 (2010).

90. FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1055 (8th Cir. 1999).

91. Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005); *see also*, Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002) ("In determining whether conduct may be characterized as exclusionary, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or

A merger is not the only setting in which antitrust champions scale efficiencies. At the retail level, economies of scale constitute a legitimate reason for a manufacturer to limit intrabrand competition by imposing vertical restraints.[92] Antitrust law also generally tolerates combinations of competitors into joint ventures to achieve economies of scale, with the presence of such efficiencies removing a challenge from the application of *per se* condemnation and establishing a facially plausible justification for the concerted activity.[93] Removing conduct from *per se* illegality comes close to legalizing it, given the rarity of plaintiff successes in challenging the conduct under the rule of reason.[94]

Thus, modern antitrust law tends to encourage, rather than discourage, bigness. In fact, its focus on allocative efficiency renders this consequence unsurprising. A firm achieving scale economies produces greater output at lower cost. That other competitors might be devastated in the process is not a modern antitrust concern. Nor is it of any concern that scale efficiency may result in indispensability to the marketplace.

Only in the most indirect way does modern antitrust law discourage bigness by imposing somewhat more stringent standards on firms that have market power (which sometimes equates to bigness, although not always) or that operate in oligopoly markets (in which the small number of rivals sometimes means that they are large, but not always). The

exclusionary.] However, merely because an entity has monopoly power, does not bar it from taking advantage of its scale of economies because of its size. Such advantages are a consequence of size and not the exercise of monopoly power.") (citations omitted).

92. "A purpose to facilitate point-of-sale services or to protect minimum economies of scale could induce a manufacturer to limit intrabrand competition. Notwithstanding price effects, such limitations are lawful when reasonable and not subject to automatic condemnation." Business Electronics Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 746 (1988) (quoting 7 P. Areeda, Antitrust Law § 1457, 174-75 (1986)).

93. *See* Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296 (1985).

94. One rare successful challenge under the rule of reason is found in Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005), a case that is indicative of the difficulties plaintiffs face under Post-Chicago School antitrust rules. In that case the FTC challenged an agreement between competing record companies to suspend advertising and discounting of two record albums temporarily during the launch period for a jointly-produced recording. The court affirmed the FTC's application of the rule of reason to the challenged agreement, even though it involved competitors agreeing not to put specific products on sale for a period of time – a collusive restriction on price and advertising that in an earlier era probably would have met with *per se* condemnation.

existence of monopoly power is not unlawful by itself, but Section 2 of the Sherman Act imposes different, more stringent, standards of conduct on firms that have (or threaten to achieve) market power.[95] Moreover, antitrust law imposes a different set of rules on the conduct of large monopolies. Section 1 of the Sherman Act sometimes imposes more stringent standards on firms in highly concentrated markets, or at least exposes them to antitrust risks that probably inhibit a certain amount of marketplace conduct than would otherwise occur.[96] Firms operating in a market with an oligopolistic structure are subject to certain limitations on their behavior, and may more easily be found to have engaged in unlawful price fixing or tacit collusion than firms in more diffuse markets. For instance, "a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement" in a Sherman Act conspiracy case.[97] While such parallel conduct alone is not enough to support a conspiracy complaint,[98] the potential exposure to antitrust remedies can discourage firms in an oligopolistic market from acting as freely as they might in a more competitive one. This holds particularly true if firms interact through trade associations or in other contexts that would add to the inference of agreement.[99] Thus, antitrust law imposes certain burdens on monopolists and oligopolists, and, to this limited extent, can be seen as disfavoring these market structures.

However, it is one thing to demand higher standards of conduct in monopolistic and concentrated markets, and quite another to discourage the existence of big firms. First, size and market power are not the same thing, such that many big firms do not have market power that would even implicate the constraints of heightened antitrust scrutiny. These constraints apply to some big firms, but not all, and can also apply to small firms. Indeed, monopolies can be large, but they can also be small by any measure, such as a monopoly held by virtue of a patent over a small but essential input, or in a market that can sustain only a single

95. 15 U.S.C. § 2 (1952).

96. 15 U.S.C. § 1 (1952).

97. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007).

98. *See id.*

99. *See e.g.*, Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3d Cir. 1993) (noting that a range of circumstantial evidence can show collusion; "[f]or example, have they attended meetings or conducted discussions at which they had the opportunity to conspire…?").

small seller, such as the local baker in a village without any others.[100]

More importantly, the possibility of encountering more stringent antitrust conduct rules would not plausibly lead firms to control their own size. The economic inducements for growth and market power are compelling, and, in some cases, vast size can be obtained without even implicating antitrust rules, such as by conglomerate or out-of-market acquisition activity. It seems unlikely that a firm would decide, for example, to forego an opportunity to increase its size and market share on the thin ground that doing so would require it to exercise more caution when attending trade association meetings.

Market extension combinations that do not even implicate antitrust rules have fueled growth in key sectors of the economy. The banking industry, one that is central to the too-big-to-fail crisis, provides an excellent example. The banking industry transformed itself from relatively small and local enterprises to global giants through merger activity and relaxed regulation. Between 1980 and 1999, the number of commercial banks declined from approximately 15,000 to just 9,000. The trend toward concentration continued into the new century. At the end of 2000, there were 397 banks with assets of $1 billion or more; by mid-2009 there were 136 more of these large banks, and at the same time, the total number of commercial banks dropped by approximately 1,320.[101] The concentration of the banking industry provoked almost no antitrust intervention. Bank mergers implicate antitrust laws only when they combine competing banks with overlapping geographic reach.[102] The biggest bank mergers often involved little in the way of competitive

100. *See* Mitchel v. Reynolds, 24 Eng. Rep. 347 (K.B. 1711).

101. *Statistics on Banking*, FDIC, http://www2.fdic.gov/SDI/SOB/.

102. For example, the proposed merger of PNC Financial Services Group, Inc. with National City Corporation was approved by the Antitrust Division of the United States Department of Justice on the condition that the parties divest a total of 61 branches in western Pennsylvania with approximately $4.1 billion in deposits, as well as certain middle-market lending operations of National City Bank in the region. Thus, in the area of their most significant competitive overlap, the merger implicated antitrust rules pertaining to mergers and triggered the imposition of the divestiture remedy. Even with this structural remedy, however, the merger created the nation's fifth largest bank with $289 billion in assets and about $180 billion in total deposits. The $4.1 billion divestiture represented only a little more than 2% of the merging parties aggregate deposits. *See* Press Release, United States Department of Justice, Justice Department Requires Divestitures in Acquisition of National City Corporation by PNC Financial Services Group (Dec. 11, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/240315.pdf.

overlap and were waived through by antitrust and banking regulators without conditions or with minimal divestitures imposed as conditions for these approvals.[103] Thus, antitrust does not deter the existence of big firms by treating those with market power somewhat differently than those without it.

What is missing from antitrust is any real discipline against the vast attenuated size and shape of the too-big-to-fail company. Antitrust law contains no prohibition against size, and, instead, modern antitrust law probably coddles, more than it impedes, corporate expansion.

2. The Self-Inflicted Wound Problem

The second difficulty with resorting to antitrust law to prevent colossal failures is that antitrust conduct standards do not restrict risk taking activity, even if the risks are obviously ill-advised. A violation of antitrust law inflicts a wound on consumers and perhaps on rivals, but not on the actor. All aspects of antitrust law prohibitions concur in this respect. For example, monopoly law prohibits certain forms of predatory and exclusionary conduct by dominant firms that harm consumers and market competition by weakening or destroying the monopolist's rivals or preventing their emergence into the marketplace.[104] Merger prohibitions seek to prevent the acquisition of monopoly power for the same ultimate purpose.[105] Similarly, conspiracy antitrust prohibitions target the combined exercise of market power to harm competition.[106] No antitrust prohibition directs itself against harm a firm inflicts on itself.[107] Rather, antitrust economics proceeds on the

103. *See generally,* Yomarie Silva, Note, The "Too Big to Fail" Doctrine and the Credit Crisis, 28 REV. BANKING & FIN. L. 115 (2009).

104. "The conduct that § 2 brands as anticompetitive must… cause or threaten harm to consumers from lower market output, higher prices, reduced innovation, or some other indicator of diminished competitiveness." P. E. AREEDA AND H. HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW ¶ 6.04 (2d ed. 2003).

