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Systemic Financial-Service Institutions and Monopoly Power

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SYSTEMIC FINANCIAL-SERVICE INSTITUTIONS AND MONOPOLY POWER

Sharon E. Foster⁺

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“We have always known that heedless self-interest was bad morals; we now know that it is bad economics.”¹

—President Franklin D. Roosevelt

The financial crisis of 2008 gave rise to considerable debate regarding the causes of the crisis and prevention of its future occurrence.² However, affirmative assurance that such a financial crisis never happens again is highly unlikely. Certainly, the Dodd-Frank Wall Street Reform and Consumer Protection Act does not purport to ensure a similar financial crisis never happens again, despite rhetoric to the contrary, because it protects systemic financial-service institutions that were at the heart of the 2008 financial crisis.³ As long as systemic financial-service institutions exist, there is a strong probability that another financial crisis will occur and that a taxpayer-financed government-bailout will be necessary.⁴ Indeed, the Dodd-Frank Wall Street Reform and Consumer Protection Act anticipates such an event.⁵

1. Franklin D. Roosevelt, President, United States, Second Inaugural Address (Jan. 20, 1937), available at http://avalon.law.yale.edu/20th_century/froos2.asp.

2. See SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 3–6, 9–13 (2010) (suggesting that deregulation caused by Wall Street’s influence in Washington is to blame for the 2008 financial crisis and criticizing the government’s proposed solutions as insufficient to prevent a future financial crisis); RICHARD A. POSNER, A FAILURE OF CAPITALISM xii–xiii (2009) [hereinafter POSNER, A FAILURE OF CAPITALISM] (posing questions about the cause, solution, and prevention of the 2008 financial crisis); Adam J. Levinton, *The Crisis Without a Face: Emerging Narratives of the Financial Crisis*, 63 U. MIAMI L. REV. 999, 999–1000 (2009) (predicting that the cause of the financial crisis will be an underlying theme of the crisis’s analysis now and in the future, and introducing some of the emerging ideologies on the issue of cause); Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183, 185–86 (2009) (describing the beginnings of the 2008 financial crisis, identifying the debate regarding its cause, and introducing a possible solution to preventing its reoccurrence in the future).

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165, 124 Stat. 1376, 1423 (2010) (to be codified at 12 U.S.C. § 5365) (leaving in place existing financial institutions, but requiring closer supervision of their risk as it relates to the overall economy of the nation); see JOHNSON & KWAK, *supra* note 2, at 11–13 (suggesting that the 2008 financial crisis will happen again so long as the size and power of existing financial institutions remain unaffected).

4. See JOHNSON AND KWAK, *supra* note 2, at 208–11 (summarizing arguments made by accredited economists and commentators suggesting that breaking up big financial institutions will be the best way to control the excessive risk-taking that led to the 2008 financial crisis).

5. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1101, 1105, 124 Stat. at 2113–15, 2121–25 (2010) (to be codified at 12 U.S.C. § 343, 5612).

Though the Act protects the cause of the 2008 financial crisis, another financial crisis can be mitigated through the application of antitrust law, specifically § 2 of the Sherman Antitrust Act (Sherman Act), an anti-monopolization law.⁶ Section 2 of the Sherman Act prohibits monopoly power acquired or maintained through anticompetitive conduct.⁷ Accordingly, the application of § 2 to a systemic financial-service institution will depend on whether the institution has monopoly power and, if so, whether such power was acquired or maintained through anticompetitive conduct.

This Article begins by examining the origins of § 2 of the Sherman Act and its evolution, exploring its aim to meet the goals of modern, economic policy. The passage of § 2 invoked a populist approach, which reflected the concern that a concentration of private wealth is dangerous to democracy.⁸ Though this remains a concern today regarding systemic financial-service institutions, the populist approach was never fully embraced by the courts. Instead, the economic-efficiency approach, which used antitrust law to address market failure and to maintain and promote a free market system, became the dominant doctrine.

Section II of this Article illustrates how systemic financial-service institutions do not serve economic efficiency well and, indeed, exacerbate market failure and encourage more government intervention through bailouts. Accordingly, applying § 2 of the Sherman Act to systemic financial-service institutions is not incompatible with either the populist or the economic-efficiency approach.

Section III then discusses the application of § 2 liability to systemic financial-service institutions as a solution to the recent, financial crisis and as a means to prevent another crisis. Notably, this application has elicited little discussion, likely due to the belief that any one systemic financial-service institution does not have a sufficient market share to establish the monopoly power necessary to implicate § 2 liability. However, the courts have never limited monopoly power to a market-share analysis.⁹ This Article proposes that monopoly power can be established by the negative externality that systemic financial-service institutions can create. This negative externality is an extorted government subsidy that is not available to nonsystemic financial-service institutions, which results in an anticompetitive environment, monopoly prices, and consumer harm. This Article concludes that such power is acquired or maintained through anticompetitive conduct—specifically deliberate acts aimed to obtain systemic status.

6. See Sherman Antitrust Act, 15 U.S.C. § 2 (2006); *infra* text accompanying notes 76–80.

7. Sherman Antitrust Act § 2.

8. See *infra* notes 35–41.

9. See Lawrence A. Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust*, 125 U. PA. L. REV. 1214, 1220 (discussing the inability of a static market-structure analysis to respond to the modern changes in technology and industry, and the courts' expanding consideration of such innovative factors).

The recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act does not contain a specific antitrust immunity provision.¹⁰ Section IV addresses the possibility that, even if systemic financial-service institutions have monopoly power and such power is acquired or maintained through anticompetitive conduct, the courts nevertheless might find an implied immunity because of the regulatory nature of the industry. This section goes on to conclude that, although courts are reluctant to apply antitrust law to regulated industries, recent experience with inadequate regulatory oversight should prompt courts to reconsider this trend and apply antitrust law absent Congressional direction otherwise.

Next, Section V discusses judicial hurdles associated with the application of § 2 of the Sherman Act to systemic financial-service institutions, including the problems of quasi-implied immunity, cyclical government enforcement, a lack of judicial understanding of the economic theories underlying antitrust law and the financial-services sector, the expense of litigating antitrust cases, the potential resultant social and economic burdens, and the potential side effects created if systemic financial-service institutions are required to divest and cannot compete with foreign, systemic financial-service institutions. But, though applying § 2 to systemic financial-service institutions may create substantial problems, the possible prevention of a future financial crisis outweighs the potential consequences of applying § 2. In fact, a more radical approach may be required to guarantee financial stability.

Finally, Section VI addresses some of the shortfalls of exclusively relying on regulatory oversight and reform to resolve the problem of systemic financial-service institutions, especially when reform does not work to eliminate these institutions. Specifically, the recently passed regulatory reform will possibly mitigate some of the negative effects of systemic financial-service institutions if problems are caught in time. However, the regulation fails to eliminate risks that may circumvent the preventative measures. This is not to say that regulatory reform is undesirable, rather that it is merely a limited remedy that should be augmented with antitrust law.

I. HISTORY OF THE POLICY OF U.S. ANTITRUST LAW

As long as there has been trade, there have been attempts to monopolize. Laws relating to restraints on trade can be traced back to the ancient Roman period.¹¹ Competition laws pertaining to restraints on trade evolved into

10. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 6, 124 Stat. 1376, 1390-91 (2010) (to be codified at 12 U.S.C. § 5303) (providing that the Act does not affect the operation of antitrust laws unless otherwise provided).

11. See David J. Gerber, *Prometheus Born: The High Middle Ages and the Relationship Between Law and Economic Conduct*, 38 ST. LOUIS U. L.J. 673, 722-23 (1994) (discussing the introduction of penalties under Roman Law resulting from activity that unnaturally raised prices); Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 199 (1998) (acknowledging a Roman "antitrust" law).

middlemen laws and were known as forestalling, regrating, and engrossing.¹² These laws primarily dealt with enhanced prices created by the use of middlemen or tactics that reduced supply.¹³ Initially, laws addressing monopolies were limited mostly to special grants or letters patent given by the crown for the exclusive right to manufacture or sell a good.¹⁴ Though the middlemen laws in England were repealed in 1772, and common law aspects were abolished in 1844,¹⁵ case law relating to restraints on trade continued to develop.¹⁶ As such, the development of economic theories appertaining to supply and demand emerged along with economic theories relating to monopolies.¹⁷

From this English common law, the United States developed its antitrust law.¹⁸ The Congressional Record containing the debates leading to the passage of the Sherman Act in 1890—the first antitrust act in the United States—indicates a concern with restraints on trade similar to English common law concerns.¹⁹ However, U.S. antitrust law also reflects the unique social, political, and economic situation in the United States during the late nineteenth century.²⁰

When Senator John Sherman first introduced the bill that declared trusts and combinations in the restraint of trade unlawful on December 4, 1889, it did not include single party offenses, known as Sherman Act § 2 monopolization offenses.²¹ The original bill prohibited arrangements that tended to “prevent full and free competition . . . and all arrangements . . . which tend to advance

12. 2 WILLIAM BLACKSTONE, COMMENTARIES *158–59; PHILLIP AREEDA ET AL., ANTITRUST ANALYSIS para. 128, at 32 (6th ed. 2004). Engrossing is to buy as much of a good as possible with the intent to resell at a monopoly price. 5 THE OXFORD ENGLISH DICTIONARY 260 (2d ed. 1989). Forestalling is to buy up goods before they reach the public market with the intent to raise prices. 6 THE OXFORD ENGLISH DICTIONARY, *supra*, at 62. Regrating is to buy up commodities for later resale in the same or a nearby market area for a profit. 13 THE OXFORD ENGLISH DICTIONARY, *supra*, at 518–19.

13. 2 BLACKSTONE, *supra* note 12.

14. *Id.*

15. AREEDA ET AL., *supra* note 12.

16. See *Nordenfelt v. Maxium Nordenfelt Guns & Ammunition*, [1894] A.C. 535 (H.L.) at 565 (Eng.) (discussing whether the agreement between the parties illegally restrained trade).

17. See ADAM SMITH, THE WEALTH OF NATIONS 164 (Andrew Skinner ed., Penguin Books 1981) (1776) (describing monopolies and their distortion of supply and demand).

18. See 21 CONG. REC. 2456–59 (1890) (statement of Sen. Sherman) (recognizing that the bill proposing to restrain trade “applies old and well recognized principles of common law”); Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415, 415 (1998) (acknowledging that the United States inherited antitrust law from Britain); Sullivan and Fikentscher, *supra* note 11, at 199 (explaining how America developed its antitrust law from English and Roman principles).

19. 21 Cong. Rec. 2456–59 (1890) (statement of Sen. Sherman).

20. See Sullivan & Fikentscher, *supra* note 11, at 199 (explaining the evolution of American industry, particularly with regard to competition and trade).

21. See ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW 3–4 (1910) (analyzing the original Sherman bill and noting its prohibitions).

the cost to the consumer.”²² After introduction, the bill was referred to the Senate Finance Committee, which developed a substitute bill that Senator Sherman presented on March 21, 1890.²³ Much of the debate regarding the substitute bill revolved around Congress’s constitutional power to legislate trade as supplied by the Interstate Commerce Clause.²⁴ The legislative history indicates that Senator Sherman did not intend to concentrate private economic power in the hands of a few who could control prices and thereby harm consumers;²⁵ rather Senator Sherman meant to permit federal courts to hear matters that affected interstate and international commerce on the same common law basis as state courts,²⁶ in part because he did not ascribe to the economic argument that more efficient production reduced prices to consumers.²⁷

Debate on the bill continued on March 27, 1890, again with a focus on the constitutionality of the proposed legislation, and the matter was referred to the Judiciary Committee.²⁸ The Judiciary Committee reported back on April 8, 1890, with an amended bill that substantially became the current Sherman Antitrust Act.²⁹ This version of the bill did not include specific reference to consumers and incorporated the unlawfulness of monopolization provision in § 2.³⁰ Although considerable debate took place regarding this bill, most of it centered on amendments relating to the damage provisions, which Congress ultimately rejected.³¹ Prior to its final passage, however, an interesting exchange took place between Senators George F. Edmunds and John Edward Kenna regarding monopolization. Senator Kenna was concerned that deeming monopolization unlawful would penalize one who, solely by “his own skill and energy,” obtained an innocent monopoly.³² Senator Edmunds responded that such a result would not occur if the individual did not buy off his adversaries or obtain possession of all of the goods in question.³³ Senator Hoar took the position that the bill’s use of the term “monopoly” merely reflected an intent to

22. *Id.* at 3.

23. 21 CONG. REC. 2455 (1890) (statement of the Chief Clerk).

24. *See id.* at 2456–68.

25. *Id.* at 2457 (statement of Sen. Sherman).

26. *Id.* at 2456 (statement of Sen. Sherman).

27. *Id.* at 2460 (statement of Sen. Sherman) (“It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer.”).

28. *See id.* at 2723–31.

29. *Compare* Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006), *with* 21 CONG. REC. 3145 (1890) (statement of the Secretary).

30. *See* 21 CONG. REC. 3145 (1890) (statement of the Secretary) (reciting the updated bill language).

31. *See id.* at 3145–51 (rejecting amendments proposed by Senators Eugene Reagan and James Z. George).

32. *Id.* at 3151–52 (statement of Sen. Kenna).

33. *Id.*

codify the common law's stance on restraint of trade, so as to make it equally bad for one to restrain trade as it is for two or more entities to do so.³⁴ Ultimately, the Senate passed the bill on April 8, 1890, without further amendment by a vote of fifty-two to one, with twenty absent.³⁵

The House of Representatives considered the bill on May 1, 1890, where, because of the international aspect of the bill, the debate focused on protective tariffs and whether these were conducive to the creation of trusts.³⁶ Additionally, the record reveals public outrage over the concentration of private wealth into the hands of a few.³⁷ At that time, as now, there was great public outcry regarding overreaching interest rates on mortgages and the price of necessities, which indebted the common people and further concentrated private wealth into the hands of a few.³⁸

Many legal scholars and authorities support the populist position that United States antitrust law was premised on political and social values, such as the fear that the concentration of private wealth in the hands of a few is dangerous to democracy.³⁹ This populist view of the purpose of antitrust law is also

34. *Id.* at 1352.

35. *Id.* at 1353.

36. *Id.* at 4092–98, 4102.