105. *See* MERGER GUIDELINES, *supra* note 71, §1 ("[M]ergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise... A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

106. *See, e.g.*, U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (holding that the Sherman Act is directed, among other things, against combinations of power to control prices even in a "substantial part of the commerce in [a] commodity.")

107. Some antitrust violations involve agreements that restrict the freedom of firms

assumption that all firms seek to maximize profits. In order to maximize profits, firms must decide how much to produce and sell, and how to produce and sell it – that is, they must decide how to compete. If a firm decides to take a risk in that endeavor, antitrust courts will not second-guess it to block the taking of that risk *ex ante* or to punish it *ex post*. Antitrust fosters competition only by keeping it open, not by preventing it or directing companies in how to succeed or at least avoid failure.

The too-big-to-fail firm threatens the economy by virtue of the wounds it inflicted upon itself, rather than by virtue of the wounds it inflicted on others for its own advancement. Thus, the essential feature of a firm that has become too big to fail is that it has somehow threatened its own economic survival, generally by taking ill-advised risks or pursuing a disastrous business strategy. If such a firm fails, it is, by definition, inefficient in the sense that the resources dedicated to the firm produced poor results. However, supporting an inefficient participant's existence in a market and averting its failure serves no antitrust objectives, even when the failure of such a firm would harm consumers by eliminating that firm's rivalry. If, instead, such a firm exits its market, thereby leaving its last standing rival with a monopoly, it is not the case (nor should it be) that the exiting firm violated the antitrust laws by closing up shop. True, its conduct created a monopoly, but it created a monopoly in *another* firm rather than for itself. Yet, absent a collusive deal in which the firm receives payment to exit the market, the mere act of departure is not illegal. To hold otherwise would impose a sort of Iron Curtain around markets, forbidding departures on pain of civil or even criminal prosecution.

Thus, antitrust law is directed at conduct that harms other firms, and not self-inflicted wounds that characterize the too-big-to-fail firm. This creates a moral hazard problem, spurring the firm that is too big to fail to take risks that fall on someone other than the firm, and also leading to excessive and inefficient risk taking. However, antitrust law is simply not directed at preventing even mindless leaps toward profits, even if the results of such conduct may very well inflict catastrophic consumer

---

to expand their market share by competing, and in some sense thus involve what might be regarded as self-inflicted harm. A market allocation or similar such restraint, however, is intended on balance to be profitable for the conspirators, and so impose no net harm on them. The too-big-to-fail firm is one that is approaching collapse, and antitrust rules do not prohibit companies from collapsing.

harm.

3. The Incipiency Problem

A final problem with the application of existing antitrust rules to the too-big-to-fail problem is the incipiency issue. Mostly, antitrust law applies *post hoc* to condemn past conduct that has already interfered impermissibly with competitive markets. Furthermore, standing and antitrust injury remedial standards for private litigation require proof that both the marketplace and the plaintiff suffered harm.[108] Thus, most antitrust prohibitions do not reach incipient problems at all, and those few that do only apply to likely or probable violations. For example, the standard for assessing most claims under Section 1 of the Sherman Act, the Rule of Reason, evaluates whether concerted action has had a net anticompetitive effect taking into account the history and nature of the restraint.[109] This standard scrutinizes alleged offenses under Section 1 for past actual effects rather than projected future effects.

There are, of course, antitrust statutes applicable to prevent incipient harm. Section 7 of the Clayton Act prohibits any transaction "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[110] It seeks to forestall anticompetitive mergers "in their incipiency," before their effects occur, and thus requires a prediction about the merger's impact on future competition.[111] Proving a Section 7 violation does not require showing that a merger has caused higher prices in the affected market, but, rather, "that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for."[112] Section 5 of the Federal Trade Commission Act also has prospective as well as *post hoc* reach.[113] It has long been established that the FTC can

108. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

109. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 880 (2007).

110. 15 U.S.C.A. § 18 (2010).

111. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963).

112. Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986).

113. 15 U.S.C.A. § 45 (2010) ("(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") Subsection (2) empowers the Commission to "prevent persons… from using unfair methods of competition…." but excludes, among other

challenge as an unfair method of competition prohibited by Section 5 any conduct that would be unlawful under the antitrust laws, as well as conduct that threatens to become a violation. Thus, in *FTC v. Motion Picture Advertising Servs. Co.*,[114] the Supreme Court concluded that the Commission can proceed under Section 5 to prohibit in their incipiency practices that threatened to become a Sherman Act violation when fully grown. Subsequently, the Supreme Court has repeatedly upheld Commission challenges under Section 5 without requiring proof of market power or anticompetitive effects, affirming the FTC's "power under § 5 to arrest trade restraints in their incipiency."[115] Finally, the prohibition in Section 2 of the Sherman Act against attempted monopolization reaches incipient problems, condemning conduct that presents a dangerous likelihood of successful monopolization.[116] As Justice Holmes observed in *Swift & Co. v. United States*:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent — for instance, the monopoly — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.[117]

A too-big-to-fail problem is one of layered contingencies. As explored above, one element of a too-big-to-fail problem is the broader economic context in which a company's imminent threatened failure occurs. At the time when firms like AIG and Bear Sterns were rescued, many other economic problems of national scope had already accumulated before the bailout decisions had to be made.[118] It is uncertain, if not doubtful, whether the bailout of any single firm would have been considered a pressing need had the surrounding circumstances been less threatening. In any event, a firm is only in the requisite sense too-big-to-fail *if* it is very big and deeply integral to broader economic

industries, banking from the reach of this power.

114. 344 U.S. 392, 394 (1953).

115. Spectrum Sports, Inc. v. McQuillen, 506 U.S. 447, 455 (1993).

116. Swift & Co. v. United States, 196 U.S. 375 (1905).

117. *Id.* at 396.

118. MURPHY, *supra* note 17, at 2-4.

activity that depends upon it, *and also if* there are economic conditions surrounding the corporate crisis rendering the imminent failure unacceptably catastrophic. If AIG was too big to allow its demise in the fall of 2008 when these problems coalesced, was it also "too big" during the housing boom that was in full bloom just months earlier? Had it failed in 2006, would the government have had any reason to intervene to prevent collapse? At what point along the pathway towards a full-blown catastrophe does the incipient problem become palpable enough to raise the specter of bailouts or some alternative governmental intervention? By the same token, at what point could antitrust intervention, if it is available, be expected to kick in? The point of intervention would not be to punish or exact damages, but to prevent catastrophe. However, any intervention, whether from antitrust or other sources, would face significant difficulties anticipating the contingencies involved, including the potential for an adverse turn of events in the broader economic context and the likely effects of a particular company's interrelations with others in the event that it failed. Moreover, antitrust law, in particular, is limited by various doctrines that preclude intervention based on speculation.[119]

Even the antitrust statutes with some preventive reach are of limited use in forestalling a catastrophic business collapse because the narrow range of possibilities against which Post-Chicago substantive antitrust guards barely overlaps with the possibilities that a catastrophic potential failure portend. For antitrust incipiency statutes to intervene to avert a too-big-to-fail scenario would require an imminent threat of the right sort. Under existing antitrust laws that are based on Post-Chicago assumptions, it is theoretically *possible* that intervention could happen, but it will be the unusual case to be sure. Section 2's prohibition against

---

119. For example, causation and standing in antitrust jurisprudence are restrictive concepts, limiting damage claims to plaintiffs whose injuries are direct. In *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519 (1983), the Court held that a union lacked standing to challenge a boycott against unionized firms on the ground that the injury was too indirect and speculative, notwithstanding that there was not real doubt that the boycott had injured union firms. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 925 (2000). Similarly, the indirect purchaser damages exclusion established in *Ill. Brick Co. v. Illinois,* 431 U.S. 720 (1977), denies a damages remedy to indirect purchasers from a price-fixing cartel again without serious doubt that downstream customers are often harmed, but out of concern for burdening federal courts with imponderable antitrust damages apportionment problems. *Id.* at 478-79.

attempted monopolization seems of no possible application outside the coincidental circumstance in which a very big company is both headed for a train wreck and happens, at the same time, to be conducting its business with unlawful intent and the likely effect of maintaining or creating a monopoly. This case will be the exceptional circumstance almost by definition: a company is unlikely to become a monopoly at the same time as it is likely to fail. The more plausible candidates for intercepting a too-big-to-fail failure are Section 5 of the FTC Act and Section 7 of the Clayton Act.

4. The Current Reach of Section 5 of the FTC Act

Is it, or could it be, a violation of Section 5 for a company to engage in some form of risky conduct that poses a threat to its own survival and creates a strong possibility of governmental protection or bailout? If so, at what point in time along the continuum of events would that conduct rise to the level of an "unfair method of competition"? Is it "unfair" in the requisite sense for a firm to take unreasonable risks that its smaller rivals cannot afford to take given an imbalance in the likelihood of governmental rescue for the "too-big-to-fail" company?

Section 5 is an adaptable statute by its nature. It proscribes "unfair methods of competition," which the Supreme Court has found to be a concept that is "flexible . . . with evolving content."[120] The Court has repeatedly held that the meaning of "unfair methods of competition" can be ascertained only on a case-by-case basis by the "gradual process of judicial inclusion and exclusion."[121] The results of judicial articulation of the concept have been inconclusive and spotty, but a few points have emerged. First, Section 5 prohibits whatever is also prohibited by the antitrust laws (subject to certain jurisdictional limitations of the FTC Act).[122] However, Section 5 is not confined to conduct that violates antitrust law:

120. FTC v. Bunte Bros., 312 U.S. 349 (1941).

121. FTC v. Raladam Co., 284 U.S. 643, 648 (1931).

122. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986); United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 279 n.7 (1975); FTC v. Brown Shoe Co., 384 U.S. 316, 321-22 (1966); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 609 (1953); FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 395 (1953), *reh'g denied*, 345 U.S. 914 (1953); FTC v. Cement Inst., 333 U.S. 683, 690, 693 (1948), *reh'g denied*, 334 U.S. 839 (1948).

> In the area of anticompetitive practices, the FTC Act functions as a kind of penumbra around the federal antitrust statutes. An anticompetitive practice need not violate the Sherman Act or the Clayton Act in order to violate the FTC Act . . . However, the scope of the FTC is nonetheless linked to the antitrust laws. The power of the Federal Trade Commission to declare anticompetitive trade practices "unfair" extends primarily to "trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate those laws."[123]

Thus, conduct that may fall outside the reach of the antitrust laws for technical reasons may violate Section 5, such as an invitation to fix prices where no agreement to do so is actually formed.[124] Moreover, since as long ago as 1972, the Supreme Court has held that conduct that does not implicate antitrust law or policy may fall within the potential reach of Section 5:

> Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[125]

The sweep of Section 5's "unfair methods of competition" has been regarded as a broad grant of authority that affords the agency power to intervene to protect the public against practices that may defy categorization. For example, a company using deceptive advertising, intentionally or not, that other companies complying with the Act do not use, creates an unfair advantage over its competitors.[126] Conduct that is legally proper, such as bringing lawsuits in courts of proper venue, has been held to be an unfair method of competition where the defendants in those lawsuits were consumers who were disadvantaged by having to travel long distances to defend themselves against the plaintiff

---

123. Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1292-93 (4th Cir. 1987) (dictum) (quoting *Brown Shoe Co.*, 384 U.S. at 321).

124. *See In re* Quality Trailer Prods., 5 Trade Reg. Rep. (CCH) 23,247 (Aug. 11, 1992); *see also In re* YKK (U.S.A.), Inc., 58 Fed. Reg. 19,454 (Apr. 14, 1993), 58 Fed Reg. 41,790 (Aug. 5, 1993) (consent decree); *In re* AE Clevite, Inc., 58 Fed. Reg. 17,405 (Apr. 2, 1993), 58 Fed. Reg. 35,459 (July 1, 1993) (consent decree).

125. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

126. Montgomery Ward & Co. v. FTC, 379 F.2d 666, 672 (7th Cir. 1967).

corporation's charges.[127] However, courts have imposed limitations on the scope of Section 5 in the interest of predictability, especially where the conduct is outside the reach of antitrust laws. Where "unfairness" is applied to conduct that is not measurable by unfairness standards under other statutes, "standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."[128]

The conduct that creates a too-big-to-fail problem can fall into an infinite variety of categories, some of which Section 5 intervention might theoretically reach. First, of course, growth is often accomplished by mergers and acquisitions. The antitrust standard for such a transaction is only implicated where market power is increased, but Section 5 could reach further. For example, the FTC might block a conglomerate merger on the grounds that the scale efficiencies or other putative benefits from the combination are outweighed by looming indispensability problems, particularly if the moral hazard created by the merger gave the merging firms an unfair advantage over smaller rivals who could not rely on bailouts.

The market extension mergers in the banking industry, again, provide an excellent example. Suppose that Bank A is the dominant commercial bank in Region A, and it acquires Banks B, C and D, which each dominate in their respective Regions B, C and D. By hypothesis, none of these banks competes with the others, such that the merger is not horizontal and likely does not provoke any resistance under Section 7.[129] While the failure of pre-merger Bank A standing alone might pose a significant but manageable clean-up problem for the Federal Reserve System, at some point, that will no longer be the case if Bank A merges with enough dominant banks in enough geographic markets. Eventually, market extension mergers can and do create banks that cannot be allowed to fail. If it is additionally supposed that it would be economically rational for post-merger Bank A to take advantage of its too-big-to-fail status, such as by engaging in high-risk-high-return

127. Spiegel, Inc. v. FTC, 540 F.2d 287, 294 (1976).

128. E. I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984).

129. For purposes of antitrust analysis, geographic market extension mergers are essentially no different from product market extension mergers. In 1998, for example, Citi Group acquired Travelers, extending its banking business into the business of insurance.

lending on a global scale with the expectation of federal rescue if risks materialize, is that an "unfair method of competition"? If so, are the mergers that position Bank A to engage in that unfair method of competition also unfair, or is it too speculative even for the incipiency standards of Section 5? There is no case authority to resolve this, but at least one current Commissioner controversially believes that Section 5 plausibly applies.[130]

5. Consolidation, Efficiency and the Current Reach of Section 7 of the Clayton Act

Section 7 of the Clayton Act, containing the principal federal statutory provision governing mergers, provides that:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[131]

As currently understood, Section 7 of the Clayton Act represents no particular objection to size, and instead concerns itself with combinations that create market power or facilitate its exercise. Policy makers have sometimes toyed with the idea of limiting mergers of large and leading companies, but those proposals have not been implemented or enacted into law.[132] Indeed, the failed attempts to outlaw mergers exceeding specified size thresholds make clear that existing law does not

---

130. *See* Rosch, *supra* note 20, at 8.

131. 15 U.S.C. § 18 (2010).

132. *See, e.g.*, Phil C. Neal, REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, 115 CONG. REC. 13,890 (1969) (recommending limiting certain acquisitions by firms having $250 million in sales or $500 million in assets of leading firms in concentrated markets; in 1979 a bill was introduced in the Senate that would have prohibited mergers between a companies with sales or assets exceeding $2 billion as well as smaller mergers in concentrated markets); Donald I. Baker & Karen L. Grimm, S. 600 – An Unnecessary and Dangerous Foray into Classic Populism, 40 OHIO ST. L. J. 847 (1979).

prohibit such transactions.[133] Section 7 instead limits aggregations of market power, rather than size – and the two do not correlate. Conglomerate mergers can be very large without affecting concentration in any relevant economic market, and thus very large mergers are permitted in very large markets.

The most influential interpretation of this broadly-worded statute is embodied in federal agency guidelines rather than judicial opinions, largely because the Supreme Court has only rarely taken cases that would allow it to expand on the statute's meaning.[134] As the Merger Guidelines make clear at the outset: "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. . . . [T]he result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources."[135] The evaluation of the legality of a merger under the 1992 Guidelines, which is also generally followed by the courts, proceeds by defining the relevant markets in which the transaction may increase concentration and then by measuring its concentration effects, taking certain defenses and justifications into account as to transactions that otherwise exceed stated permissible concentration thresholds. Nothing in the case law or the 1992 Guidelines addresses the problem of unwieldy size or the possibility that the resulting firm might wield intolerable political power or present unacceptable risks of its own failure. Size does not constitute a valid basis for disapproving a merger under the Guidelines analysis, and so it is no surprise to find that mergers of enormous size are routinely approved by antitrust enforcers and federal courts applying Section 7.