37. *See id.* at 4102–03. For example, following is a poem that was read into the record that day:

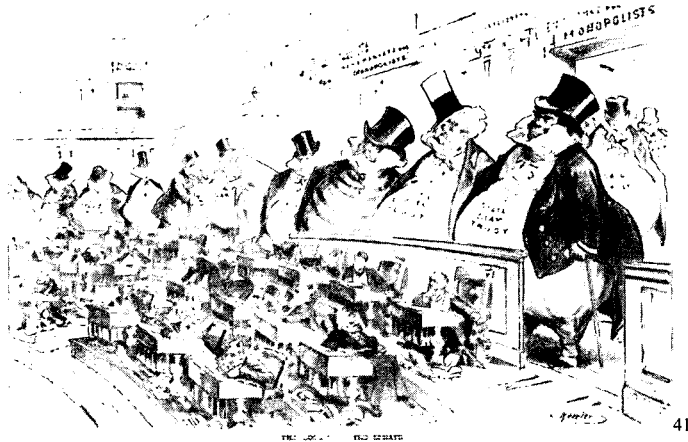
An' once there was a Senator who wouldn't mine the prayer
 An' the interests of his people—he was a millionaire;
 His office was a boughten one, with corporation wealth,
 Of a set of legislators as dishonest as himself;
 But just when he warn't lookin' the people got the scent
 Of the dirt 'at he was playin', an' his underpinnin' went,
 An' down he came kerwollop; they knowed what they's about,
 An the Grangers 'ill get you too, ef you don't watch out.

Id. at 4103.

38. *Id.* at 4102–03.

39. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) (contending that institutions that have accumulated a great concentration of economic power are able to control the government); Standard Oil Co. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part) (articulating the public's fear that harm could result from the aggregation of capital by corporations in the late nineteenth century); Shirma Baradaran-Robison et al., *Religious Monopolies and the Commodification of Religion*, 32 PEPP. L. REV. 885, 932–34 (2005) (contending that a major goal of the Sherman Act was to avoid harm to democracy by decreasing the concentration of power in the hands of a few); Richard M. Brunell, *Appropriability in Antitrust: How Much Is Enough?*, 69 ANTITRUST L.J. 1, 37–39 (2001) (arguing that antitrust analysis is more than simply a consideration of economic factors); James M. Fesmire, *Maximum Vertical Price Fixing from Albrecht Through Brunswick to Kahn: An Antitrust Odyssey*, 24 SEATTLE U. L. REV. 721, 742–43 (2001) (“[T]he purposes of antitrust law include the prevention of excessive concentration of economic power and the tendency of such concentrations to lead to undesirable government intrusion into the economy.”); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1152–54 (1981) (asserting that antitrust laws oppose private power and are not meant to further economic efficiency); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051,

supported by scholars of economic history and political science.⁴⁰ Indeed, the political cartoons of the time certainly suggest a public sentiment that private economic wealth was undermining the democratic process:



Additionally, some court opinions support the populist view by articulating concerns regarding the concentration of wealth in the few.⁴²

1051–53 (1979) (“It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”); Maurice Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 989–90 (2008) (noting various non-economic concerns both scholars and the Supreme Court hold regarding concentrated wealth); Sullivan, *supra* note 9, at 1219–20 (stating that the Sherman Act is the product of political and social concerns, as opposed to concerns over economic efficiency); Justin R. Watkins, *Always Low Prices, Always at a Cost: A Call to Arms Against the Wal-Martization of America*, 40 J. MARSHALL L. REV. 267, 281–85 (2006) (acknowledging the view held by some scholars that non-economic factors played a role in Congress’s passage of the Sherman Act).

40. See DONALD L. KEMMERER & C. CLYDE JONES, *AMERICAN ECONOMIC HISTORY* 349–51 (1959) (discussing the creation of the Sherman Act and notable, subsequent events); PETER D’A. JONES, *AN ECONOMIC HISTORY OF THE UNITED STATES SINCE 1783* 199 (1969) (noting that public sentiment against trusts was enhanced during President Roosevelt’s administration); Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 AM. POL. SCI. REV. 1026, 1038–39 (1977) (suggesting that antitrust policy is necessary to avoid concentration of both economic and political power).

41. Joseph Keppler, *The Bosses of the Senate*, PUCK, Jan. 23, 1989.

42. See *Nat’l Broiler Mktg. Ass’n v. United States*, 436 U.S. 816, 829 (1978) (Brennan, J., concurring) (stating that the Sherman Act resulted from populist legislation designed to respond to concentrations of economic wealth); *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (Douglas, J., dissenting) (“Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy.”); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1110 (7th Cir. 1983) (acknowledging the populist origins of antitrust law); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (noting that one of the goals of early antitrust legislation was to end the aggregation of economic wealth and to aid helpless individuals).

Despite historical evidence to the contrary, some argue that the sole policy behind antitrust law is to increase economic efficiency.⁴³ The economic-efficiency argument stems from the Chicago School antitrust analysis, which gained judicial recognition in the 1960s and, some would argue, became a dominant theory in the 1970s and 1980s.⁴⁴ The Chicago School and post-Chicago School of economic theory do not represent the first time economic theory played a role in the policy of antitrust law, however. For example, in the first Supreme Court decision regarding the Sherman Act, *United States v. E. C. Knight Co.*, the Court was faced with the legality of a sugar trust.⁴⁵ Although the Court's decision ultimately focused on defining interstate commerce and found that manufacturing monopolies did not involve commerce, the Court indicated in dicta that economic considerations are relevant to the issue of monopolization: "[i]n the view which we take of the case, we need not discuss whether, . . . according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved . . ."⁴⁶

Though it appears that economic considerations have always played a role in antitrust law, it is fair to say that, given its evolution over the years,⁴⁷ antitrust law changes to reflect current political, social, and economic realities.⁴⁸ Accordingly, as the Chicago School and post-Chicago School theory of economic efficiency gained political and social prominence, some antitrust scholars advocated the mathematical certainty of economic efficiency as a means to achieve legal certainty.⁴⁹ Unfortunately, the mathematical certainty

43. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 1, at 4 (3d ed. 2006) (noting that the general goal of antitrust law is to maximize consumer welfare through competition and efficiency); ROBERT H. BORK, *THE ANTITRUST PARADOX* 79 (1978) (arguing that economic efficiency provides a means by which to determine consumer welfare); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 4 (1976) [hereinafter POSNER, *ANTITRUST LAW*] (stating that the justification for antitrust enforcement hinges upon what will yield the most efficient result); Stucke, *supra* note 39, at 964 (promoting efficiency as the goal of competition and antitrust enforcement).

44. Watkins, *supra* note 39, at 282.

45. 156 U.S. 1, 9 (1895).

46. *Id.* at 10.

47. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 56–71 (3d ed.) (2005) (providing an overview of the history of antitrust law in the United States).

48. See Sullivan & Fikentscher, *supra* note 11, at 197 (“[T]he meaning of the term antitrust changes depending on various factors: the nation, the time period, the state of technology, the capacity and social demands on business, the overall business culture, the currently accepted economic theories, as well as the overall national concerns and values.”).

49. See Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401, 409–12 (1965) (discussing theories that take a “business” type approach to antitrust law); Herbert Hovenkamp, *Antitrust Power After Chicago*, 84 MICH. L. REV. 213, 233–34 (1985) (stating that when given certain assumptions, the economic-efficiency model can identify certain efficiency circumstances).

of modern economic theory, as reflected in national economic policy, has recently proven unreliable because humans do not act with mathematical certainty.⁵⁰ Fortunately, the Supreme Court has never fully abandoned a more holistic approach to the problem of antitrust law.⁵¹ In fact, in *Spectrum Sports, Inc. v. McQuillan*, the Court held:

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.⁵²

The financial crisis of 2008 was the result of a market failure.⁵³ The question facing Americans today—and the question this Article addresses—is whether antitrust law may be utilized to correct some of the problems that caused the financial crisis of 2008.

Certainly, some of the initial goals of antitrust law were intended to address the problem of a concentration of private economic power, though the problem still exists today.⁵⁴ But, history also suggests that preserving the free market is an important goal of antitrust law, and, in fact, it has played a critical role in the development of antitrust law.⁵⁵ The reason for this dichotomy of antitrust theory is simple: the two goals are not mutually exclusive. Both the populist view that the concentration of private economic power undermines the democratic process⁵⁶ as well as free-market economic theory raise concerns about the propriety of government intervention.⁵⁷ In the 2008 financial crisis, the government intervened to rescue systemic financial-service institutions.⁵⁸ The populist perspective would likely posit that this government intervention came at the request of systemic financial-service institutions and was granted

50. POSNER, A FAILURE OF CAPITALISM, *supra* note 2, at 83.

51. HOVENKAMP, *supra* note 47, at 56–67, 69 (describing the trend of the Court's decisions regarding the Sherman Act and asserting that the Court has yet to say that economic efficiency is the main concern of antitrust law).

52. 506 U.S. 447, 458 (1993).

53. POSNER, A FAILURE OF CAPITALISM, *supra* note 2, at xii, 49.

54. *See* JOHNSON & KWAK, *supra* note 2, at 189–222 (arguing that large financial institutions caused the recent financial crisis and that these entities must be broken up to prevent future crises).

55. AREEDA & HOVENKAMP, *supra* note 43, para. 112c2, at 131–32 (acknowledging the prominent role of low-cost production, “efficient resource allocation, and progressiveness” in antitrust policy).

56. *See id.* para. 100b, at 6 (discussing that populists tend to believe that competition will “solve all manner of economic and social problems”).

57. BORK, *supra* note 43, at 412–13 (articulating the limited government-intervention approach favored by economic theorists).

58. JOHNSON & KWAK, *supra* note 2, at 1–5.

on generous terms due to their political power.⁵⁹ Alternatively, under the free-market economic theory, a firm that took unreasonable risks should fail, not receive a government bailout.⁶⁰ As the Supreme Court pointed out in *Spectrum*, antitrust law is aimed at *protecting the public* from the failure of the market.⁶¹ Systemic financial-service institutions that have a propensity for creating market failure harm the public⁶² and violate both the populist and economic efficiency theories of antitrust law.⁶³

II. THE INEFFICIENCIES OF SYSTEMIC FINANCIAL-SERVICE INSTITUTIONS

Systemic financial failure is a domino effect⁶⁴ because an institution, market, or instrument can cause widespread distress in the financial system or overall economy.⁶⁵ In this regard, systemic financial

59. See, e.g., Edmund L. Andrews, *Fed in an \$85 Billion Rescue of an Insurer Near Failure*, N.Y. TIMES, Sept. 17, 2008, at A1 (acknowledging the effect that fear of economic collapse has on the political arena); Simon Johnson, *Antitrust for Banks? Ask Carl Shapiro*, WALL STREET PIT (May 12, 2009, 8:18 PM), <http://wallstreetpit.com/4272-antitrust-for-banks-ask-carl-shapiro> (discussing the fact that banks engage in certain risky behavior because they understand that they wield strong political power).

60. See Lawrence H. Summers, *Rebuilding a Healthy Financial System*, Remarks at the Georgetown University Future of Finance Conference (Sept. 18, 2009), available at <http://www.whitehouse.gov/administration/eop/nec/speeches/rebuilding-a-healthy-financial-system> (explaining how, in a free-market system, explicit or implicit guarantees of government intervention in the case of failure encourage larger financial institutions to take more risks).

61. 506 U.S. 447, 458 (1993).

62. Allison M. Hashmall, Note, *After the Fall: A New Framework to Regulate "Too Big to Fail" Non-Bank Financial Institutions*, 85 N.Y.U. L. REV. 829, 833 (2010) ("Systemic risk can also harm the economy primarily by raising the cost of capital . . .").

63. Compare AREEDA & HOVENKAMP, *supra* note 43, at 3–4 (providing examples of populist goals), with POSNER, *ANTITRUST LAW*, *supra* note 43, at 8 (explaining why monopolies reduce economic efficiency in many circumstances).

64. See Oliver de Bandt & Phillip Hartmann, *Systemic Risk: A Survey* 10 (European Cent. Bank, Working Paper No. 35, 2000) (explaining how the narrow definition of a "systemic event" can, through the failure of a financial institution, result in a "sequential fashion of considerable adverse effects," known as a domino effect); Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198 (2008) (defining a "domino effect" as "a chain of bad economic consequences"). Although systemic financial markets or systemic financial instruments can also cause systemic financial failure, this Article focuses on the elimination of systemic financial-service institutions, which arguably can cause systemic financial failure. Though regulation of systemic financial-service institutions cannot guarantee economic stability, the elimination of systemic financial-service institutions reduces the probability of systemic financial failure caused by systemic financial instruments through reducing the holdings of systemic financial instruments and markets, and thus allowing the principles of a free market to eliminate weak players.

65. See MONETARY & CAPITAL MKTS. DEP'T, INT'L MONETARY FUND, MONETARY & ECON. DEP'T, BANK FOR INT'L SETTLEMENTS & THE SECRETARIAT OF FIN. STABILITY BD., *GUIDANCE TO ASSESS THE SYSTEMIC IMPORTANCE OF FINANCIAL INSTITUTIONS, MARKETS AND INSTRUMENTS: INITIAL CONSIDERATIONS* 5 (2009) [hereinafter IMF'S INITIAL

failure market failure is market failure.⁶⁶

Several different market-intervention methods have been utilized to address systemic financial failure caused by systemic financial-service institutions. A “bailout,” through which the government funnels public funds into a systemic financial-service institution, is one method used to rescue the economy from systemic financial failure.⁶⁷ Another method used is merger, where the government finds a relatively healthy institution to take over the weaker one.⁶⁸ Although in the short term such methods may soften the consequences of a systemic financial failure, the long-term effects have a high-cost impact on competition in a free market in at least three ways. First, bailouts skew competitive markets by injecting government aid into systemic financial-service institutions, but not into nonsystemic financial-service institution competitors.⁶⁹ This not only creates the moral hazard of rewarding bad judgment, but it also amounts to a subsidy and creates an unfair advantage by providing the systemic financial-service institution with publicly funded insurance against failure.⁷⁰ Second, the merger method consolidates systemic

CONSIDERATIONS] (“G-20 members consider an institution, market or instrument as systemic if its failure or malfunction causes widespread distress, either as a direct impact or as a trigger for broader contagion.”); Schwarcz, *supra* note 64, at 198 (identifying ways in which the domino effect can cause significant consequences to financial intuitions and financial market prices).

66. See INGO FENDER & JACOB GYNTELBERG, BANKS FOR INT’L SETTLEMENTS, BIS QUARTERLY REVIEW: INTERNATIONAL BANKING AND FINANCIAL MARKET DEVELOPMENTS 1–12 (Sept. 2008) (indicating how higher financial sector losses coincided with the struggling credit and housing markets); Ben S. Bernanke, Chairman, Fed. Reserve Bd., Current Economic and Financial Conditions, Speech at the National Association for Business Economics 50th Annual Meeting (Oct. 7, 2008), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20081007a.htm> (providing examples of how the systemic risk associated with large companies threatens financial stability to the point where there is justification for the government to intervene in order to protect the public interest and mitigate market failure).

67. Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Policy Bailout*, 67 IND. L.J. 951, 955 (1992) (“Bailout is a form of government intervention in another market arena, in most cases, a private market.”); see, e.g., Simon Johnson & James Kwak, *Teddy Showed the Banks Who’s Boss. Will Obama?*, WASH. POST, Apr. 4, 2010, at B3 (discussing the government bailouts of 2009 and the early twentieth century).

68. See FABIA PANETTA ET AL., BANK FOR INT’L SETTLEMENTS, AN ASSESSMENT OF FINANCIAL SECTOR RESCUE PROGRAMMES 10–19 (2009) (demonstrating how the government took on the loss of a bank and essentially merged assets to promote stability).

69. See INT’L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: RESPONDING TO THE FINANCIAL CRISIS AND MEASURING SYSTEMIC RISK 38, 40 tbl.1.5 (2009), available at www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf (explaining policies used to address failing banks and concurring effectiveness of each policy).

70. See JOHNSON & KWAK, *supra* note 2, at 171–72 (exploring how, through stress tests, reduced competition, and lower interest rates, the government helped banks increase profits and created a government lifeline that gave banks the time to recapitalize themselves); Okamoto, *supra* note 2, at 204–05 (categorizing banks that are too big to fail as falling within “asset manager relationships” where an actor does not bear the full cost of the risk, making it easy to take on additional risk to earn returns); Johnson & Kwak, *supra* note 67 (discussing unfair

financial-service institutions, which exacerbates the consequence of any failure of the remaining systemic financial-service institutions.⁷¹ Finally, these methods undermine the basic tenets of free-market theory because the government saves an institution the market deemed unfit.⁷²

III. SYSTEMIC FINANCIAL SERVICE-INSTITUTIONS AND § 2 OF THE SHERMAN ACT

Though financial-reform laws and regulation have not addressed the possibility of eliminating systemic financial-service institutions through antitrust law, international financial reform has raised the possibility of mitigating the situation through merger review. For example, the Treaty on the Functioning of the European Union recognizes that state aid may distort free markets by creating an unfair trade advantage.⁷³ Although the treaty provided for extraordinary measures to address the financial crisis in 2009,⁷⁴ such as mergers between large financial-services institutions and state aid (bailout money), the European Union's Competition Commission will require some divestiture of these institutions once the financial markets have stabilized.⁷⁵ However, these measures are responsive and do not reflect a policy to

competition and noting that the "huge financial firms" that have "get out of jail free card[s] distort the free market").

71. See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Implications of the Financial Meltdown for the FTC, Remarks at the New York Bar Association Annual Dinner 7-9 (Jan. 29, 2009), available at <http://www.ftc.gov/speeches/rosch/091029financialcrisisnybarspeech.pdf> ("[I]f 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.").

72. See Pitofsky, *supra* note 39, at 1056 (discussing the preference for a "free market system"); David Shay Corbett II, Book Note, *Free Markets and Government Regulation: The Competing Views of Thomas Woods and George Cooper*, 14 N.C. BANKING INST. 547, 547-49 (2010) (discussing how the free-market economy is essentially a market environment left untouched by the government or another powerful economic force and noting that, though a free-market economy naturally finds equilibrium, government regulation upsets the equilibrium).

73. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, §§ 1, 3(c), Mar. 30, 2010, 2010 O.J. (C 83) 1, 91-92.

74. *Id.* art. 107, § 2(b) (providing that "aid to make good the damage caused by natural disasters or exceptional occurrences" is compatible with the internal market).

75. Neelie Kroes, European Comm'r for Competition Policy, Commission Outlines Conditions for State Aid to KBC, ING and Lloyds, Opening Remarks at Press Conference (Nov. 18, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/541&format=HTML&aged=0&language=EN&guiLanguage=en> (follow "PDF" hyperlink); Foo Yun Chee, *New EU Bank Rules Will Limit Acquisitions*, REUTERS (Jul. 23, 2009), <http://www.uk.reuters.com/assets/print?aid=UKTRE56M23620090723>; Clara Ferreira-Marques & Steve Slater, *Lloyds, RBS Agree to Massive Shake-up*, REUTERS (Nov. 3, 2009), <http://www.reuters.com/assets/print?aid=USTRE5A206F20091103>; Myless Neligan & Raji Menon, *Update 1-Lloyds Tests Waters on Cash Call, Deal Seen Soon*, REUTERS (Oct. 30, 2009), <http://uk.reuters.com/assets/print?aid=UKLU71701820091030>.

eliminate, or prevent the formation of, systemic financial-service institutions before they require state aid.⁷⁶

In the United States, there has been a slow, but growing, recognition of the prudence of addressing the problem of systemic institutions through antitrust law.⁷⁷ J. Thomas Rosch, a Commissioner for the Federal Trade Commission—one of the U.S. federal agencies charged with antitrust enforcement—indicated the possibility of addressing systemic financial-service institutions through domestic antitrust law.⁷⁸ This suggestion initially received criticism,⁷⁹ but it has garnered support over time, at least with respect to addressing systemic financial-service institutions through merger law and regulatory reform.⁸⁰

The critical question is: will current antitrust law, in particular § 2 of the Sherman Act, work? Theoretically, the answer is “yes,” if the courts properly define a systemic financial-service institution and apply case precedent defining monopolization. But this would require the courts to recognize the economic reality that market share alone is insufficient to determine monopoly power in the case of systemic financial-service institutions.

A. *Defining Systemic Financial-Service Institutions*

The Financial Stability Board (FSB), an international financial organization consisting of “[n]ational and regional authorities responsible for maintaining financial responsibility . . . ; [i]nternational financial institutions; . . . and [i]nternational standard setting, regulatory, supervisory and central bank bodies,”⁸¹ along with the International Monetary Fund and Bank for International Settlements, has identified three key characteristics of systemic institutions that provide a good starting point for defining the entities.⁸² These are:

76. See INT’L MONETARY FUND, *supra* note 69, at xxiii (discussing how “new regulatory approaches are needed to avoid the buildup of systemic risk” and prevent the reaction of systemic financial-institution leverage).

77. See, e.g., Rosch, *supra* note 71, at 2, 7–9, 13 (suggesting that applying antitrust enforcement to mergers, single-firm conduct, and cartels will help solve the economic crisis).

78. *Id.*

79. See *id.* at 5–6, 8–9.

80. See JOHNSON & KWAK, *supra*, note 2, at 13, 220–21 (discussing how the nature of private businesses has changed over the years and how antitrust law and politics can contribute to the prevention of the formation of “too big to fail” institutions); Damien Paletta & Jonathan Weisman, *Proposal Set to Curb Bank Giants*, WALL ST. J., Jan. 21, 2010, at A2 (addressing President Barack Obama’s proposal to restrict the country’s largest financial institutions in order to prevent large-scale economic rule as well as to preclude these institutions from distorting “normal competitive forces”).

81. Financial Stability Board Charter arts. 1, 4, available at http://www.financialstabilityboard.org/publications/r_090925d.pdf.

82. IMF’S INITIAL CONSIDERATIONS, *supra* note 65, at 9.

1. *Size.* The determination of size takes into account on- and off-balance-sheet items, the institution's assets, transactions, and general risk exposure.⁸³ These characteristics are then analyzed with regard to the business model used and the complexity of the institution itself.⁸⁴ A systemic institution's potential for problems in the case of failure is often connected to the size of activity in a market.⁸⁵

2. *"Lack of substitutability."* Generally, certain types of infrastructure-like services provided by a systemic institution to other institutions are of systemic importance.⁸⁶ When an institution provides a voluminous amount of services, the fact that these institutions have no adequate substitutes is of great concern.⁸⁷

3. *Interconnectedness.* This refers to the aforementioned domino effect, in which a systemic institution's potential failure will have immediate and sizeable effects on a large number of other significant institutions.⁸⁸ This is also known as counterparty risk.⁸⁹

Additionally, the FSB identifies a number of important considerations that supplement these three criteria.⁹⁰ One of these is leverage.⁹¹ Leverage involves the interaction of relatively illiquid, risky assets and large amounts of short-term funding, all of which creates great potential for disruptive failures.⁹² It is often understood as a ratio of debt to equity.⁹³ Together, these criteria and characteristics give rise to an analysis of systemic significance.⁹⁴ The FSB posits that "[t]he ideal model-derived measure of systemic impact would be built on the basis of a macroeconomic model that includes a developed financial sector to capture the macro-financial linkages, but also a description of the network of links between financial institutions and markets."⁹⁵ With

83. *Id.*

84. *Id.*

85. *Id.* at 10.

86. *Id.* at 9–10.

87. *Id.* at 9.

88. *Id.* at 9–10.

89. See Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167, 206 (2011) (noting that "[c]ounterparty risk refers to the counterparty's ability to satisfy its obligations under a credit default swap agreement" and discussing the risk involved if a counterparty cannot fulfill its obligations).

90. IMF'S INITIAL CONSIDERATIONS, *supra* note 65, at 11, 13.

91. *Id.*

92. See *id.* at 13, 25 tbl.1.

93. Sonya Andreassen Henderson & Michael LoGiudice, *Balance Sheet and Income Statement Basics*, 1823 PRAC. L. INST. 145, 163 (2010) ("The debt-to-equity ratio measures the leverage of the company.").

94. IMF'S INITIAL CONSIDERATIONS, *supra* note 65, at 15 ("The framework discussed . . . provides a general structure for the assessment of systemic significance of financial institutions and markets.").

95. *Id.*

this, the FSB has identified four concepts that are helpful in analyzing specific systemic financial institutions: size, interconnectedness, leverage, and systemic significance.⁹⁶

The FSB criteria relating to a systemic financial institution were derived from a survey of central bankers and represent a general consensus regarding key characteristics of a systemic institution.⁹⁷ Additionally, these characteristics correspond with what most commentators have stated regarding systemic institutions.⁹⁸ Finally, the FSB characteristics are the same characteristics articulated in financial regulatory reform in the United States.⁹⁹ By applying the FSB model to situations in the past where the United States determined that a financial-services institution was systemic and warranted government intervention, we can determine the relative systemic risk of a financial institution.

1. *An Example from the Past: Continental Illinois*

A famous example of a systemic financial-institution is Continental Illinois National Bank (Continental).¹⁰⁰ In 1984, fearing the failure of the seventh-largest bank in the United States, regulators bought Continental's bad debt, and the Federal Deposit Insurance Corporation (FDIC) fully protected all of Continental's depositors despite the limits on deposit insurance.¹⁰¹ Applying the characteristics of a systemic institution to Continental at the time of the crisis reveals the following:

96. See *supra* text accompanying notes 81–95.

97. IMF'S INITIAL CONSIDERATIONS, *supra* note 65, at 2, 4.

98. See Okamoto, *supra* note 2, at 194 (discussing Schwarcz's definition of "systemic risk"); Schwarcz, *supra* note 64, at 198–200 (noting the domino effect that often results from the failure of institutions and discussing, in particular, the connectedness of financial institutions and the resultant potential for failure).

99. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 404(b)(3), 804(a)(2), 124 Stat. 1376, 1572, 1807 (2010) (to be codified at 12 U.S.C. § 5463(a)(2) and 15 U.S.C. § 80b-4(b)(3)).

100. Cybil White, *Riegle-Neal's 10% Nationwide Deposit Cap: Arbitrary and Unnecessary*, 9 N.C. BANKING INST. 374, 354 (2005).

101. *Inquiry into Continental Illinois Corporation and Continental Illinois National Bank: Hearings Before the Subcomm. on Fin. Insts. Supervision, Regulation and Ins. of the H. Comm. on Banking, Fin. and Urban Affairs*, 98th Cong. 175, 348 (1984) (statement of C. Todd Conover) (noting that the FDIC owned eighty percent of the shares of the bank); Kenneth A. Guenther, *The Outlook for Specialized Institutions in the World of the Too Big to Fail*, 8 ANN. REV. BANKING L. 467, 470 (1989) (noting, in the context of the Continental failure, that banks that are "too big to be allowed to fail" are fully protected); White, *supra* note 100, at 354–55 ("[T]he [FDIC] disregarded the limit on deposit insurance coverage and fully protected all Continental creditors." (citation omitted)); 1 FDIC, AN EXAMINATION OF THE BANKING CRISES OF THE 1980S AND EARLY 1990S, 243–44 (1997), available at www.fdic.gov/bank/historical/history/235_258.pdf.

1. *Size.* Continental had approximately \$40 billion in total assets in 1983.¹⁰² All U.S. banks had \$2.05 trillion in total assets in 1983.¹⁰³

2. *Interconnectedness.* A total of 2,300 banks invested in Continental.¹⁰⁴ Sixty-six of those banks, with total assets of \$5 billion, “had more than 100 percent of their equity capital invested in Continental.”¹⁰⁵

3. *Leverage.* 20:1.¹⁰⁶

4. *Systemic Significance.* The Gross Domestic Product (GDP) in 1983 was \$3.5 trillion.¹⁰⁷ Using the formula that *assets + (assets x leverage) + interconnectedness = potential exposure*, the calculation works out as follows:

$\$40,000,000,000 + (\$40,000,000,000 \times 20) + \$5,000,000,000 = \$845,000,000,000$. The U.S. economy may be calculated by looking at banking assets plus GDP— $\$2,049,018,000,000 + \$3,500,000,000,000 = \$5,549,018,000,000$. Accordingly, the exposure of funds resulting from Continental’s financial structure was 24.1% of GDP and 15.2% of GDP combined with U.S. banking assets.

2. *Example from the Past: Long-Term Capital Management*

In 1998, the hedge fund Long-Term Capital Management (LTCM) was about to fail.¹⁰⁸ Again, the government intervened, fearing a systemic event.¹⁰⁹ The same characteristics as applied to LTCM demonstrate the following:

1. *Size.* LTCM had \$126 billion in total assets in 1998.¹¹⁰ All U.S. banks had \$5,283,300,000,000 in assets in 1998.¹¹¹

2. *Interconnectedness.* At least \$3 billion.¹¹²

102. 1 FDIC, *MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE* 546 (1997), available at <http://www.fdic.gov/bank/historical/managing/history2-04.pdf>.

103. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *ANNUAL STATISTICAL DIGEST: 1983* 208 (1983), available at <http://fraser.stlouisfed.org/publications/astatdig/issue/112/download/958/part2.pdf>.

104. *Continental-Illinois*, UNIV. OF CHI., <http://picker.uchicago.edu/bailouts/CINB.ppt#287>, 34, MorahHazard (last visited Feb. 7, 2011).

105. *Id.*

106. *What is the Size of the Problem?*, DINOCRAT.COM (Mar. 5, 2008), <http://www.dinocrat.com/archives/2008/03/15/what-is-the-size-of-the-problem-2/>.

107. *Economic Statistics*, NATIONMASTER.COM, http://nationmaster.com/graph/eco_gdp-economy-gdp&date=1983 (last visited Feb. 7, 2011).