---

133. In response to the current crisis, legislation has been proposed to enable regulators to dismantle or impose discipline on any firm that poses a too-big-to-fail risk. A proposal by Congressman Kanjorski of Pennsylvania would empower a newly-created financial industry regulatory Council to make determinations about the size, scope of operations, business relationships and interconnectedness, and mix of activities of the largest financial services businesses and to impose, among other things, divestiture to unaffiliated companies upon a finding of systemic risk. This provision would not amend Section 7 but might cast a different light on it. H. Amdt. 527, 111th Cong. (2009) (unenacted).

134. *See* MERGER GUIDELINES, supra note 71. The Supreme Court's most recent antitrust merger case was in 1990, and concerned remedies of private parties under Section 16 of the Clayton Act rather than substantive standards. California v. Am. Stores Co., 495 U.S. 271 (1990).

135. MERGER GUIDELINES, supra note 71, § 0.1.

One increasingly important defense is the presence of merger-specific efficiencies, since scale efficiencies are often articulated as a motivation for many mergers. At one time, efficiencies justifications for mergers were largely ignored on the grounds that even the most anticompetitive transactions will create some efficiencies. In 1967, the Supreme Court held that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[136] Intervening years and the emergence of the Chicago School brought an increased tolerance of potential anticompetitive effects that are now regarded as potentially offset by merger specific efficiencies. In 1997, the FTC and U.S. Department of Justice expanded the efficiencies provisions of the Merger Guidelines in an effort to delineate how the agencies will evaluate claimed efficiencies and balance them against potential adverse competitive effects from mergers.[137] An FTC study published in 2009 reviewed the agency's experience with efficiencies justifications that had been proffered for mergers over a ten-year period.[138] Of 118 mergers that were the subject of Bureau of Economics staff memoranda, 50 transactions presented at least one efficiency-related justification.[139] Efficiencies arguments fared reasonably well at the agency, with the Bureau of Economics accepting roughly 27% of all efficiencies justifications advocated for merger transactions during the study period.[140]

While efficiencies of scale are considered in approving transactions, inefficiencies of scale are not, such that mergers resulting in inefficiently large scale are not disapproved on that particular ground. It is likely that at least some mega-mergers have had adverse effects on overall efficiency by creating out-sized firms. However, antitrust hardly puts in place an "inefficiency filter" to block big mergers that do not create or

136. FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).

137. *See* MERGER GUIDELINES, supra note 71, § 4.

138. MALCOLM B. COATE & ANDREW J. HEIMERT, FED. TRADE COMM'N, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION: 1997– 2007 (2009), *available at* http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf.

139. *Id.* at 34, tbl.1.

140. *Id.* at 35. Data were also reported for the Bureau of Competition, which reached substantially similar results, although there was some disparity between the two wings of the agency. Acceptance or rejection of efficiency defenses by either bureau was not necessarily reflected in the ultimate determination by the agency itself.

enhance the exercise of market power even if the merged firm is simply unwieldy. For example, certain high-profile mega-mergers have proved to have been ill-conceived and inefficient, such as AOL's $182 billion merger with Time Warner in 2001. The combination was touted as creating a digital media powerhouse with the potential to reach every American with a computer or a television set. The FTC approved the merger under a consent decree that sought to prevent Time Warner from exploiting market power in broadband by discriminating or denying access in connection with its cable system,[141] which serviced roughly 20% of U.S. households.[142] The concept of the merger proved to be so ill-advised that within five years Time Warner could not find a buyer for AOL and was forced to spin off the failed internet access and online advertising business.[143] The combined assets did not work efficiently together. One can of course debate whether the FTC's *ex ante* review (or the parties themselves) should have anticipated the inefficiencies inherent in that transaction, but, even if it had, current antitrust law would have offered it no grounds on which to oppose the transaction.

At least some scholarly support exists for the proposition that many mega-mergers in the United States and globally in recent years have created outsized firms far surpassing efficient scale, resulting in unwieldy and inefficient, rather than more competitive, enterprises. In many industries, including financial services, the minimum efficient scale has increased over time along with technological advances, deregulation and other developments. However, it seems likely that merger size has grown at a much larger rate, casting some doubt on the notion that bank mega-mergers are generally necessary to achieve scale efficiencies. As long ago as 1993, a scholarly assessment of merger activity in the banking industry concluded that x-efficiency, or managerial ability to control costs, played a substantially greater role than scale efficiencies in the overall performance of banks, and that bank mergers often did not yield any scale efficiencies at all.[144] Subsequent

141. *In re* America Online, Inc. and Time-Warner, Inc., Agreement Containing Consent Orders, (Dec. 14, 2000), *available at* http://www.ftc.gov/os/2000/12/aolconsent.pdf.

142. *See In re* America Online, Inc. and Time-Warner, Inc , Analysis of Proposed Consent Order To Aid Public Comment (Dec. 14, 2000), *available at* http://www.ftc.gov/os/2000/12/aolanalysis.pdf.

143. Shira Ovide & Emily Steel, *It's Now Official: AOL, Time Warner to Split*, WALL ST. J., May 29, 2009, at B1.

144. *See* Dean Amel et al., *Consolidation and Efficiency in the Financial Sector: A*

scholarly assessments of consolidation and efficiency in financial services markets echo similar observations.[145] One study concluded: "Ex post results of M&As seem to contradict the motivations given by practitioners for consolidation, which are largely related to issues of economies of scale and scope and to improvements in management quality."[146] Mega-mergers are more or less routine, and have rarely been blocked by antitrust agencies, at least not since the much-disparaged cases like *Von's Grocery* three decades back.[147] In 2008, for example, InBev's $52 billion acquisition of Anheuser-Busch topped the list of mergers exceeding $2 billion.[148]

Notwithstanding credible arguments that some mega-mergers deliver scale *inefficiencies*, Section 7 does not put the courts or agencies in a position to second-guess the desirability of a merger that is otherwise lawful. Horizontal mergers of enormous size are not objectionable under current standards, which are quite relaxed by comparison with historic standards or even standards imposed in certain other jurisdictions. Furthermore, by definition, conglomerate mergers do not aggregate horizontal market power and are essentially beyond the reach of Post-Chicago antitrust law. Conglomerate mergers, therefore, can create behemoth enterprises of ungainly and inefficient proportions with impunity. An efficiencies defense might be of interest for certain horizontal mergers, but no defense based on efficiency or otherwise is required, or even relevant, to a merger that does not increase concentration or pose a vertical foreclosure problem. Conglomerate and market extension mergers do neither. Thus, the existing antitrust law approach to mergers and acquisitions could do almost nothing to prevent the accumulation of resources into a poorly positioned firm whose own failure would also risk broader systemic failure.

Review of the International Evidence, Aug. 2002), *available at* www.federalreserve.gov/pubs/feds/2002/200247/200247pap.pdf.

145. *See id.*

146. *See id* at 42.

147. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

148. *See*, Dept. of Justice Press Release approving merger with modifications, *available at* www.justice.gov/opa/pr/2008/November/08-at-1008.html. For a summary of data on mergers and acquisitions ranked by size, see generally INSTITUTE ON MERGERS, ACQUISITIONS AND ALLIANCES STATISTICS, *available at* http://www.imaa-institute.org/statistics-mergers-acquisitions.html. *See also* JOHN WILLIAMSON, CONG. RESEARCH SERV., LARGEST MERGERS AND ACQUISITIONS BY CORPORATIONS IN 2008 2 (2009).

Therefore, Post-Chicago antitrust is not a public policy weapon of much use in preventing too-big-to-fail problems. As a general matter, Post-Chicago theory concerns itself more with over-deterrence than under-deterrence, embodies *laissez-faire* tendencies relying on markets to self-correct, and, most importantly, applies antitrust law to enhance allocative efficiency to the virtual exclusion of other societal values. The too-big-to-fail problem barely intersects with the problem of optimizing allocative efficiency and, for the same reason, barely invites antitrust intervention of any sort. The only limitation on this conclusion is the possibility that Section 5 of the FTC Act might sometimes be invoked to prevent or dismantle an out-sized merger that created a substantial likelihood of "unfairness," based on a rational economic expectation that the merged firm would operate under presumed bailout protection.

IV. *COULD* ANTITRUST LAW HELP?

Since Post-Chicago antitrust has very little to contribute in combating the too-big-to-fail problem, the natural question becomes: *could* antitrust do a better job without doing violence to fundamental doctrine? Responding to this question presents particular difficulty because what "fundamental antitrust doctrine" comprises has never been altogether clear. Indeed, antitrust doctrine has shifted around over time. However, at one time, antitrust had a broader reach than it currently does, and the very dynamism of antitrust law could theoretically free up courts to restore some or all of that earlier reach, or perhaps even give antitrust another new face, as was done by the Chicago School revolution. Also, whatever "fundamental antitrust doctrine" means, it ought to at least include the important and uncontroversial advances that the law made in response to advances in the field of economics. For example, "restoring" antitrust should not entail reversing course to re-declare all vertical territorial exclusivity agreements *per se* illegal because the potential efficiencies from such arrangements are uncontroverted. Contrastingly, "restoring" the law's original distrust of highly concentrated market structures would not ignore any important or uncontroversial advances in economics.

If, as is probably the case, many too-big-to-fail companies are in markets that are highly concentrated (the measurement of which, in turn, might be open to redesign), then perhaps prophylactic antitrust rules could be fashioned to forestall at least some systemic failures. Given the very high costs of the recent systemic failures, it might be worth imposing such newly-fashioned antitrust rules even at some more modest expense in terms of efficiency. Moreover, efficiency claims made by some too-big-to-fail firms lack much empirical support or even prima facie plausibility, and so the social costs of dismantling a few potentially catastrophic firms may be less than advertised in some quarters. Finally, there is no reason in principle why antitrust must remain rigidly devoted to economics-based policy as its sole source of direction.

There is also a substantial difference between preventing and curing too-big-to-fail problems. Even current antitrust law ought to help make corrections when markets have failed. It is not surprising that the Assistant Attorney General for Antitrust, Christine Varney, concluded in the midst of the recent crisis that: "First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive."[149] As Professor Maurice Stucke observes (echoing many others), "antitrust enforcement is not a luxury reserved for more prosperous times."[150] Thus, antitrust might play an important curative role after a too-big-to-fail crisis. Moreover, if restoring competition *in the wake* of collapse is an important public policy tool for redressing the problem, it also seems well worth considering whether the enforcement of competition law *in advance* of a collapse might play a preventative role.

A. HARNESSING THE DYNAMISM OF ANTITRUST

Antitrust law cannot help avert the need for too-big-to-fail bailouts unless it adapts to address some of the sources of the problem. However, antitrust is a legal system whose rules are formed and applied with very specific reference to the policies underlying the law. Those policies have proved to be subject to dramatic changes over time in

149. Christine A. Varney, Address Before the Center for American Progress: Vigorous Antitrust Enforcement in a Challenging Era (May 11, 2009), *available at* http://www.justice.gov/atr/public/speeches/245711.pdf.

150. Maurice E. Stucke, *New Antitrust Realism* 20 (Univ. of Tenn. Legal Studies Research, Paper No. 1323815, 2009), *available at* http://ssrn.com/abstract=1323815.

response to evolutions in the economy, developments in the related field of economics, and trends in society and politics. As policies have changed, so have antitrust rules. Therefore, there is no reason to believe that antitrust law has settled once and for all upon Post-Chicago policy and theory. Indeed, the history of antitrust policy is instructive as to this unlikelihood.

The public policies embodied in the nation's antitrust laws have never been precisely clear, but, clearly, antitrust policy has been anything but stagnant. While some adherents of the Chicago School have advocated an exclusive focus on consumer welfare, defined as allocative efficiency, the courts, including the Supreme Court, have never gone that far.[151] Moreover, antitrust policy has undergone broad historic shifts. It evolves, sometimes through legislative reform, sometimes by judicial reinterpretation, and at other times by policy statements of federal and state enforcement agencies. Indeed, United States antitrust law has had a rich and varied history in Congress, the courts and enforcement agencies. A detailed tracing of shifts in policy underpinnings through time is complex and beyond the scope of this article,[152] but it is important here to understand how modern antitrust law came to sharpen and narrow its focus on the objective of allocative efficiency, or consumer welfare, and how momentous a policy shift was required to bring us to the narrow Post-Chicago approach.

Antitrust as a legislative response to large enterprise has a particularly significant and uneven history. While the current policy devotion to allocative efficiency regards bigness in a neutral or positively favorable manner, antitrust policies of an earlier era viewed the presence of large corporations as posing a variety of dangers to our economy. The early sweeping construction of the Sherman Act mirrored the prevailing public fear and mistrust of large corporations.[153] In fact, the name "antitrust" derives from the peculiar form of business organization, the "trust," that was used to aggregate large business enterprises under unitary control, in circumvention of the constraints of 19th Century state corporations codes.[154] Early in the 20th Century, the Supreme Court overruled *Trans-Missouri Freight* and introduced the

---

151. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 56 – 77 (4th ed. 2005).

152. For an interesting summary of the evolution of antitrust policy, see *id.*

153. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

154. SULLIVAN & GRIMES, *supra* note 120, at 6.

"rule of reason" in its controversial *Standard Oil* decision, which was perceived at the time as limiting the reach of the law – although notably the decision broke apart the Standard Oil trust.[155] A few years later, in 1914, Congress passed what many regarded as remedial legislation in the Clayton Act.[156] In the 1921 decision of *United States v. American Can Co.*, the District Court reaffirmed the prevailing view that antitrust law was designed to address "a public danger" from big business, and a preference, therefore, for smaller business:

> If it be true that size and power, apart from the way in which they were acquired, or the purpose with which they are used, do not offend against the law, it is equally true that one of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used. It is easy to conceive that they might be acquired honestly and used as fairly as men who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult social, industrial and political problems.[157]

155. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911). The Court in *Standard Oil* sustained a decree that required the dismantling of the Standard Oil trust, but the rule of reason announced in the case was regarded by Progressives and others as weakening the law. Justice Harlan's dissent exclaimed that "the action of the court in this case might well alarm thoughtful men who revered the Constitution." *Id.* at 104.

156. In the presidential election of 1912, antitrust was an important issue that brought sometimes fierce debate among Woodrow Wilson, William Howard Taft and Theodore Roosevelt. Once elected, President Wilson pressed for the enactment of the Clayton Act (15 U.S.C. § 12 *et seq.*). *See* J.P. MILLER, *Woodrow Wilson's Contributions to Antitrust Policy*, *in* THE PHILOSOPHY AND POLICIES OF WOODROW WILSON, 132 *et seq.* (Earl Latham ed., 1958).

157. United States v. American Can Co., 230 F. 859, 902 (D. Md. 1916), *appeal dismissed* 256 U.S. 706 (1921). Despite the court's recognition of these policy concerns about "size and power" it went on to withhold the government's requested decree to break up the company because however large and powerful it was, the defendant had not misbehaved. "[Congress] has not yet been willing to go far in the way of regulating and controlling corporations merely because they are large and powerful, perhaps because many people have always felt that government control is in itself an evil, and to be avoided whenever it is not absolutely required for the prevention

In the decades following, enforcement priorities were mixed, with relatively lax regulation of industrial concentration,[158] but more aggressive enforcement against certain forms of unfair or exclusive conduct, such as resale price maintenance,[159] exclusive dealing,[160] and anticompetitive trade association activity.[161] In the 1930s and 1940s, following a brief relaxation of antitrust rules under the Codes of Fair Competition,[162] federal antitrust enforcement expanded to attack monopolies,[163] vertical integration,[164] and various forms of tacit collusion.[165] At its extreme, the preference for small enterprise was embodied in the enactment of the Robinson-Patman Act.[166] Beginning around 1950, with the enactment of the Celler-Kefauver amendments to the Clayton Act,[167] federal antitrust policy became explicit in regarding large enterprise with some degree of suspicion. In *Brown Shoe Co. v. United States*, the Supreme Court explained the Celler-Kefauver amendments as stemming from "a fear of what was considered to be a rising tide of economic concentration in the American economy," and recited an array of public policies behind that enactment, including economic efficiency, inherent dangers of unchecked corporate expansion, desirability of local control over industry, protection of small business, and "the threat to other values" aside from economic ones.[168]

---

of greater wrong." *Id.*

158. *See, e.g.*, United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

159. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

160. *See, e.g.*, FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).