108. BASLE COMM. ON BANKING SUPERVISION, *BANKS’ INTERACTIONS WITH HIGHLY LEVERAGED INSTITUTIONS* 10 (1999), available at <http://bis.org/publ/bcbs45.pdf>.

109. Barbara Crutchfield George et al., *The Opaque and Under-Regulated Hedge Fund Industry: Victim or Culprit in the Subprime Mortgage Crisis?*, 5 N.Y.U. J.L. & BUS. 359, 369 (2009).

110. Mardi Dungey et al., *International Contagion Effects from the Russian Crisis and the LTCM Near Collapse* 6–7 (Int’l Monetary Fund, Working Paper No. 02/74, 2002), available at <http://www.imf.org/external/pubs/ft/wp/2002/wp0274.pdf>.

111. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *STATISTICAL DIGEST: 1996–2000* 51, <http://fraser.stlouisfed.org/publications/astatdig/issue/112/download/855/part1.pdf>.

3. *Leverage*. 55:1.¹¹³

4. *Systemic Significance*. The GDP in 1998 was \$8,694,600,000,000.¹¹⁴ When applying the formula above, $assets + (assets \times leverage) + interconnectedness = potential\ exposure$, the following results: $\$126,000,000,000 + (\$126,000,000,000 \times 55) + \$3,000,000,000 = \$7,059,000,000,000$. In 1998, the U.S. economy—banking assets plus GDP—was \$13,977,900,000,000 (\$5,283,300,000,000 + \$8,694,600,000,000). Accordingly, exposure was 81% of GDP and 50.5% of GDP combined with U.S. banking assets.

Based upon these two examples, when the sum of a financial institution's assets, leverage, and interconnectedness reaches around 15.2% of GDP plus U.S. banking assets, the U.S. government will intervene. This intervention is usually in the form of a capital infusion and a guarantee to the institution's creditors that they will be made whole at the expense of U.S. taxpayers.¹¹⁵

B. Section 2 of the Sherman Antitrust Act

Once it has been determined that a financial-service institution is systemic, the next question is whether it violates § 2 of the Sherman Act. As indicated above, a systemic financial-service institution runs afoul of general antitrust principles, such as those reflected by the populist and economic-efficiency theories.¹¹⁶ But, is it possible that a single systemic financial-service institution can monopolize trade or commerce in violation of § 2? Based on the foregoing analysis, the answer is yes.

Section 2 of the Sherman Act provides, in pertinent part: “[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”¹¹⁷ The verb “monopolize,” as used in § 2, means to improperly obtain a dominant position in the market so as to exclude actual or potential competition.¹¹⁸ And, a federal judge stated that “[a] practice short of complete monopoly but which tends to create a monopoly and to deprive the

112. BASLE COMM. ON BANKING SUPERVISION, *supra* note 108, at 13. “[M]ajor counterparties developed rough estimates of the possible additional losses associated with their direct exposures,” and these estimates ranged from \$3 to \$5 billion. *Id.*

113. Dungey et al., *supra* note 110, at 6.

114. *Economic Statistics*, *supra* note 107.

115. See Helen Kennedy, *Taxpayers to Rescue in \$20 Billion Citigroup Bailout*, N.Y. DAILY NEWS, Nov. 23, 2008, http://www.nydailynews.com/money/2008/11/23/2008-2008-11-23_taxpayers_to_rescue_in_20_billion_citigr.html (explaining the process for a government bailout of Citigroup).

116. See *supra* text accompanying notes 56–60.

117. Sherman Antitrust Act, 15 U.S.C. § 2 (2006).

118. *Cape Cod Food Prods., Inc. v. Nat'l Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954).

public of the advantages from free competition in interstate trade offends the policy of the Sherman Act.”¹¹⁹

The U.S. Supreme Court held that a monopoly under § 2 is established if there is “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹²⁰

1. Monopoly Power

The first prong of § 2 of the Sherman Act test is “monopoly power,”¹²¹ which the Supreme Court defined as “the power to control prices *or* exclude competition.”¹²² Traditionally, courts have relied upon empirical evidence of monopoly power, or, in the absence of empirical evidence, they have conducted a market-share analysis to determine if a monopoly exists.¹²³

Market share is determined by ascertaining the percent control of a product (product market) within a specified geographic area (geographic market).¹²⁴ If the market share reaches a certain level, courts will infer market power (monopoly power),¹²⁵ which is the power to control prices or exclude competition.¹²⁶ Additionally, courts have required significant entry barriers to prevent new competition from entering the market.¹²⁷

Despite this, courts have not held the market-share analysis to be the exclusive method for determining monopoly power.¹²⁸ Indeed, the economic

119. *Ala. Sportservice, Inc. v. Nat’l Horsemen’s Benevolent & Protective Ass’n*, 767 F. Supp. 1573, 1582 (M.D. Fla. 1991).

120. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

121. *Id.* at 570.

122. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (emphasis added).

123. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d. Cir. 2007).

124. HOVENKAMP, *supra* note 47, at 83.

125. “Monopoly power” and “market power” are terms that appear to be used interchangeably by courts and commentators. *See id.* at 272–73 (using the terms “monopoly power” and “market power” interchangeably).

126. *Id.*

127. *Broadcom Corp.*, 501 F.3d at 307. The Third Circuit explained:

To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant “entry barriers” protect that market. Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist’s supracompetitive prices.

Id. (internal citations omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986) (“[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.”).

128. Sullivan, *supra* note 9, at 1220.

theory, which influences courts regarding antitrust analysis,¹²⁹ recognizes that a pure market-share analysis is misleading.¹³⁰ For example, a pure market-share analysis inaccurately assumes a Pareto-optimal market,¹³¹ and it ignores the effects of externalities.¹³² That said, applying a market-share analysis would seem to indicate that a systemic financial-service institution with less than thirty-three percent market share has little chance to be found as possessing monopoly power.¹³³

a. Market Share and Monopoly Power

The market-share analysis provides a relatively simple test that can be understood and applied in the litigation context. But, to apply a market-share analysis, the court must first define the product market. This seemingly simple question turns out to be extremely complicated.

i. Product Market

Under a market-share analysis, a broadly defined product market will result in a lower market share than a narrowly defined one. For example, a firm may have only fifteen percent of the shoe market, but have seventy-five percent of the work-boot market. Such a firm would probably have the ability to control prices or eliminate competitors in the work-boot market, but not the overall shoe market.

To a large extent, the product market depends upon the elasticity of the demand curve.¹³⁴ A product is elastic when consumers turn to a substitute when an original product's price increases.¹³⁵ Thus, a firm with a high market share in an elastic market may have less market power than a firm with less

129. *Id.* at 1220–21.

130. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (1981).

131. William J. Baumol & Janusz A. Ordover, *Antitrust: Source of Dynamic and Static Inefficiencies?*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 82, 83 (Thomas M. Jorde & David J. Teece eds., 1992).

132. See Landes & Posner, *supra* note 130, at 947 (explaining that “influence of market demand and supply elasticity on market power” should be considered under a market-share analysis); Richard S. Markovits, *The American Antitrust Laws on the Centennial of the Sherman Act: A Critique of the Statutes Themselves, Their Interpretation, and Their Operationalization*, 38 BUFF. L. REV. 673, 743–44 (1990) (asserting that a market-share approach reflects neither the company's theoretical nor actual monopoly power in a given market).

133. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d. Cir. 1945) (doubting whether a sixty or sixty-four percent share of the market is enough to constitute a monopoly, and asserting that “certainly thirty-three per cent is not”); Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L L. 151, 170 (2009) (explaining that “substantial market power” indicates an abuse of economic power).

134. See Landes & Posner, *supra* note 130, at 938–41 (explaining that the elasticity of demand has a significant impact on a firm's market power).

135. *Id.* at 945.

market share in an inelastic market.¹³⁶ Accordingly, in a Sherman Act analysis, a court may ask, for example, if a customer seeking a work boot would substitute it for a different type of shoe. To the extent the answer is “yes,” the product market would be elastic. Although courts certainly take elasticity into consideration,¹³⁷ their ability to correctly define the product market, including what properly constitutes a substitute, has been questioned.¹³⁸

The product market for financial services has fluctuated over time. Initially, the Glass-Steagall Act of 1933 had the effect of separating investment banking and commercial banking.¹³⁹ Given this distinction, the Supreme Court, in *United States v. Philadelphia National Bank*, defined “product market” for commercial banking as “various kinds of credit . . . and services.”¹⁴⁰

136. See *id.* at 947–48. Other situations affecting the elasticity of a demand curve include when competitors do not operate at capacity so they can increase output and when the industry is not costly to enter. *Id.* at 949–51.

137. See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (noting that, although the defendant may have monopolized the cellophane business, other types of plastic wrapping provided competition and interchangeability).

138. ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS: IN A NUTSHELL* 188–222 (5th ed. 2004) (arguing that the Supreme Court’s analysis in *E.I. du Pont de Nemours & Co.* is incorrect because high cross-elasticity indicates low market power only when competitors offer comparable prices for the same product); POSNER, *ANTITRUST LAW*, *supra* note 43, at 127–28 (explaining that the *E.I. du Pont de Nemours & Co.* market-share analysis erroneously ignored substitution in production and failed to specify the price for which products in a given market could be considered interchangeable). See generally Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956) (describing *E.I. du Pont de Nemours & Co.* and arguing that the alleged monopolist should carry the burden of proving that competitors in the market offer equally comparable products).

139. Sarah A. Wagman, *Laws Separating Commercial Banking Security Activities as an Impediment to Free Trade in Financial Services: A Comparative Study of Competitiveness in the International Market for Financial Services*, 15 MICH. L. REV. 999, 1006 (1994) (“The effect of the Glass-Steagall Act is to impose a basic separation between commercial and investment banking.”).

An “investment bank” is defined as

an individual or institution which acts as an underwriter or agent for corporations and municipalities issuing securities. Most also maintain broker/dealer operations, maintain markets for previously issued securities, and offer advisory services to investors. Investment banks also have a large role in facilitating mergers and acquisitions, private equity placements and corporate restructuring.

Investment Bank, INVESTORWORDS.COM, http://investorwords.com/2602/investment_bank.html (last visited Feb. 7, 2011).

Prior to legislative deregulation, commercial banking included: “acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice.” *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 326 n.5 (1962).

140. *Phila. Nat’l Bank*, 374 U.S. at 356. The last Supreme Court case to apply this definition was *United States v. Connecticut National Bank*, in which the Court held that commercial

In the nearly five decades since the Court's *Philadelphia National Bank* decision, the product market has changed significantly because of the repeal of the Glass-Steagall Act in 1999.¹⁴¹ As a result, banks are currently allowed to conduct both commercial banking and investment banking.¹⁴² This suggests a more elastic product market because customers are no longer limited to commercial banks for some services and investment banks for others. Despite this major development, the *Philadelphia National Bank* product-market definition of 1963 remains unchanged. However, the *Philadelphia National Bank* rule allows for adjustments to reflect trade realities. The Court stated, in pertinent part, "[i]n sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.'"¹⁴³ If economic reality is applied to the essence of the *Philadelphia Bank* rule, it becomes evident that the cluster of products and services offered solely by the commercial banks in 1963 are offered by a variety of financial-service institutions today.¹⁴⁴ Accordingly, the product market should be singly defined for purposes of financial-service institutions, and should no longer be divided between commercial and investments banks.

This economic-reality approach would seem to broaden the product market and reduce market share as well as the ability to establish monopoly power. However, the functional interchangeability of these financial-service institutions suggests otherwise, that a more elastic product market does not end the problem. As the court found in *FTC v. Staples*, submarkets may exist within the broader product market for purposes of product-market definition and, hence, monopoly power.¹⁴⁵ The application of a submarket analysis narrows the product-market definition and increases market share. Indicia used by the courts to determine if a submarket exists include: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized

banking is the product market for savings banks, not a separate product market. 418 U.S. 656, 666 (1974).

141. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101(a), 113 Stat. 1338, 1341 (1999).

142. See *id.* (repealing the Glass-Steagall Act, which had effectively prohibited affiliations between investment and commercial banks).

143. *Phila. Nat'l Bank*, 374 U.S. at 357 (quoting *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 811 (9th Cir. 1961)).

144. See ARTHUR F. BURNS, *THE ONGOING REVOLUTION IN AMERICAN BANKING* 4-5, 11 (1988) (noting the restrictions placed on banks and financial institutions regarding "the kinds of services each could offer" and discussing the effect of the emergence of higher interest rates); Heidi Mandanis Schooner & Michael Taylor, *Convergence and Competition: The Case of Bank Regulation in Britain and the United States*, 20 MICH. J. INT'L L. 595, 623 (1999) (exploring how the disintermediation of banks in the 1960s prompted many commercial-loan customers to switch from banks to the commercial-paper market).

145. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997).

vendors.”¹⁴⁶ The court in *Staples* noted that these were “practical indicia,” thereby permitting a finding that a submarket exists in situations where some, but not all, of the indicia are present.¹⁴⁷ For example, in *Staples*, where the focus was on sensitivity to price change, the court noted that office-supply superstores, such as Staples, Office Depot, or OfficeMax, only viewed each other as competitors in consumable office supplies and did not consider other non-office supply superstores, such as WalMart.¹⁴⁸

Applying the *Staples* indicia, it is apparent that systemic financial-service institutions constitute a submarket. This denotation has the effect of increasing market share by narrowly defining the product market as a submarket. This is accomplished by first considering the Dodd-Frank Wall Street Reform and Consumer Protection Act’s treatment of systemic financial companies as separate economic entities that have separate prudential requirements, capital requirements, and methods to wind-down a failed systemic financial-service institution.¹⁴⁹ Second, the large size of systemic financial-service institutions permits them to carry out large, complex business transactions for their distinct customers.¹⁵⁰ Third, systemic financial-service institutions charge higher interest rates for loans and higher fees to customers, while paying lower interest rates to customers on consumer saving and checking accounts than do nonsystemic financial-service institutions.¹⁵¹ Finally, systemic financial-service institutions raise fees with little-to-no regard for the business actions of nonsystemic financial-service institutions.¹⁵² All these factors suggest a submarket in financial services offered by systemic financial-service institutions.

Of course, there has been much criticism of the submarket analysis, specifically contending that it pays insufficient attention to the relevant market’s ability to charge monopoly prices.¹⁵³ Indeed, these critics present a compelling argument to the extent that the submarket theory does not reflect

146. *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

147. *Id.*

148. *Id.* at 1075–78.

149. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, §§ 165, 203–204, 124 Stat. 1376, 1423–32, 1450–56 (2010) (to be codified at 12 U.S.C. §§ 5365, 5383–5384).

150. JOHNSON & KWAK, *supra* note 2, at 219.

151. Vincent DiLorenzo, *Cost Benefit Analysis, Deregulated Markets, and Consumer Benefits: A Study of the Financial Services Modernization Experience*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 339, 344 (2003) (asserting that large financial institutions are not more efficient, do not offer consumer benefits, and in fact, charge higher fees for customers than smaller financial-service companies); David Cho, *Banks “Too Big to Fail” Have Grown Even Bigger*, WASH. POST, Aug. 28, 2009, at A19 (discussing the concern of consumers regarding the bailout and the bailout’s effect on the financial industry, noting that they see fewer choices and higher costs with regard to financial services).

152. Cho, *supra* note 151, at A19.

153. IIB PHILLIP AREEDA ET AL., ANTITRUST LAW para. 533c, at 254–57 (3d ed. 2007).

economic reality expressed in terms of ability to control prices or eliminate competitors because it creates too narrow a market, therefore increasing the probability of false positives. However, given the fact that many commentators and most regulators seem to differentiate between large, medium, and small banks, there is a conception in the trade that bank size somehow correlates to the economic reality of bank markets.¹⁵⁴

ii. Geographic Market

“Geographic-market area” is defined as the area where a hypothetical monopolist could effectively control prices.¹⁵⁵ In the financial-services sector, the Supreme Court last defined the geographic market in a 1970 bank-merger case, which applied the *Philadelphia National Bank* case.¹⁵⁶ Since then, the geographic market has greatly changed because of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.¹⁵⁷ In the past, the Supreme Court held that banking was local in nature:

The proper question to be asked in this case is not where the parties . . . do business or even where they compete, but where, within the area of competitive overlap, the effect . . . on competition will be direct and immediate. . . . This depends upon “the geographic structure of supplier-customer relations.” . . . The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries.¹⁵⁸

154. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 165, 203–204, 124 Stat. at 1450–56 (establishing separate prudential standards for nonbank financial companies, nonbank holding companies supervised by a board of directors, and bank holding companies with assets of \$500 billion or more); Michael W. Boyer, Student Article, *Financial Regulatory Reform: A New Foundation or More of the Same?*, 22 LOY. CONSUMER L. REV. 233, 245 (2009) (discussing the different performances between large banks and small and medium banks in the early 2000s); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-281, BANK FEES: FEDERAL BANKING REGULATORS COULD BETTER ENSURE THAT CONSUMERS HAVE REQUIRED DISCLOSURE DOCUMENTS PRIOR TO OPENING CHECKING OR SAVINGS ACCOUNTS 12, 16–17, 45 (2008), available at www.gao.gov/new.items/d08281.pdf [hereinafter BANK FEES] (analyzing the banking system based on the size of the bank, noting differences in consumers' costs between larger and smaller banks, and defining an institution's size based on assets).

155. Tim McCarthy, *Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 DUKE L.J. 865, 867–68 (1997).

156. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 362–65 (1970); see also *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356–59 (1963).

157. See Pub. L. No. 103-328, 108 Stat. 2338 (codified as amended in scattered sections of 12 U.S.C.); *Survey of 1995 Alabama Legislation*, 47 ALA. L. REV. 645, 648 (1996) (explaining that the Riegle-Neal Act allows mergers between banks in different states, which essentially preempts state law on such a merger, and noting that the Act authorizes national banks to establish branches in states that expressly permit out-of-state banks to establish branches within the states' borders).

158. *Phila. Nat'l Bank*, 374 U.S. at 356–59 (quoting CARL KAYSSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 102 (1959)).

Although this observation may reflect the economic reality of the time, much has changed in banking since the 1960s. Today, banking is national in nature and, in some instances, international. Electronic banking reduced the necessity of a local bank for many, and commercial banking has expanded into previously forbidden areas of investment banking and insurance.¹⁵⁹ Accordingly, the Court's analysis in *Philadelphia National Bank* of the geographic market for banking is inapplicable today, especially regarding systemic financial-service institutions, which reach throughout the nation and, in some cases, the world.¹⁶⁰

Fortunately, the Supreme Court recognized that precedent does not require courts to be "blind . . . to economic realities."¹⁶¹ In the case of systemic financial-service institutions, the national market reflects the reality of how they build and conduct their business.¹⁶² These institutions engage in national planning, are regulated on a national level, and conduct activities in many states.¹⁶³ Though one could argue that, under this construct, the geographic market should be the world because systemic financial-services institutions conduct their business on a global basis, such a conclusion depends on the particular institution. Most domestic systemic financial-service institutions have a majority of their assets in domestic, not international, sources.¹⁶⁴ Because the domestic GDP serves as the target for a systemic financial-services institution's achievement of a negative externality of public

159. See Kagan et al., *Does Internet Banking Affect the Performance of Community Banks?*, AGECON SEARCH (Oct. 10, 2010, 12:16 PM), <http://ageconsearch.umn.edu/bitstream/19246/1/sp05ka03.pdf> (discussing how advancements in technology have made community banks less relevant and have opened the banking industry to national and international market levels); see also Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 102-103, 113 Stat. 1338, 1341-51 (1999) (codified in scattered sections of 12 U.S.C.) (opening up the market by allowing investment banks, commercial banks, and insurance companies to consolidate when they previously were unable).

160. Carl Felsenfeld, *Panel Discussion I: Development of Bank Mergers Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 527 (2008) (claiming that consolidation in national banking and continued changes in banking services allow for altering market definitions and participants); Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended Philadelphia National Bank Holiday*, 13 FORDHAM J. CORP. & FIN. L. 595, 637-46 (2008) (advocating for the modernization of the geographic area in antitrust analysis to expand such beyond the local scope of the Supreme Court's decision in *Philadelphia National Bank*).

161. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 662 (1974).

162. *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966).

163. See *id.* (noting that the geographic area of the entity at issue was national and that it engaged in "national planning"); Felsenfeld, *supra* note 160, at 526-27 (discussing the large and expanding geographic market for many business); Pekarek & Huth, *supra* note 160, at 631-36 (discussing how financial services are no longer confined to a determinate industry).

164. FEDERAL RESERVE STATISTICAL RELEASE: INSURED U.S.-CHARTERED COMMERCIAL BANKS THAT HAVE CONSOLIDATED ASSETS OF \$300 MILLION OR MORE, RANKED BY CONSOLIDATED ASSETS, FED. RESERVE (JUNE 30, 2010), www.federalreserve.gov/releases/br/current/default.htm.

insurance against risk, the national market is a more likely “economic reality” than an international market.

However, the expansion of the geographic market from a local to a national one dilutes monopoly power.¹⁶⁵ As the borders of the geographic market expand, so do the potential market participants, which reduces market power under a market-share analysis. This reduction, coupled with the aforementioned struggle to define the product market, suggests that a systemic financial-service institution would not be found to possess monopoly power under the traditional market-share analysis. Rather, a new approach is required to establish the monopoly power of a systemic financial-service institution.

C. Negative Externalities and Monopoly Power

Given the less-than-optimal application and result of a market-share approach to monopoly power, an alternative method focusing on negative externalities is desirable and feasible under the current law concerning § 2 of the Sherman Act. This Article proposes that systemic financial-service institutions possess monopoly power by virtue of their systemic nature.¹⁶⁶ Though the analysis may depend upon the industry, systemic financial-service institutions can, and have, controlled prices and eliminated competitors.¹⁶⁷

1. The First Prong of § 2 of the Sherman Act: Possessing Monopoly Power

Section 2 of the Sherman Act has two elements.¹⁶⁸ The first is “the possession of monopoly power in the relevant market.”¹⁶⁹ Before delving into monopoly power, it is necessary to explore externalities generally. Externalities may be positive or negative. A positive externality occurs when

165. Felsenfeld, *supra* note 160, at 527 (discussing how redefining a global market creates levels of commercial-bank concentration that would fall below that which antitrust laws are aimed to prevent).

166. Whether all systemic institutions possess monopoly power is beyond the scope of this Article.

167. THOMAS M. HOENIG, LEVERAGE AND DEBT: THE IMPACT OF TODAY’S CHOICES ON TOMORROW (2009), available at www.kansascityfed.org/speechbio/hoenigPDF/hoenigKBA.08.06.09.pdf (commenting on the concentration in the banking industry); see Cho, *supra* note 151, at A19 (discussing methods used by community banks to better compete with larger institutions, such as increased personalized services); Andrew Martin & Ron Lieber, *Overdraft Open Season*, N.Y. TIMES, Feb. 23, 2010, at B1 (noting that large banks were preparing an advertisement campaign to convince consumers to sign up for overdraft services after federal regulations prohibited banks from charging overdraft fees without the consent of the consumer); *Failed Bank List*, FED. DEPOSIT INS. CORP., www.fdic.gov/bank/individual/failed/banklist.html (last updated Feb. 7, 2011) [hereinafter *Failed Bank List*].

168. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); see also Sherman Antitrust Act, 15 U.S.C. § 2 (2006) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”).

169. *Grinnell Corp.*, 384 U.S. at 570.

the acts of one person bestow a benefit on another.¹⁷⁰ A negative externality occurs when the acts of one person impose a cost on another.¹⁷¹ Negative externalities that are not internalized through legislation or regulation create a Pareto-imperfect market, reducing the costs to the producer and increasing the costs to others.¹⁷² The cost reduction does not necessarily result in cost savings to consumers, although it may.¹⁷³ When a firm has significant cost savings through externalities and its competitors do not, the firm enjoying the benefit of the negative externalities is able to control prices with a smaller market share.¹⁷⁴

Systemic financial-service institutions benefit from the negative externality of public insurance against risk.¹⁷⁵ This insurance is in the form of government intervention through bailouts, aimed at preventing the systemic financial service institution from failing. With such insurance, the cost of which the public bears, systemic financial-service institutions are free to take high risks with corresponding higher profits and can avoid the traditional free-market punishment for taking unreasonable risks.¹⁷⁶ Firms that can externalize costs have an unfair advantage over firms that cannot.¹⁷⁷ Specifically, a systemic financial-service institution can take greater risks, which results in higher profits and an enhanced ability to control prices with a smaller market share than courts normally required in antitrust litigation.¹⁷⁸

Additionally, the power to exclude competitors is often tied to the excluding firm's ability to raise its rivals' costs.¹⁷⁹ As the global financial crisis of 2008

170. Yakov Amihud & Haim Mendelson, *A New Approach to the Regulation of Trading Across Securities Markets*, 71 N.Y.U. L. REV. 1411, 1432 n.115 (1996).

171. Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTEL. PROP. L. 1, 8 (2005).

172. Francesco Parisi & Ben W.F. Depoorter, *Private Choices and Public Law: Richard A. Posner's Contributions to Family Law and Policy*, 17 J. CONTEMP. HEALTH L. & POL'Y 403, 417 (2001).

173. *See id.*

174. *See* Thomas A. Lambert & Joshua D. Wright, *Antitrust (Over-) Confidence*, 20 LOY. CONSUMER L. REV. 219, 221 (2008) (arguing that antitrust law should consider externalities); Steven J. Pilloff, *Does the Presence of Big Banks Influence Competition in Local Markets?*, 15 J. FIN. SERVS. RESEARCH 159, 161 (1999) (stating that big banks have more influence on competition than their market share would suggest).

175. Cho, *supra* note 151 (explaining that big banks engage in unreasonably risky behavior because they know that the public will bail them out).

176. *See id.*; de Bandt & Hartmann, *supra* note 64, at 17 (discussing public and private safety nets that ultimately bear the risk of moral hazard when financial institutions fail).

177. Lambert & Wright, *supra* note 174, at 221.

178. *See* BANK FEES, *supra* note 154, at 16 (discussing how, overall, large institutions charge more than medium and small institutions for overdraft fees); Pilloff, *supra* note 174, at 161 (noting that "deep pockets" permit big banks to "engage in predatory or disciplinary pricing behavior in a particular market," which has an impact on smaller competitors that do not have the same resources).

179. Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 249 (1987).

has demonstrated, systemic financial-service institutions have the ability to extort government aid, which reduces the costs of their poor judgment, but relatively increases the costs to their competitors.¹⁸⁰ Empirical evidence has established that this dynamic has the effect of eliminating competitors; 140 FDIC nonsystemic financial-services institutions failed in 2009.¹⁸¹ During the same time period, the government bailed out systemic financial-service institutions with public funds.¹⁸² These institutions were then allowed to buy other failing institutions with the public-bailout money, which served to compound the problem.¹⁸³ The ability of systemic financial-service institutions to eliminate competitors, coupled with the ability to control prices, is indicative of monopoly power.

2. The Willful Acquisition or Maintenance of Monopoly Power: Conduct Prong

The second prong of a Sherman §2 analysis is “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹⁸⁴ “Simply possessing monopoly power” is not enough.¹⁸⁵ The Supreme Court has interpreted antitrust law narrowly to safeguard “risk taking that produces innovation and economic growth.”¹⁸⁶ The conduct examined in this Article is the intentional quest of systemic financial-service institutions to become systemic in order to increase the likelihood of a government bailout if excessive risk taking results in a financial crisis. To date, no cases indicate that such conduct is or is not “willful acquisition or maintenance of monopoly power” as required by the Sherman Act, but the underlying antitrust premise of efficiency supports the proposition that such conduct is anticompetitive.¹⁸⁷

The type of conduct indicative of “willful acquisition or maintenance” has variously been described as “exclusionary,”¹⁸⁸ “predatory,”¹⁸⁹ and

180. Cho, *supra* note 151, at A19 (revealing that, after the bailout, large banks had a 0.34% interest rate advantage over small banks, up from a 0.08% advantage in 2009, and that large banks raised their deposit fees 8%, while small banks had to lower their fees 12% to be competitive).

181. *Failed Bank List*, *supra* note 167.

182. Cho, *supra* note 151, at A19.

183. *Id.*

184. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

185. *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1118 (2009).

186. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 407 (2004).

187. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) (noting that unlawful monopolist behavior is not based in efficiency).

188. *Pac. Bell Tel. Co.*, 129 S. Ct. at 1120; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Aspen Skiing Co.*, 472 U.S. at 602–03.

“anticompetitive.”¹⁹⁰ Specifically, it is “behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”¹⁹¹ A firm does not further competition on the merits when its actions are predicated on some basis other than efficiency.¹⁹²

Examples of the type of conduct that have met these requirements in the past include “below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses”;¹⁹³ “limited circumstances in which a firm’s unilateral refusal to deal with its rivals can give rise to antitrust liability”;¹⁹⁴ tying arrangements where a firm requires a customer to purchase a tied product in order to purchase the tying product;¹⁹⁵ fraudulent patent procurement;¹⁹⁶ acquisition of competitors;¹⁹⁷ and restrictive agreements.¹⁹⁸ These examples are illustrative and do not create an exhaustive list; rather, industries employ a myriad of anticompetitive conduct.¹⁹⁹

On the other hand, the Supreme Court has not found illicit conduct when facts indicated price cuts that were not below costs and were used by the company merely to increase business.²⁰⁰ Further, in price-cutting cases, the Court has expressed concern regarding overzealous antitrust enforcement that could chill competition²⁰¹ and harm consumers who benefit from the lower

189. *Brooke Group*, 509 U.S., at 222–24; *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *Aspen Skiing Co.*, 472 U.S. at 602.