161. *See, e.g.*, Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918); Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Manufacturers' Ass'n v. United States, 268 U.S. 563 (1925).

162. The Codes of Fair Competition under the National Recovery Administration ("NRA") provided an avenue for antitrust exemptions for corporations that complied with the standards set out. *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966). The NRA and the Codes of Fair Competition barely took effect before losing public support and eventual condemnation by the Supreme Court in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

163. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

164. *See, e.g.*, United States v. Paramount Pictures., 334 U.S. 131 (1947).

165. *See, e.g.*, Interstate Circuit v. United States, 306 U.S. 208 (1939).

166. 15 U.S.C. § 13(a)

167. 15 U.S.C. § 12-27, *amended by* 29 U.S.C. §§ 52-53 (1950).

168. Brown Shoe Co. v. United States 370 U.S. 294, 315-16 (1962).

Influential economists in the 1950s and 1960s fueled the most aggressive period of antitrust enforcement against industry concentration, believing that market structure drove marketplace performance, ultimately culminating in the 1968 Justice Department Merger Guidelines.[169]

In addressing the too-big-to-fail issue, it is thus important to recognize that as recently as the 1970s, the antitrust laws were still understood by at least the courts and some leading scholars to promote a rich mix of social, political and economic objectives.[170] These included, among others: advancing economic efficiency, innovation and consumer welfare; the protection of individual traders and their business freedom against certain kinds of private interference; the prevention of antidemocratic political pressures that might flow from concentrations of economic power and wealth; limiting wealth transfers from consumers to monopolies and cartels; and (at various times and in varying degrees) limiting the growth of big business as an end in itself.[171] Walter Adams and James W. Brock wrote in 1991:

> The primary purpose of antitrust is to perpetuate and preserve a system of governance for a competitive, free enterprise economy. Efficiency and consumer welfare constitute ancillary benefits that are expected to flow from a system of economic freedom. Like the U.S. Constitution, antitrust is concerned primarily with process and only secondarily with outcomes. Antitrust calls for a dispersion of power, buttressed by built-in checks and balances, to guard against the abuse of power and to preserve not only individual freedom, but also more importantly a free system. Antitrust is founded on a theory of hostility toward private concentration of power so great that even a democratic government can be entrusted with it only in exceptional circumstances.[172]

169. *See, e.g.*, MERGER GUIDELINES, *supra* note 71. *See generally*, CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959); JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956); THEODORE P. KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT (1980).

170. *See generally*, SULLIVAN & GRIMES, *supra* note 120, 11-15; Pitofsky, *supra* note 2.

171. *Id.*

172. *See* Walter Adams & James W. Brock, *Antitrust & Enforceability: An Empirical Perspective*, *in* REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS

Some of these policies do not seem so far removed from the too-big-to-fail problem. The preference for small over large enterprise as an end in itself bears directly on the matter. Similarly, the preference for local control over industry, the aim to protect small businessmen and women from oppression by gigantic corporations, and the desire to shield democratic institutions from the corrupting influence of concentrations of wealth might all speak to the problem. Indeed, it may be that the emergence of a too-big-to-fail enterprise violates every single policy, other than allocative efficiency, that has ever been mentioned in connection with the Sherman Act. Moreover, it can also be argued that even the more strictly economics-driven underpinnings of antitrust have unnecessarily disregarded the problem of corporate size by ignoring diseconomies of scale, allowing conglomerate and market extension merger activity even where consumer welfare may be harmed by shifting resources into ungainly enterprises and squandering the output, price and innovation advantages of smaller enterprise. Given the dynamism of antitrust law and policy, there is good reason to consider a new dynamic shift.

B. Was the Paradox Really so Bad?

Of course, it is one thing to note that antitrust policy is dynamic enough to adapt to the too-big-to-fail problem, but quite another to conclude that it ought to adapt. Many good reasons explain why the older order of antitrust broke down and gave way to the Chicago School. However, some of those reasons now seem to have been overstated, and the antitrust "paradox" that launched the Chicago School antitrust movement has its own problems. Robert Bork successfully advocated that pre-Chicago School antitrust policy was paradoxical and "at war" with itself.[173] More specifically, he argued that there had never been any policy underpinning to antitrust other than allocative efficiency and that, by embracing other policies, courts had created an internally inconsistent law that sought to promote efficiency but also rewarded inefficient firms with viable antitrust claims. However, was it *really* so bad for a statute with the breadth and importance of the Sherman Act to embrace multiple policies that sometimes were in tension with one another? Even if the answer is yes, which is not clear, was abandoning all

---

ON LEGAL, ECONOMIC AND POLITICAL POLICY 152-60 (Harry First et al., eds. 1991).

173. *See* BORK, *supra* note 51.

antitrust policies aside from allocative efficiency *really always* in the best interests of consumers, or were Bork's *laissez-faire* achievements instead in the interests of the corporations to which consumers turn for goods and services? Finally, have *laissez-faire* policies themselves led to the paradoxical result that government ultimately has been forced to take a greater role in the private sector?

It was an overstatement to say that antitrust never was concerned with anything except allocative efficiency or that antitrust policy never objected to large enterprise for other reasons. In fact, that assertion behind the Chicago School argument is bizarrely at odds with history. Nearly 100 years ago, Justice Harlan described the Sherman Act as arising from a universal conviction that "the country was in real danger from another kind of slavery . . . that would result from the aggregations of capital in the hands of a few."[174] That was not a statement about allocative efficiency. As discussed above, the first 100 years of antitrust jurisprudence seem to contain an unwavering commitment to a number of competing policies sometimes acknowledged to be in tension with one another.

Furthermore, it is arguable that *laissez-faire* policies indeed yielded a paradox of their own by bringing about the recent need for massive government intrusion into the private sector. In what has turned out to be a prescient warning about the perils of the then-emergent Chicago School, in 1979, Robert Pitofsky wrote:

> It is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws. By 'political values,' I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and, second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. *A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.*[175]

This final prediction could not have been more accurate. The

174. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part).

175. *See* Pitofsky, *supra* note 2, at 1051 (emphasis added).

emergence of a few corporate giants that were left to take under-regulated risks and to grow without significant government intervention eventually forced the United States government to become the largest investor in the U.S. automobile industry, a controlling owner of some of the largest banks and other financial institutions in the country, as well as to infuse hundreds of billions of dollars into the private financial sector in the form of equity investments, loans and loan guarantees.[176] The government has also injected federal funds into the home mortgage refinance marketplace to forestall foreclosures.[177] All of this bailout activity came with unavoidable pressures for governmental control over a range of private enterprise decision making, even including management compensation. Additional government intervention of a more durable sort also seems inevitable as Congress and regulatory agencies respond to a stinging public backlash against a government that is perceived (rightly or not) to have let the country's booming economy disintegrate. Federal and state regulation addressing dozens of areas of economic activity including real estate mortgage lending practices, trading in derivatives and other securities, solvency of financial institutions, management compensation and corporate governance has been enacted or is under consideration.[178] All of this can, in some measure, be attributed to inadequate government oversight of sectors of the economy that are "dominated by a few corporate giants." Thus the new paradox: *laissez-faire* policies that have led to unprecedented government intervention in the private sector.

Which paradox is worse? One problem with myopic attention to allocative efficiency is that consumers could be worse off if firms must be too big to fail to achieve optimum scale. The too-big-to-fail problem never figured into economic arguments for "letting the marketplace decide," and it changes the equation. Suppose, for the sake of argument, that banks in the United States really need to be as big as the nation just permitted them to become to compete for one-stop-shopping corporate customers in the global financial services markets. That is, suppose that

---

176. *See generally*, BAILOUTS: PUBLIC MONEY, PRIVATE PROFIT (Wright, Robert E. ed. 2009).

177. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended in scattered sections of 12 U.S.C.).

178. *See*, *e.g.*, Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613; Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765; Troubled Asset Relief Program, Pub. L. No. 110-343, 122 Stat. 3765 (2008); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

their current gigantic size has not yet crested optimum efficient scale. That does not necessarily mean that their gigantic size could not pose a threat of greater consumer harm than would follow from the marginal loss of scale efficiency that would result (by hypothesis, at least) if the banks were required to be a bit smaller. Certainly, some consumer harm has resulted from the too-big-to-fail problem even if one assumes that these same firms were generating economies of scale as they claim. Commissioner Rosch correctly noted that the failure of a too-big-to-fail enterprise causes consumer harm in the form of reduced output, resulting in higher prices and possibly diminished innovation, and no one has ever measured those harms against whatever consumer benefits supposedly flow from allowing firms to become too-big-to-fail.[179] Thus, even if it would be a paradox of one sort to impose antitrust-based limits on some corporate size, it may equally be a paradox of another sort not to – even viewing antitrust myopically as concerned with nothing except output, price and innovation.

C. THE PROBLEM OF DISECONOMIES OF SCALE

Post-Chicago antitrust contains yet another paradox, or at least an inconsistency worthy of further study: *optimum scale efficiency* is considered measurable and a presentable basis for allowing a merger transaction, but *excessive-scale inefficiency* is not considered a proper basis on its own for disallowing a merger. That is, no court or agency has ever blocked a merger on the exclusive grounds of scale diseconomies, let alone that the merged entity would be too big to fail – there has to be another basis for antitrust to intervene. The reverse no longer holds true since the revision to the Horizontal Merger Guidelines in 1997.[180] The Guidelines now provide for a quantitative assessment of merger specific efficiencies, and indicate that the agencies will consider such efficiencies as capable of offsetting some potential adverse competitive effects of a merger. Although the Guidelines acknowledge that efficiencies "are difficult to verify," they invite merger proponents to "substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency." Nowhere do the Guidelines attempt to quantify or address the consumer harm that can result when an otherwise benign merger

179. Rosch, *supra* note 20.
180. *See* MERGER GUIDELINES, supra note 71, § 4.

creates an out-sized merged enterprise of inefficient scale.

Diseconomies of scale can harm consumer welfare just as much as the prevention of economies of scale. Diseconomies of scale result when a firm's marginal cost begins to exceed long-run average costs.[181] This can occur when a firm's size becomes so unwieldy that each additional unit of production costs more than the one before. Among the many causes that have been studied include the tendency for large organizations to isolate decision makers from the results of their decisions[182] – a familiar theme in recent discussions about corporate compensation excesses divorced from performance measures. Other causes of diseconomies of scale in large enterprises include increased communications costs, duplication of effort, inertia, and internal culture clashes.[183] By definition, when a firm exceeds optimum scale, each additional unit produced costs more, and consumers pay the price for that. Why is it that optimal scale efficiency is measurable and constitutes a proper consideration to *permit* a transaction and overcome some anticompetitive potential, yet diseconomies of scale are not considered worthy of any sort of antitrust inquiry at all (other than perhaps to rebut claims of scale economies)?

This may add one more justification for antitrust to address itself to some too-big-to-fail problems. Although current antitrust rules do nothing to preserve smaller enterprise for its own sake, even the narrowest economic doctrinal underpinnings may support doing so in some limited circumstances.

V. CONCLUSIONS

Antitrust is quintessentially addressed to the optimum organization of the nation's economy, even if it does not purport to address all aspects of it. The central concern of antitrust law is economic power and its potential to be misused. Vast aggregations of economic power in convergence with other phenomena cause too-big-to-fail crises. It therefore stands to reason that antitrust ought to be concerned with some

181. *See* SULLIVAN & GRIMES, *supra* note 120, at 532. A seminal explanation of so-called "X-inefficiency" is found at Harvey Leibenstein, *Allocative Efficiency vs. "X-Efficiency*," 56 Am. Econ. Rev. 392 (1966).

182. *See* SULLIVAN & GRIMES, *supra* note 120, at 532.

183. *Id.*

aspects of the too-big-to-fail problem, at least insofar as the problem stems from aggregated economic size and power. Since the too-big-to-fail problem is complex, it is unsurprising that antitrust alone is not the cure, but it could make a difference by controlling certain forms of conduct that lead to firms becoming excessively large.

The foregoing considerations lead to a few conclusions and proposals for bringing antitrust into the public policy discussion about preventing or limiting the need for public rescues of private firms that are too big, too interconnected and perhaps too powerful to be allowed to fail.

A. Existing Antitrust Merger Law Could Help Prevent Some Out-sized Combinations

Antitrust law reaches a range of business practices, and many of them (such as price discrimination) are unlikely ever to have any role in the creation of a too-big-to-fail crisis. The most relevant prohibitions relate to mergers. Although some firms become too-big-to-fail by internal growth, the public has at times been forced to rescue some firms that grew by merger activity. It is perfectly appropriate for antitrust law to consider whether a merger transaction threatens consumer harm. The 1992 Horizontal Merger Guidelines are currently under review, and some attention might be paid in the final product to the problems related to combinations that create merged entities that are too-big-to-fail. Although too-big-to-fail is not central to most merger analysis, enormous consumer harm has resulted from allowing corporate growth to create so many indispensible firms. Put differently, since size contributes to the problem, controlling size might contribute to a solution. A few ways exist in which antitrust law might more assertively intervene to control the population growth in the too-big-to-fail category of businesses.

1. Diseconomies of Scale in Merger Analysis

Mergers could be reviewed under a modified standard that takes into account the possibility that the merged entity will simply be too big measured by its own economics. Since consumer harm in the form of higher prices and reduced output can result from allowing a firm to achieve a scale that exceeds the optimum, here is one place where antitrust might play a role without much adaptation from its current approach. However, this is a controversial proposal, to be sure, because the Clayton Act only prohibits combinations whose effects "may be substantially to lessen competition or tend to create a monopoly," and theoretically a firm could exceed optimum scale without doing either of those things.[184] There will also be disagreement about what constitutes efficient scale, as is already a matter of public debate about the size of the nation's four largest banks. Still, sometimes a firm's becoming very large and inefficient will dampen competition and place upward pressure on prices, and that should be of concern to antitrust agencies and courts.

Another objection would be that the government ought not to intervene in the entrepreneurial process by dictating optimum scale instead of allowing the marketplace to decide. If a firm decides to grow to a certain size in the hope of obtaining a competitive advantage, it may be argued that the government should not determine that such a marketplace gamble is inefficient. Notably, other types of likely inefficient results of mergers are already taken into account in orthodox merger review. For example, it is understood that a profit maximizing monopoly may be willing to spend resources inefficiently to retain its monopoly position, such as through various forms of costly predation, so long as the costs do not exceed the monopoly profits. Also, those who will argue that the government has no business deciding the optimum scale of private enterprise need to explain why the efficiencies provisions added to the 1992 Guidelines do not run afoul of the same principle. If economists can take measurements to assure the public that a business combination will achieve scale efficiencies sufficient to offset presumptive monopoly power, they ought equally to be able to warn the public that another merger would move the combined firm beyond the optimal scale. The standard analysis of merger-specific efficiencies is a complex one, but its basic arithmetic is simple enough: the presumptive monopoly deadweight welfare loss is calculated to be a number that is less than the combined firm's reduction in cost-per-unit times the number of units produced.[185] The converse should be no more difficult

184. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2006), is not limited by the language of the Clayton Act.

185. Under the 1992 Merger Guidelines, the efficiencies "defense" only comes into play where the transaction is presumptively anticompetitive based on the structural and behavioral analysis set forth in the Guidelines. This means that efficiencies as a defense is only calculated where there is at least a presumption of post-merger market power sufficient to reduce output, raise prices and thus create a monopoly "deadweight welfare loss." MERGER GUIDELINES, supra note 71, § 4.

or speculative. Of course, just as scale efficiencies are difficult for merger proponents to quantify, those opposing a combination on inefficiency grounds should bear a similar burden. Oftentimes, the burden may turn out to be too great, in which case a diseconomies of scale filter would do no good. However, a diseconomies of scale filter would not appear to do any harm and it might prevent some out-sized combinations that create inefficient firms.