190. *Aspen Skiing Co.*, 472 U.S. at 602.

191. *Id.* at 604 (quoting 3 AREEDA & HOVENKAMP, *supra* note 43, § 651b, at 76–77).

192. *See id.* at 602–03 (citing ROBERT BORK, *THE ANTITRUST PARADOX* 160 (1978)) (noting that anticompetitive behavior and improper exclusion is intended to create a monopoly).

193. *Pac. Bell Tel. Co.*, 129 S. Ct. at 1118 (citing *Brooke Group, Ltd.*, 509 U.S. at 222–24).

194. *Id.* (citing *Aspen Skiing Co.*, 472 U.S. at 608–11).

195. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482–83 (1992) (holding that the issue of whether Kodak engaged in monopolistic behavior when it limited private-service companies’ access to replacement parts turned on whether Kodak had valid business justifications for its activity).

196. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177–78 (1965) (concerning allegations that a company misrepresented facts in an attempt to gain a patent).

197. *See Standard Oil Co. v. United States*, 221 U.S. 1, 75 (1911) (discussing whether a monopoly existed as a result of corporate combinations and stock transfers).

198. *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (considering restrictive agreements that preempted competition as a factor in determining whether a monopoly existed).

199. *Verizon Comm’n’s, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 414 (2004) (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (*per curiam*)).

200. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (discussing how cutting prices is a common way to increase business and is at the core of competition).

201. *See id.* (“[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.” (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (internal citation marks omitted))); *see also Brooke Group Ltd. v. Brown & Williamson*

prices.²⁰² Additionally, the Court has been reluctant to find monopolistic conduct in cases where a firm refused to deal with its rivals, finding instead that, as a general rule, firms are free to deal with whomever they please.²⁰³ Finally, the Court has allowed tying arrangements where there is economic efficiency in selling products as a package.²⁰⁴ To summarize, courts will not “act as central planners, identifying the proper price, quantity, and other terms of dealing.”²⁰⁵ They will, however, intercede when the conduct is predicated on an economically meritless attempt to usurp control of a market.²⁰⁶

Evidence suggests that systemic financial-service institutions actively seek systemic status in order to obtain a government bailout if their risk taking proves to be in poor judgment.²⁰⁷ Upon achieving this status, a systemic financial-service institution can leverage at a higher ratio and take greater risks, resulting in higher profits than their nonsystemic competitors because they are not faced with the economic downside to such risks, namely bankruptcy.²⁰⁸ In a free market, innovation and risk taking is tempered by the reality of bankruptcy, creating a balanced, vibrant, rational market rather than a chaotic, irrational market.

The overarching question is: is deliberately becoming systemic efficient? The Supreme Court has equated efficiency with the theoretical possibility of pro-competitive effects.²⁰⁹ Perhaps some economists would argue the

Tobacco Corp., 509 U.S. 209, 226 (1993) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986)) (referencing the chilling effect that mistaking price cuts to increase business for predatory pricing may have on competition).

202. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (stating that low prices benefit customers and, as long as they are not predatory, do not threaten competition).

203. *Pa. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). *But see Verizon Commc'ns Inc.*, 540 U.S. at 409 (“The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.”).

204. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11–12 (1984), *superseded by statute on other grounds*, Act of Nov. 19, 1988, Pub. L. No. 100-703, § 201, 102 Stat. 4674, 4676 (codified at 35 U.S.C. § 271(d) (2006)), *as recognized in Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

205. *Verizon Commc'ns Inc.*, 540 U.S. at 408.

206. *See Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 610–11 (1988) (upholding a verdict for the plaintiff where evidence supported an inference that the defendant was not motivated by efficiency and was willing to sacrifice profits in order to push out the competitor).

207. *See JOHNSON & KWAK, supra* note 2, at 202–04 (asserting that private institutions will seek to hold wider economic interests hostage to increase their chances of bailout).

208. *Id.* at 193.

209. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–94 (2007) (citing authorities noting instances of businesses that use resale price management for purposes of efficiency and not to gain or establish a monopoly).

efficiencies of systemic financial-service institutions, but, to date, most argue the opposite.²¹⁰

Economies of scale could be efficient for antitrust purposes,²¹¹ as could marketing²¹² and distribution efficiencies.²¹³ But all of these “efficiencies” seem to be premised on a theory of free enterprise—a free market theory that aims to minimize government intervention.²¹⁴ In contrast, systemic financial-service institutions seek government intervention through bailouts, a contradiction of the free-market theory.²¹⁵ Because antitrust enforcement is also government intervention, the ultimate question becomes: which form of government intervention is more efficient—bailouts or antitrust enforcement?

In balancing efficiencies between bailouts and antitrust enforcement, Judge Learned Hand’s negligence formula is instructive. Negligence exists if the burden of preventing a harm (B) is less than the probability that an actor’s conduct will result in injury (P), multiplied by the gravity of that injury (L); accordingly, negligence exists if $B < PL$.²¹⁶ As applied to financial reform, efficiency exists if the burden of eliminating a systemic financial-service institution (B) is less than the probability (P) of systemic financial failure (L). It follows that, even if the probability of systemic financial failure can be lowered by managing systemic financial-service institutions, the harm may remain unacceptable relative to the burden of eliminating systemic financial-service institutions through divestiture. In other words, a systemic financial-service institution may be so risky, eliminating—rather than managing—it may be prudent.

210. See, e.g., JOHNSON & KWAK, *supra* note 2, at 211–13 (arguing that there is no empirical evidence to support the conclusion that big banks are efficient and that much of what big-bank proponents note to be efficiencies can be achieved by smaller financial institutions); POSNER, A FAILURE OF CAPITALISM, *supra* note 2, at 128–29 (arguing that the efficiency of big banks borrowing short term and lending long term actually creates instability in financial institutions, and, though perhaps less immediately profitable, long-term borrowing is more economically beneficial); Boyer, *supra* note 154, at 245 (arguing that, despite all the business reforms, such as cutting services at branches to increase online banking, large banks did not perform as well as smaller banks).

211. *FTC v. Procter Gamble Co.*, 386 U.S. 568, 588 (1967) (Harlan, J., concurring); LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 74, at 200 (1977).

212. See *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 n.23 (1977) (“Marketing efficiency is not the only legitimate reason for a manufacturer’s desire to exert control over the manner in which his products are sold and received.”).

213. See *id.* at 54–56 (discussing the efficiency and general practice of product distribution).

214. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 464 (10th ed. 1997) (defining “free enterprise” as “freedom of private business to organize and operate for profit in a competitive system without interference by government beyond regulation necessary to protect public interest and keep the national economy in balance”).

215. See JOHNSON & KWAK, *supra* note 2, at 193 (theorizing that megabanks take greater risks because they know the government will intervene to prevent a major market failure).

216. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Aspects of Judge Hand’s formula are represented in the *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS § 293 (1965).

IV. ANTITRUST AND IMPLIED IMMUNITY IN REGULATED INDUSTRIES

In certain arenas, such as the insurance industry, Congress provides express immunity from antitrust laws.²¹⁷ In other regulated industries, Congress expressly preserves antitrust enforcement.²¹⁸ But, when legislation is silent on the immunity issue or merely provides a general savings clause, the courts have to consider the issue of implied immunity.²¹⁹ Until recently, the possibility of implied immunity from antitrust laws for regulated industries was of little concern.²²⁰ The Supreme Court stated the following in *Gordon v. New York Stock Exchange*, a case involving securities law: “Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a ‘plain repugnancy between the antitrust and regulatory provisions’ will repeal be implied.”²²¹

However, the Court relaxed the “plain repugnancy” standard in the more recent decision of *Credit Suisse Securities (USA) L.L.C. v. Billing*.²²²

In *Credit Suisse*, the Court again addressed the issue of implied antitrust immunity in the context of securities law.²²³ The Securities Act of 1933 had a general savings clause,²²⁴ but no clause expressly saving antitrust law.²²⁵ The Court, using an implied immunity analysis, applied a four-part test:

- (1) an area of conduct squarely within the heartland of securities regulations;
 - (2) clear and adequate SEC authority to regulate;
 - (3) active and ongoing agency regulation; and
 - (4) a serious conflict between the antitrust and regulatory regimes.
- We therefore conclude that the securities laws are “clearly incompatible” with the application of the antitrust laws in this context.²²⁶

Some suggest that the change in language from *Gordon*’s “plain repugnancy” test to *Credit Suisse*’s “clearly incompatible” test reflects a broader approach by the Court regarding implied immunity, permitting an expanding application of antitrust immunity in cases involving securities

217. See McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (2006).

218. See *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, L.L.P.*, 540 U.S. 398, 406–07 (2004) (noting that the Telecommunications Act of 1996 “preserves claims that satisfy existing antitrust standards”).

219. *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 551 U.S. 264, 271 (2007).

220. See *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682–83 (1975) (discussing a line of Supreme Court opinions recognizing that antitrust immunity is granted in very limited circumstances).

221. *Id.* at 682 (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 351 (1963)).

222. 551 U.S. at 275–76.

223. See *id.* at 267–68.

224. 15 U.S.C. § 77p(a) (2006).

225. *Credit Suisse Sec. (USA) L.L.C.*, 551 U.S. at 288 (Thomas, J., dissenting).

226. *Id.* at 285 (majority opinion).

laws.²²⁷ After this, it remains to be answered whether the Court would extend the *Credit Suisse* test to banking law.

It is possible that banking law would continue to be governed by the “plain repugnancy” standard the Court set forth in *Philadelphia National Bank*: “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”²²⁸ However, this would lead to the application of different standards depending on the regulated industry in question—implied immunity on the basis of a “clearly incompatible” test would be applied in securities law, and implied immunity on the basis of “plain repugnancy” would be applied in the banking sector.²²⁹ The “plain repugnancy” test is easy to apply and rather predictable; if the industry is regulated, implied immunity from antitrust law will still be disfavored.²³⁰

Alternatively, and perhaps more likely, courts will apply the more expansive “clearly incompatible” implied-immunity test—that is, the test more likely to find implied immunity—to all regulated industries.²³¹ However, because it has become apparent that the lack of regulatory oversight significantly contributed to the current financial crisis,²³² specifically given recent public disclosures about the Securities and Exchange Commission’s lack of oversight,²³³ courts should, at the very least, critically review the application of the second and third prongs of the *Credit Suisse* test: “(2) clear and adequate [regulatory

227. See Stacey Sheely Chubbuck, Note, *Securities Law and Antitrust Law: Two Legal Titans Clash Before the United States Supreme Court in Credit Suisse Securities v. Billing*, 62 OKLA. L. REV. 145, 164–65 (2009) (arguing that, as a result of the more expansive *Credit Suisse* holding, “implied immunity could extend to any activity ruled to be within the ‘heartland’ of securities regulations”).

228. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 350–51 (1963).

229. See Justin Lacour, Note, *Unclear Repugnancy: Antitrust Immunity in Securities Markets After Credit Suisse Securities (USA) L.L.C. v. Billing*, 82 ST. JOHN’S L. REV. 1115, 1117–21 (2008) (arguing that, as a result of the Court’s new approach to implied immunity in *Credit Suisse*, there is no clear standard, which could lead to different results).

230. *Phila. Nat’l Bank*, 374 U.S. at 350–51.

231. See Bruce H. Schneider, *Credit Suisse Securities v. Billing and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L.J. 833, 833, 840–41 (2007) (arguing that the *Credit Suisse* approach is applicable to other industries and finding it likely that mortgage lenders have implied antitrust immunity because that industry is heavily regulated).

232. See POSNER, A FAILURE OF CAPITALISM, *supra* note 2, at 46 (describing the banking industry as “largely unregulated,” a factor that contributed to the 2008 financial crisis).

233. James Gordon Meek, *SEC Porn Scandal: Political Payback for Fraud Suit Against Goldman Sachs?*, DAILY NEWS (Apr. 24, 2010, 4:00 AM), http://www.dailynews.com/news/national/2010/04/24/2010-04-24_sec_porn_proble_just_payback.html (implying that the SEC pornography scandal reemerged in the public eye as a result of the SEC’s decision to pursue a fraud suit against Goldman Sachs); Ed O’Keefe, *SEC Porn Scandal Results in Zero Firings, Agency Said*, WASH. POST (Apr. 27, 2010, 8:37 PM), http://voices.washingtonpost.com/federal-eye/2010/04/new_sec_porn_bust_details_rele_1.html (revealing that several SEC employees used work time to view pornography instead of overseeing the securities industry).

agency] authority to regulate [and] (3) active and ongoing agency regulation.”²³⁴

The Dodd-Frank Wall Street Reform and Consumer Protection Act has an antitrust-specific savings clause,²³⁵ thus a court could not find implied immunity.²³⁶ Systemic financial-service institutions that fall under the provisions of this Act would, therefore, not be entitled to express or implied immunity.²³⁷ That said, the Supreme Court held that in regulated industries, where the regulatory structure is designed to address anticompetitive harm, the benefits of applying antitrust law will be small, even when Congress has expressly preserved the application of antitrust laws.²³⁸ A discussion of the issues associated with this quasi-implied immunity follows.

V. PROBLEMS WITH APPLYING SHERMAN § 2 TO SYSTEMIC FINANCIAL-SERVICE INSTITUTIONS

There are several problems with applying § 2 of the Sherman Act to systemic financial-service institutions. First, there is the general issue of whether § 2 is applicable to systemic financial-service institutions.²³⁹ As discussed in Parts II and IV, § 2 applies to these institutions,²⁴⁰ though there are certainly those who disagree.²⁴¹ Regardless, there are many remaining problems, including quasi-implied immunity, cyclical government enforcement, a lack of judicial understanding of the economic theories underlying antitrust law and the financial services sector, the expense of litigation in antitrust cases, the additional social burdens to the economy if an action has a negative impact on the economy, and the burden created if the government requires systemic financial-service institutions to divest and thus become too small to compete against unregulated foreign systemic financial-service institutions.

234. *Credit Suisse Sec. (USA) L.L.C. v. Billing*, 551 U.S. 264, 285 (2007).

235. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 6, 124 Stat. 1376, 1390–91 (2010) (to be codified at 12 U.S.C. § 5303).

236. *Cf. Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, L.L.P.*, 540 U.S. 398, 406 (2004) (finding that the antitrust-specific savings clause of the Telecommunications Act of 1996 barred a finding of implied immunity).

237. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 6, 124 Stat. at 1390–91.

238. *Verizon Commc'ns Inc.*, 540 U.S. at 412.

239. *See supra* Parts II–III.

240. *See supra* Parts II–III.

241. *See* Rosch, *supra* note 71, at 8–9 (acknowledging the debate about whether antitrust law should apply to “too big to fail” institutions); *see also* Lawrence J. White, *Financial Regulation and the Current Crisis: A Guide for the Antitrust Community* 39–40 (June 11, 2009) (unpublished manuscript), available at <http://www.ssrn.com/abstract=1426188> (arguing that size is an issue for many “too big to fail” institutions, and therefore antitrust issues, which concern market power, generally do not apply).

A. Quasi-Implied Immunity

When the courts deal with a regulated industry in an antitrust case, there is a reluctance to intervene, especially if the courts are asked to expand application of § 2 of the Sherman Act. The Supreme Court recognized in *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, L.L.P.* that, generally, when deciding antitrust cases, the Court considers the level of federal and state regulation of the industry, the “distinctive economic and legal setting of the regulated industry,” and whether the regulatory structure is designed to “deter and remedy anticompetitive harm.”²⁴² In particular, the Court noted that, where such a regulatory structure exists, “the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.”²⁴³ Such a regulatory context is probative of implied immunity, but “it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.”²⁴⁴ Of course, the simple answer to the Court’s reservation about intervening in such circumstances is that Congress, not the judiciary, should decide if there is to be antitrust immunity. This is particularly true in cases where the applicable statute has a specific antitrust savings clause.

More problematic is the question of what courts should do when faced with a regulatory structure that is ostensibly designed to deter and remedy anticompetitive harm but that is, in fact, impotent due to certain regulatory issues, such as regulatory capture, regulatory cycles, regulatory arbitrage, or dysfunctional regulatory oversight.²⁴⁵ When such factors are present, the benefit of antitrust enforcement may be extensive, and the application of antitrust quasi-immunity would undermine competition and the free market. Indeed, it seems Congress anticipated these regulatory problems in legislation where it incorporated an antitrust-specific savings clause.²⁴⁶

B. Cyclical Government Enforcement

Antitrust actions brought by the government, specifically by the Department of Justice or the Federal Trade Commission, are sporadic at best. Data on § 2 of the Sherman Act reveals a paucity of § 2 actions:

242. *Verizon Commc’ns Inc.*, 540 U.S. 411–12.

243. *Id.* at 412.

244. *Id.*

245. *See supra* Part VII.

246. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 6, 124 Stat. 1376, 1390–91 (to be codified at 12 U.S.C. § 1503).

Table 1. DOJ Investigations²⁴⁷

TOTAL INVESTIGATIONS INITIATED	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Sherman § 2 Monopoly	10	10	13	11	7	8	3	6	0	7

Table 2. DOJ District Court Antitrust Cases²⁴⁸

CIVIL ACTIONS REGARDING SHERMAN ACT § 2	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Filed	1	0	0	0	0	0	0	0	0	0
Terminated	0	0	0	0	1	0	2	1	0	0
Won	0	0	0	0	0	0	0	1	0	0
Lost	0	0	0	0	1	0	1	0	0	0
Dismissed	0	0	0	0	0	0	1	0	0	0

Table 3. FTC Non-Merger Enforcement Actions²⁴⁹

FISCAL YEAR	PART 2 CONSENTS	FEDERAL INJUNCTIONS	PART 3 ADMINISTRATIVE COMPLAINTS	TOTAL NON-MERGER ENFORCEMENT ACTIONS	ORDER VIOLATIONS
2010	5	—	2	7	—

247. *Antitrust Division Workload Statistics*, U.S. DEP'T OF JUSTICE: ANTITRUST DIV., <http://www.justice.gov/atr/public/workload-statistics.pdf> (last visited Feb. 7, 2011).

248. *Id.*

249. *FTC Competition Enforcement Database: Nonmerger Enforcement Actions*, FED. TRADE COMM'N, <http://www.ftc.gov/bc/caselist/nonmerger/index.shtml> (last modified Nov. 30, 2010).

2009	6	1	—	7	—
2008	3	1	—	4	—
2007	9	—	2	11	—
2006	5	1	—	6	—
2005	4	—	—	4	—
2004	7	1	1	9	—
2003	16	—	7	23	—
2002	8	—	1	9	—
2001	1	—	2	3	—
2000	8	—	1	9	—
1999	4	1	—	5	—
1998	10	—	2	12	—
1997	2	1	1	4	—
1996	5	—	1	6	—
TOTAL	93	6	20	119	—

The data above suggest an unwillingness on the part of government enforcement agencies to bring monopolization cases. This is further supported by a lack of commitment from the Department of Justice, Antitrust Division to investigate monopolization issues relating to systemic financial-service institutions.²⁵⁰ Antitrust enforcement may be cyclical, depending on factors such as antitrust legislation and economic productivity;²⁵¹ currently, the government appears to be in a period of nonenforcement. But, despite this problem of cyclical nonenforcement of antitrust laws, § 2 of the Sherman Act is enforceable through private law suits.²⁵² Private suits may serve to mitigate periods experiencing a lack of government enforcement.²⁵³

250. See Peter Whoriskey, *Justice's Monopoly Guidelines Assailed: Majority of FTC Says Policy Would Weaken Enforcement*, WASH. POST, Sept. 9, 2008, at D1 (“The Justice Department issued a report yesterday establishing how and when it will crack down on misbehaving monopolies, but its approach was immediately assailed as too lax and the work of an administration willing to allow big business to run roughshod over consumers.”).

251. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1175–76 (2008) (providing evidence that antitrust-enforcement cycles are affected by new antitrust legislation and economic productivity).

252. Sherman Antitrust Act, 15 U.S.C. § 15(a) (2006).

253. *But see* Lambert & Wright, *supra* note 174, at 228–30 (discussing the short falls of private actions concerning § 2 of the Sherman Act).

C. Lack of Judicial Understanding of the Economic Theories Underlying Antitrust Law and the Financial Services Sector

There is some concern that courts do not fully understand the economic theories underlying antitrust law and other economic theories affecting the financial-services sector.²⁵⁴ This lack of comprehension could produce false positives—a finding of anticompetitive practices when there are none—thereby exacerbating the problem. However, antitrust economic theory does not have a monopoly on this argument, as some also argue that courts do not understand the technology involved in Internet cases.²⁵⁵ Regardless, courts continue to address complex legal issues, which is preferable to ignoring the applicable law because of its overall complexity. Though courts have made, and will continue to make, mistakes, the legal system in the United States is designed to remedy these errors through the appellate and legislative processes.²⁵⁶

D. Litigation in Antitrust Cases is Often Expensive

There is no dispute that antitrust litigation is often expensive.²⁵⁷ As a practical matter, this expense reduces the number of private antitrust cases and can have a devastating impact on a business sued for antitrust violations. Even so, the legal system is not without tools to mitigate some of the expense.

254. See *Basic Inc. v. Levinson*, 485 U.S. 224, 252–54 (1988) (White, J., dissenting) (analyzing the inherent dangers and confusion that arise when courts take on advanced economic theory); *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 609–10 (1972) (“[C]ourts are of limited utility in examining difficult economic problems.”); Rudolph J.R. Peritz, *Toward a Dynamic Antitrust Analysis of Strategic Market Behavior*, 47 N.Y.L. SCH. L. REV. 101, 113 (2003) (arguing that most courts are hesitant to apply *Eastman Kodak Co. v. Image Technical Servs., Inc.* because “judges do not understand the likelihood of harm to consumers that can result from aftermarket strategies”); Lisa C. Wood, *Court-Appointed Independent Experts: A Litigator’s Critique*, ANTITRUST, Spring 2007, at 91, 92 (noting that the need for court-appointed experts is driven by many judges’ inability to understand complex economic issues arising in antitrust law).

255. See LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, UCLA J.L. & TECH., Spring 2002, at 1, 1–3 (2002), available at http://www.lawtechjournal.com/articles/2002/01_0203_09_Kondo.pdf (“[T]he judicial system has been perplexed in the face of the extraordinary and unique complexities introduced by novel technologies and scientific breakthroughs.”).

256. Makan Delrahim, *Maintaining Flexibility in Antitrust Analysis: Meeting the Challenge of Innovation in the Media and Entertainment Industries*, 28 COLUM. J.L. & ARTS 343, 357 (2005) (recognizing that the American legal system is designed to learn from mistakes and adapt to better handle complex technological and economic issues in the future).

257. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (acknowledging the expense of antitrust litigation); *S. Austin Coalition Community v. SBC Commc’ns. Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (noting the expense of antitrust litigation); see also Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1211 (1988) (noting “Judge [Frank H.] Easterbrook’s concern that courts cannot accurately, consistently, and *inexpensively* apply their preferred economic theories” regarding antitrust law (emphasis added)).

Although discovery has been cited as the main expense in antitrust litigation,²⁵⁸ courts have the power to limit discovery²⁵⁹ and assess sanctions for frivolous-discovery tactics.²⁶⁰ Likewise, courts have significant authority to reduce some of the expenses associated with antitrust litigation by setting discovery and motion cut-off deadlines and the trial date.²⁶¹

E. The Additional Social Burdens to the Economy if Antitrust Actions Have a Negative Economic Effect

There is concern that antitrust enforcement will worsen the economic crisis.²⁶² This is particularly prevalent with regard to the divestiture of systemic financial-service institutions as some government officials advocate that maintaining systemic financial-service institutions is in the best interest of the economy.²⁶³ Breaking up big banks through antitrust law may possibly

258. *Bell Atl. Corp.*, 550 U.S. at 558–59 (2007) (citing several sources that emphasize the high cost of discovery in antitrust litigation).

259. FED. R. CIV. P. 26(b)(2).

260. FED. R. CIV. P. 37.

261. *Bell Atl. Corp.*, 550 U.S. at 593 n.13 (Stevens, J., dissenting) (referencing various federal rules of civil procedure that authorize the courts to control pretrial proceedings). *But see id.* at 560 n.6 (majority opinion) (indicating the probability of ineffective judicial supervision and the importance of discovery in establishing the relevant facts of the case).

262. See John D. Harkrider, *Lessons from the Great Depression*, ANTITRUST, Spring 2009, at 6, 9–10 (identifying a tendency to relax antitrust enforcement during economic crises and arguing that antitrust enforcement must be more vigilant in hard times); Jim Wilson, *From the Section Chair*, ANTITRUST, Summer 2009, at 3, 3 (citing Carl Shapiro, Deputy Assistant Attorney Gen. for Econ., Antitrust Div., U.S. Dep’t of Justice, Competition as Public Policy, Remarks at the ABA Antitrust Symposium (May 13, 2009), available at <http://www.justice.gov/atr/public/speeches/245857.htm> (noting the need to continue to protect the principles of competition even in tough economic times).

263. Zach Carter, *Larry Summers Is Lying About Big Banks*, HUFFINGTON POST (Apr. 26, 2010, 10:01 AM), http://www.huffingtonpost.com/zach-carter/larr-summers-is-lying-ab_b_551699.html (criticizing as wrong a statement President Obama’s top economic adviser, Larry Summers, made stating that breaking up the big banks would jeopardize today’s economy); Simon Johnson, *The Consensus on Big Banks Shifts, But Not at Treasury*, HUFFINGTON POST (May 30, 2010, 8:03 PM), http://www.huffingtonpost.com/simon-johnson/the-consensus-on-big-bank_b_594980.html (reporting that international bodies and foreign governments are shifting to the view that large banks are too dangerous and need to be split up, though the U.S. government’s position supporting large banks has not changed); see *Geithner: Banks with “Privilege” of Borrowing from U.S. Must Limit Risk*, PBS NEWSHOUR (Jan. 10, 2010), http://www.pbs.org/newshour/bb/business/jan-june10/banks_01-21.html (indicating the government’s unwillingness to state that big banks need to be broken up); *Summers: Bank Reforms Would Halt “Too Big to Fail” Mentality*, PBS NEWSHOUR (Apr. 22, 2010), http://www.pbs.org/newshour/bb/business/jan-june2010/summers_04-22.html (explaining that breaking up big banks could lead to the failure of many small institutions, which would require more bailouts and reliance on taxpayers).

reap economic havoc;²⁶⁴ however merely managing systemic financial-service institutions may prolong the recession, result in repeat cataclysmic cycles, or create a need for more bailouts.²⁶⁵ The bottom line is that economists do not know what will happen, no matter which road the government takes.²⁶⁶ However, history teaches something about antitrust enforcement in an economic crisis: that the path to economic recovery in fact may be the less-traveled path of antitrust enforcement.

Significant evidence exists that supports the observation that, during the Great Depression, the Roosevelt administration initially tried to protect big business with the National Industrial Recovery Act (NIRA).²⁶⁷ The premise was that centralized planning with “codes of fair competition” would set prices, wages, and production quotas, and would restrict entry into the various markets.²⁶⁸ Competition principles were set aside under the industry-advanced theory that too much competition was bad for the economy.²⁶⁹ The experiment failed, and the economy continued its malaise.²⁷⁰ In 1937, after the Supreme Court declared major components of the NIRA unconstitutional,²⁷¹ Roosevelt changed tactics when he unleashed the antitrust kraken.²⁷² Some attribute the vigorous enforcement of antitrust laws from 1937 to 1943 as the reason the

264. *Summers: Bank Reforms Would Halt “Too Big to Fail” Mentality*, *supra* note 263 (noting that some observers believe breaking up big banks would make the country less stable and would put banks “at greater risk of failing”).

265. See Simon Johnson, *Richard Fisher, Senior Fed Official: White House Is Dead Wrong*, HUFFINGTON POST (June 6, 2010, 9:35 PM), http://www.huffingtonpost.com/simon-johnson/richard-fisher-senior-fed_b_602386.html (“[R]elying on regulation alone is unwise and most definitely the triumph of hope over experience.”).

266. See *Systemic Risk: Are Some Institutions Too Big to Fail and If So, What Should We Do About It?: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 5–15 (2009) (showing conflicting testimony regarding financial reform).

267. David J. Saylor, *Recent Federal Antitrust and DOJ/FTC Law Enforcement Developments that May Affect Communications Policy, Including Bundling of Video Programming Channels in Tiers, Single Firm Conduct (Including Conduct Involving Essential Facilities), and Media, Telecoms, and Broadband-Related Mergers*, in BROADBAND AND CABLE INDUSTRY LAW 613, 676–77 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 22634, 2010), WL 994 PLI/Pat 613 (noting that, at the beginning of the Great Depression, legislation was passed that “effectively foreclosed competition”).

268. *Id.* at 677.