2. Too-Big-to-Fail as a Factor in Merger Analysis

A second proposal that would entail little or no adjustment of current antitrust economics dogma is to incorporate the too-big-to-fail problem itself into merger review standards. This was Commissioner Rosch's idea,[186] which he acknowledged to be a provocative one. However, the controversy is not one about the basic economics of Post-Chicago antitrust. Assuming a merger presents a palpable prospect of creating a firm that cannot be allowed to fail under conditions where failure can be foreseen, the threat of antitrust-type consumer harm from the transaction may meet the standard of incipiency under Section 7 of the Clayton Act or Section 5 of the FTC Act. For example, the recent banking industry mergers that were permitted as a sort of private bailout of the acquired banks could be analyzed along these lines. In appropriate cases, it would seem to do no violence to current Post-Chicago antitrust law and policy to block such mergers on these grounds, since consumer harm via reduced output, higher prices and impaired innovation are uncontroversial objects of antitrust sanctions. Again, quantifying the threat to consumer harm may be daunting and the burden of establishing such a likelihood should not be a light one since the likelihood that any particular firm will at some point meet all of the criteria of a too-big-to-fail enterprise is not a routine conclusion. A firm might present only a very remote too-big-to-fail threat at the time it proposes a merger, and that threat might not materialize until it is too late for antitrust intervention under existing antitrust theory. One can anticipate any number of problems, but the concept remains a sound one: allowing firms to merge into a size that could not be allowed to fail through normal bankruptcy proceedings presents a threat to consumer welfare that is indistinguishable from the harms that flow from mergers we already block for other reasons. If one of the nation's four largest

186. *See*, Rosch, *supra* note 20.

banks proposed to combine with another large financial services firm, would it be too much to ask whether a non-publicly funded resolution would be feasible if their liabilities were to become unmanageable? It is the rare merger that ought to present such a question, and, in those few contexts, the question seems an appropriate one to consider.

B. Towards a Partial Restoration of Antitrust Policy

It is time to set aside the myth that antitrust law has always had as its sole objective the optimum allocation of productive resources and to restore to antitrust the policies that were jettisoned by the Chicago School by including reference to these broader policies in formulating and applying antitrust rules. It is modern mythology to suggest that antitrust was never intended to limit the economic and political power of the trusts. That myth was merely one of the arguments, and not the most forceful, for moving antitrust into a *laissez-faire* posture that trusted markets to make better decisions than the courts or agencies. The primary Chicago School objection to older antitrust policy, the real "antitrust paradox," was that it rewarded inefficient market participants with antitrust remedies exacted from their more efficient rivals. This paradox does not need to be revived in antitrust law. Rather, what ought to be restored in antitrust rules are those policies that were directed at protecting consumers, traders, democratic institutions and the economy against the perils of excessive concentrations of corporate economic power. While courts and agencies never explicitly repudiated these non-economic antitrust policy objectives, they have ignored and, at times, disparaged them. Competitor collaborations, conduct of monopolies and potentially catastrophic mergers should be subject to antitrust review that takes these other policies into account.

The too-big-to-fail public policy problem directly intersects with these other antitrust values, while almost not at all overlapping with allocative efficiency concerns. Perhaps the core value of antitrust is its preference for marketplace activity to serve the needs of consumers. However, when firms are rescued through public bailouts, the government almost inevitably must intrude into the machinery of the marketplace – just the result antitrust seeks to avoid. That alone would form a reasonable basis for objecting on antitrust grounds to the formation of a too-big-to-fail firm. Thus, a central tenet of antitrust should favor some control to prevent the combination of firms into too-big-to-fail companies whose indispensability poses a risk of displacing normal marketplace activity with *ad hoc* crisis-driven government intervention. Antitrust ought to block a proposed merger that would create a firm exceeding maximum optimal scale and whose failure, if it occurred, would foreseeably require government bailout intervention.

Furthermore, antitrust's political policy recognizes a threat to democratic institutions that has considerable resonance today. When firms become so large that they cannot be allowed to fail, they also tend to have disproportionate power over the political process. For example, a perception exists that the mega-banks formed via a combination of bail-outs and mergers significantly influenced Congressional reform of financial services regulation. A Pulitzer Prize-winning columnist for the New York Times observed: "Three years into the crisis, we are no closer to reining in too-powerful-to-fail companies or eliminating the risks that they pose to taxpayers."[187] Had the original intent of the Sherman Act been considered in connection with the recent perplexing decision to solve the too-big-to-fail problem by creating even bigger banks, perhaps a different and more tempered outcome might have emerged from the process.

Antitrust also seeks to protect the freedom of traders to do business without anticompetitive interference or exclusion from the marketplace. *Klor's*[188] makes a most interesting case in point. That case involved allegations that a rival retailer formed a conspiracy with manufacturers to boycott and ruin the plaintiff.[189] The boycott was held to fall within the *per se* prohibitions of Section 1 of the Sherman Act.[190] Yet, Klor's was a single retailer in a competitive market served by sufficiently many others such that no allocative efficiency justification exists for the result in that case.[191] Indeed, the complaint under review in that case might not withstand a motion to dismiss under the newer standards for Federal Rule of Civil Procedure 12[192] in force today, since it was implausible that the manufacturers would have any incentive to collude with one another to exclude a customer from the market. In any event, under the Post-Chicago view, *Klor's* was wrongly decided because consumers

---

187. Gretchen Morgenson, *Future Bailouts of America*, N.Y. TIMES, Feb. 14, 2010, at 1.

188. Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).

189. *Id.*, at 209.

190. *Id.*, at 212-14.

191. *Id.*

192. FED. R. CIV. P. 12. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

were not harmed by having one less retailer in a densely populated retailer marketplace. Still, what is objectionable about a rule that prohibits rivals from joining together to force another enterprise out of business, even if consumers do not pay higher prices as a result of the exclusion? Assuming the truth of the allegations, Klor's was deprived of the freedom to conduct business. Until the Chicago School, a public policy against the very deprivation of such freedom formed a part of anti-monopoly law since at least the *Case of Monopolies* in 1603.[193] It is no objection to such a rule to say that inefficient rivals whose failure is their own fault will try to blame others and sue them on trumped up antitrust claims. Courts can and should decide whether defendants colluded or not. If they have colluded to drive someone out of the market, it seems a reasonable and time-honored public policy to give the victim a remedy at law, regardless of whether consumers paid higher prices as a consequence.

The policy of protecting the freedom of traders also plays a part in the too-big-to-fail discussion, because the moral hazard problem places the mega-enterprise at a distinctly unfair advantage that could prevent smaller rivals from thriving. How, for example, could a small bank offer competitive terms on credit transactions if its largest rivals in the same market have the ability to take risks whose downside potential is backed by the United States Treasury? This policy, if considered, would bring yet another consideration into play in evaluating a small number of mergers that present a plausible too-big-to-fail risk.

C. Legislative Possibility

Further amending antitrust law to block the formation of a too-big-to-fail firm would be consistent with the original intent of the Sherman Act, and certainly with intervening enactments, such as the Celler-Kefauver amendments to the Clayton Act. Additionally, amending the Clayton Act to permit the break-up of a firm that has grown to such proportions might move antitrust in a novel direction. These sorts of legislative enactments are under consideration, and it is beyond the scope of this article to draw a conclusion as to whether public policy would be well or ill served by their enactment. However, if a too-big-to-fail statute were to be enacted, the foregoing discussion suggests that doing so would only do violence to very recent antitrust orthodoxy, but

193. *See* Darcy v. Allin, 77 E.R. 1260 (1601).

would not offend historic and original policies behind American antitrust law. The presence of these oversized enterprises, whose numbers are growing, threatens the political system because their indispensability makes them nearly impossible to govern. It also menaces important markets with the uneven playing field created by the moral hazard problem. Moreover, the presence of oversized enterprises poses the risk of unusually catastrophic harm to vast numbers of consumers and the public treasury. These are concerns that certainly are not new to antitrust.