269. See *id.*

270. *Id.* (“These codes of fair competition . . . resulted in restricted output, higher prices, and reduced consumer purchasing power.”).

271. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

272. Saylor, *supra* note 267, at 677 (noting the increase in antitrust enforcement from 1937 to 1939); see also Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 379 (1995) (indicating that the elimination of the NIRA’s ability to permit group empowerment and control after the Supreme Court declared that delegation of sovereign power to private groups was unconstitutional); Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN’S L. REV. 569, 573 (2004) (discussing the Supreme Court’s declaration that the NIRA was unconstitutional in 1935).

United States pulled out of the Great Depression.²⁷³ This attribution goes too far, however, because it is likely that many other factors contributed to the economic turnaround. Still, it appears that enforcement of antitrust laws during an economic crisis helped, rather than harmed, the economy.²⁷⁴

True, the Supreme Court expressed concern over the economic impact of a false positive,²⁷⁵ but, to date, courts have not refused to apply antitrust laws based solely on a fear of a possible negative economic impact.²⁷⁶ Indeed, the Court has specifically rejected the argument of violating antitrust laws for a perceived economic good:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.²⁷⁷

Accordingly, the application of antitrust principles in an economic crisis warrants fair consideration.

F. Too Small to Compete with Foreign Systemic Financial-Service Institutions

A major factor contributing to the deregulation of the financial-services sector was concern about foreign competition.²⁷⁸ This concern continues to

273. Saylor, *supra* note 267, at 676–78 (noting that strict antitrust enforcement from 1938 to 1943 was “a cornerstone of the New Deal’s economic agenda and a part of that era’s legacy for modern economic policy”).

274. See Kamp, *supra* note 272, at 382 (indicating that shortly after President Roosevelt abandoned the idea of a business commonwealth and “flirted with Keynesianism and a vigorous antitrust program,” the Depression era ended); William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 4 (1995) (referencing the importance of antitrust principles during the second New Deal); Saylor, *supra* note 267, at 676–78 (indicating the importance of “vigorous antitrust enforcement”); Waller, *supra* note 272, at 588–94 (exploring several antitrust cases that were brought against large and small industries during the depression, each strictly applying antitrust policy); Harkrider, *supra* note 262, at 9–10 (opining that antitrust enforcement is more important in bad economic times than in good).

275. *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko, L.L.P.*, 540 U.S. 398, 414 (2004) (“The cost of false positives counsels against an undue expansion of § 2 liability.”).

276. See *id.* at 414–15 (explaining the difficulty of evaluating the allegations of antitrust violations without the problem of “false positives”).

277. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

278. See H. JOURNAL, 105th Cong., 2d Sess. 2788 (1998) (summarizing legislation aimed to “enhance competition in the financial services industry by providing a prudential framework for

arise in legislation aimed at reregulating the financial-services sector.²⁷⁹ Simply put, the problematic issue is: would it be wise economic policy to break up U.S. systemic financial-service institutions when foreign competitors are not similarly constrained?²⁸⁰

As a policy matter, a balance should be considered with regard to foreign competition. Foreign systemic financial-service institutions may have a competitive advantage over domestic nonsystemic financial-service institutions in the short term. However, it could be argued that such advantage is nothing more than a government subsidy that could be addressed under international law through the World Trade Organization.²⁸¹ As for the long term, the benefits of eliminating systemic financial-service institutions in the United States far outweigh the consequences of short-term detriments resulting from temporary foreign competitive-advantages. One benefit is the preservation of economic freedom in a free-enterprise system, which is guarded by antitrust law.

VI. REREGULATION TO MANAGE SYSTEMIC FINANCIAL-SERVICE INSTITUTIONS

The United States has experienced regulatory problems in the recent and remote past, and there is no reason to believe that, over time, these problems will not arise again. As William Faulkner said: “The past is never dead. It’s not even past.”²⁸² Granted, there is ongoing discussion regarding how to avoid these pitfalls, but current proposals inadequately address the fact that some of

the affiliation of banks, securities firms, and other financial service providers, and for other purposes”); Jennifer Manvell Jeannot, *An International Perspective on Domestic Banking Reform: Could the European Union’s Second Banking Directive Revolutionize the Way the U.S. Regulates Its Own Financial Service Industry*, 14 AM. U. INT’L L. REV. 1715, 1717–18 (1999) (suggesting that the globalization of the banking industry may place the American domestic banking-system at a disadvantage); Press Release, Office of Public Affairs, U.S. Dep’t of the Treasury, Treasury Secretary Lawrence H. Summers Testimony Before the Joint Senate Committee on Agriculture, Nutrition and Forestry and Banking, Housing and Urban Affairs (June 21, 2000), available at <http://www.treasury.gov/press-center/press-releases/Pages/ls722.aspx> (“While the current framework here in the U.S. remains outdated, markets overseas are developing in a legal and regulatory environment that allows greater efficiency and transparency.”).

279. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 173, 124 Stat. 1376, 1440 (2010) (to be codified at 12 U.S.C. § 3105 and 15 U.S.C. § 780).

280. For a discussion of United States antitrust issues with regard to the international arena, see generally Sharon E. Foster, *Too Big to Fail—Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law but Such a Solution Will Only Work If It Is Applied on an International Basis*, 22 FLA. J. INT’L L. 31 (2010).

281. JOHNSON & KWAK, *supra* note 2, at 218.

282. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

these problems, such as regulatory arbitrage, are increasing.²⁸³ As such, the idea that domestic regulation can correct this problem requires a leap of faith.

Although much may be achieved through regulation, it is hubris to believe that regulatory reform alone will solve the current problems. Solutions to the problems of regulatory capture, regulatory cycles, regulatory arbitrage, and dysfunctional regulatory oversight have yet to be articulated in financial regulatory reform legislation. If the financial crisis of 2008 revealed anything, it is that regulation is subject to dilution with the passage of time and with the perception that the problems of the past have been fixed.²⁸⁴ Simply put, reregulation of financial services will not eliminate systemic risk if it does not eliminate systemic financial-service institutions.²⁸⁵ Accordingly, the country still faces the probability that bailouts of systemic financial service institutions will be necessary in the future.²⁸⁶

So as to not rest economic prosperity on a hope and a prayer, systemic risk should be eliminated. Without systemic financial-service institutions, free-market principles would prevail because less government intervention would be required. Of course, “[a]ntitrust enforcement is a form of government regulation,”²⁸⁷ but it presents a choice between the lesser of the two evils—either more or less government intervention. Because a complete absence of government intervention in the market is not an option in the foreseeable future, as the government will certainly intervene to avoid systemic financial failure, antitrust law may provide a valuable tool to minimize government intervention and maximize free markets.

283. Shahien Nasiripour, *Fed's Kocherlakota: Financial Reform Bill Can't End Bailouts or 'Too Big to Fail'*, HUFFINGTON POST (May 10, 2010, 5:21 PM), http://www.huffingtonpost.com/2010/05/10/feds-kocherlakota-finance_n_570689.html (referencing federal officials who admit that the objectives of financial reform cannot solve or prevent a financial crisis).

284. Arguing for the deregulation of the U.S. financial-services sector in 1987, Citicorp vice-chairman Thomas Theobald “identify[ed] the three alleged checks on corporate misconduct as a ‘very effective’ Securities and Exchange Commission, knowledgeable investors and ‘very sophisticated’ rating agencies.” Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap*, 53 FED. COMM. L.J. 489, 547 n.266 (2004). In the current economic crisis, all three of these “outside checks” have proven fatally defective.

285. Narayana Kocherlakota, President, Fed. Reserve Bank of Minn., *Taxing Risk*, Remarks at the Economic Club of Minnesota 4 (May 10, 2010), *available at* http://www.minneapolisfed.org/news_events/pres/kocherlakota_speech_07072010.pdf (arguing that governments cannot risk the collapse of systemic financial-service institutions and will bail them out no matter how resolved the government is to allow the institutions to fail).

286. *Id.* at 4, 10.

287. Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 578 (1979).

A. Regulatory Capture

Regulatory capture occurs when regulatory agencies are “dominated by the industries” that they regulate.²⁸⁸ Where there is regulatory capture, “the regulator acts primarily in the interests of the regulatees.”²⁸⁹ The financial crisis of 2008 exemplifies the consequences of regulatory capture.²⁹⁰ Unfortunately, nothing in recent financial-regulation legislation addresses this concern.²⁹¹ Without such legislation, one way to deter regulatory capture is to allow private rights of action for the enforcement and interpretation of regulatory statutes.²⁹² If regulators were not inclined to regulate, private citizens could seek redress in the courts.

B. Regulatory Cycles

Regulatory enforcement depends on the political climate. Because of this, strong support for regulations today may merely be waning support tomorrow.²⁹³ Regulatory oversight simply will not function properly in a deregulatory environment with insufficient resources, resulting in de facto deregulation.²⁹⁴ Nothing in the Dodd-Frank Wall Street Reform and Consumer Protection Act addresses changing political climate and resultant regulatory cycles.²⁹⁵ Political philosophies and new economic realities should be allowed to evolve and adapt to new circumstances. That said, the deregulatory cycle is

288. *Economics A–Z*, THE ECONOMIST, <http://www.economist.com/research/economics/alphabetic.cfm?letter=R> (last visited Feb. 7, 2011).

289. Daniel C. Hardy, *Regulatory Capture in Banking 3* (Int’l Monetary Fund, Working Paper No. 06/34, 2006).

290. JOHNSON & KWAK, *supra* note 2, at 92–104, 118, 207.

291. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C.).

292. *See* R. Preston McAfee & Nicholas A. Vakkur, *The Strategic Abuse of Antitrust Law*, 1 J. STRATEGIC MGMT. EDUC. 1, 3–4 (2004), available at <http://www.mcafee.cc/Papers/PDF/strategicantitrust.pdf> (proposing the use of private claims against firms to deter antitrust violations). *But see* William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 263–64 (1985) (noting abuses of the antitrust system, including abuses by private suits); William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 412–13 (1985) (questioning private actions for antitrust enforcement).

293. *See* POSNER, A FAILURE OF CAPITALISM, *supra* note 2, at 236, 242–43, 248 (tracing trends of regulation and deregulation in American history); Foster, *supra* note 280, at 36–50 (discussing the cycle of regulation, deregulation, and reregulation).

294. *See* Foster, *supra* note 280, at 41–43 (discussing the “de facto deregulatory cycle” that existed in the 1980s).

295. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (failing to directly address changes in regulatory cycles due to the political climate).

often followed by a negative disruption to the economic system,²⁹⁶ which is then followed by reregulation. With the current emphasis on reregulation, the United States may be doomed to repeat this cycle.

C. Regulatory Arbitrage

Regulatory arbitrage is the practice of relocating operations to a state with less regulatory oversight,²⁹⁷ exploiting regulatory interagency inconsistencies within a state,²⁹⁸ or innovating to avoid regulating, such as creating new instruments not covered by the regulatory net.²⁹⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act vests the Federal Reserve with regulatory oversight functions and creates additional layers of regulation, thereby increasing the possibility of regulatory-arbitrage opportunities between layers.³⁰⁰

D. Dysfunctional Regulatory Oversight

In the ongoing autopsy of the financial crisis of 2008, it is generally undisputed that regulatory oversight was dysfunctional.³⁰¹ Regulatory agencies ignored warnings and rubber-stamped requests of the regulated³⁰² because they were understaffed³⁰³ and ill-prepared to provide meaningful oversight.³⁰⁴ Again, the Dodd-Frank Wall Street Reform and Consumer Protection Act does not adequately address this problem.³⁰⁵ Even if regulatory oversight were adequate, it would be unreasonable to rely on the expectation

296. Karsten R. Gerdrup, *Three Episodes of Financial Fragility in Norway Since the 1890s* (Bank for Int'l Settlement, Working Paper No. 142, 2003) (presenting three financial crises in Norway that represent a deregulatory cycle).

297. Nicholas Dom, *The Governance of Securities: Ponzi Finance, Regulatory Convergence, Credit Crunch*, 50 BRIT. J. CRIMINOLOGY 23, 31 (2010); Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997).

298. Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93, 116 (2008).

299. See *id.* at 96–97 (using “put-call parity” as an example of innovation in regulatory arbitrage).

300. Dodd-Frank Wall Street Reform and Consumer Protection Act, §§ 111, 152, 1011, 1101–1109, 124 Stat. at 1392–94, 1413–14, 1964–65, 2113–29.

301. See POSNER, *A FAILURE OF CAPITALISM*, *supra* note 2, at 75 (identifying “withering” regulation as one of the underlying causes of the financial crisis).

302. Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801, 825 (1999) (reviewing J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* (1997)).

303. POSNER, *A FAILURE OF CAPITALISM*, *supra* note 2, at 248 (noting that the Bush administration decreased the size of the Security and Exchange Commission).

304. *Id.* at 236 (declaring that the government’s response to the situation was “late, slow, indecisive, and poorly articulated”).

305. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (failing to directly address the functionality of regulatory agencies).

that budgets and politics would not cause a repetitive cycle of dysfunction as they have in the past.³⁰⁶

Antitrust enforcement, which would eliminate systemic financial-institutions, has the potential to reduce regulatory capture, regulatory cycles, regulatory arbitrage, and dysfunctional regulatory oversight because it provides an additional tool for addressing the problem of systemic financial-service institutions.

VII. CONCLUSION

The history and policies of antitrust law—to protect the democratic process and promote free markets—makes § 2 of the Sherman Act uniquely applicable to the problems of systemic financial-service institutions. Additionally, the theory that antitrust law should promote economic efficiency supports applying § 2 to systemic financial-service institutions. Further, this Article established that systemic financial-service institutions have monopoly power and that their conduct in deliberately seeking systemic status is improper conduct for antitrust purposes as provided in case law. Finally, there is no express or implied immunity from antitrust law for systemic financial-service institutions.

The Dodd-Frank Wall Street Reform and Consumer Protection Act resembles the wings of an ostrich: “[i]t enable[s] [us] to run, though not to soar.”³⁰⁷ As long as there is a mere attempt to manage systemic risk and not, to the extent possible, eliminate it, economic potential is limited because the free market is undermined. Although there are problems with applying § 2 of the Sherman Act to systemic financial-service institutions, any burden associated with § 2’s application is outweighed by the harm of allowing systemic financial-service institutions to continue to exist.

306. See JOHNSON & KWAK, *supra* note 2, at 11–13 (predicting the likelihood of another financial crisis occurring followed by another government bailout).

307. 1 THOMAS BABINGTON MACAULAY, *John Dryden*, THE EDINBURGH REV., Jan. 1828, reprinted in 1 THE COMPLETE WORKS OF THOMAS BABINGTON MACAULAY: CRITICAL AND HISTORICAL ESSAYS 187, 227 (Houghton, Mifflin & Co. 1900).