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SAULE T. OMAROVA & GRAHAM S. STEELE

Banking and Antitrust

ABSTRACT. Money is power. Banks have the extraordinary power to create the nation's money and credit, which they are entrusted to channel into productive economic uses. Like most other forms of economic power, this publicly granted privilege can be abused for private gain. That is why the "money monopoly" and "money trusts" were once considered one of the most dangerous forms of concentrated private wealth, an existential threat to economic freedom and American democracy. Yet, for the past half-century, the law governing banks and the law curbing monopolies have occupied doctrinally and normatively separate spaces. Today, banking law is seen predominantly as an instrument of ensuring banks' "safety and soundness," which only minimally overlaps with competition-focused antitrust law.

This Essay offers a new understanding of banking law and its connection to antitrust. It argues that, contrary to the prevailing view, U.S. bank regulation operates as a comprehensive antimonopoly regime, designed to prevent excessive concentration of private power over the supply and allocation of money and credit in a democratic economy. The Essay shows how multiple provisions of banking law impose structural constraints on banks' ability to abuse public subsidy and other government-granted powers and privileges. While often understood as serving purely prudential purposes, these statutes and regulations seek to protect America's economy from potentially perilous competitive distortions and domination by concentrated financial interests.

Reframing the core narrative of U.S. banking law around the issue of economic power in a democratic society has far-reaching implications. Embracing the embedded antimonopoly spirit of bank regulation can fundamentally reset policymakers' priorities and expand their options. It can generate more effective and comprehensive solutions to some of today's most pressing public policy challenges, from the continuing growth of "too big to fail" banks to the rise of crypto and digital platform-based finance.

AUTHORS. Saule T. Omarova is Beth and Marc Goldberg Professor of Law, Cornell University. Graham S. Steele served as the Assistant Secretary for Financial Institutions at the U.S. Department of the Treasury from 2021 to 2024. Professional affiliations are provided for identification purposes only. The views and opinions expressed in this Essay are those of the authors and do not necessarily reflect the official policy or position of any agency of the U.S. government. For their thoughtful comments and criticisms, the authors would like to thank Dan Awrey, Felix B. Chang, Adam Feibelman, Anna Gelpern, Jamie Grischkan, Jeremy Kress, Patricia A. McCoy, Howard Shelanski, Sandeep Vaheesan, Spencer Weber Waller, Art E. Wilmarth, and participants in conferences and workshops at Yale University, Vanderbilt University, the Wharton School at the

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INTRODUCTION

Antitrust is once again a hot area in U.S. law and politics.[1] The rise of Amazon, Facebook, Google, and other giants forced it out of stuffy courtrooms and academic halls and into the public square.[2] Technology platforms' aggressive growth and seemingly unlimited ability to control our social and economic lives ignited a movement to revive antitrust as a tool of democratic politics.[3] Paralleling American politics of the early twentieth century, antitrust is now the stuff of fiery campaign speeches, bestselling books, and intense doctrinal debates.[4] In the wake of a pandemic that exposed deep inequality and structural weaknesses in the nation's economy, it may also translate into substantive policy change. The Biden Administration has signaled its resolve to prioritize curbing the power of big businesses and restoring fair competition in key sectors of the U.S. economy.[5] That caused not only Big Tech but Big Pharma, Big Agribusiness, and many other highly concentrated industries to brace themselves for the new era of antitrust enforcement.[6]

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1. *See, e.g.*, Justin Wise, *Biden Appointments, BigLaw Hires Signal Hot Antitrust Scene*, LAW360 (Mar. 17, 2021, 9:27 AM EDT), https://www.law360.com/articles/1359622/biden-appointments-biglaw-hires-signal-hot-antitrust-scene [https://perma.cc/BWN5-9MHM].
2. *See* Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656-57 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)).
3. *See, e.g.*, *id.* at 1681; STAFF OF THE SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 1-4 (Comm. Print 2022).
4. *See, e.g.*, AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021); MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2020); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020).
5. On July 9, 2021, President Biden signed an Executive Order directing government agencies to promote competition and target excessive concentrations of market power in the U.S. economy. *See* Promoting Competition in the American Economy, Exec. Order No. 14036, 3 C.F.R. § 609 (2022). Together with the appointment of Lina Khan, one of the leaders of the new progressive antitrust movement, to head the Federal Trade Commission (FTC), this signaled the start of a new era of antitrust enforcement. *See* Cat Zakrzewski & Aaron Schaffer, *The Technology 202: FTC Chair Lina Khan Holds Open Meeting Amid Early Challenges*, WASH. POST (July 2, 2021, 9:17 AM EDT), https://www.washingtonpost.com/politics/2021/07/02/technology-202-ftc-chair-lina-khan-holds-open-meeting-amid-early-challenges [https://perma.cc/FF3T-GK9H].
6. Promoting Competition in the American Economy, Exec. Order No. 14036, *supra* note 5; Stefania Palma & James Fontanella-Khan, *US Trustbusters: Why Joe Biden Is Taking on Private Equity*, FIN. TIMES (Aug. 22, 2022), https://www.ft.com/content/e9cc796e-351c-462b-8b72-e9e3c5bdd2fe [https://perma.cc/2PWU-VU4R].

Except for Big Banks. America's banking industry does not seem concerned about the antitrust turn in American politics. As the leading trade publication put it, President Biden's actions pose a "minimal threat" to the ongoing consolidation in the banking sector.[7] Wall Street clearly believes it is beyond the reach of new-generation trustbusters.

This is puzzling. Financial institutions are not immune from antitrust laws. Competition policy is part of federal bank regulation, administered by the specialized regulatory agencies – the Board of Governors of the Federal Reserve System (Fed), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) – in coordination with the Department of Justice (DOJ).[8] It is also not the case that the U.S. financial industry is perfectly competitive. Banking is notoriously concentrated, with the ten largest commercial banks controlling about 55% of the U.S. banking assets,[9] and the eight U.S. Global Systemically Important Banks (GSIBs) accounting for approximately 66% of the assets held by U.S. bank holding companies (BHCs).[10] In fact, one of the most politically salient problems in financial policy is the existence of "too big to fail" (TBTF) banking conglomerates effectively shielded from market discipline.[11]

Yet, for the past half-century, antitrust has not been a prominent theme in U.S. banking law and regulation. Regulators have balanced the need to promote

7. Jim Dobbs, *Biden Order Seen as Minimal Threat to Bank M&A*, AM. BANKER (July 12, 2021, 3:01 AM EDT), https://www.americanbanker.com/news/biden-order-seen-as-minimal-threat-to-bank-m-a [https://perma.cc/SVS3-L6A5].

8. *See infra* Part III.

9. Figures compiled from the Fed's quarterly data for large commercial banks for the first quarter of 2021 and the Fed's H.8 statistical release for assets and liabilities of U.S. commercial banks as of March 31, 2021 and April 2, 2021, respectively. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., LARGE COMMERCIAL BANKS, FED. RSRV. STATISTICAL RELEASE (Mar. 31, 2021), https://www.federalreserve.gov/releases/lbr/20210331/default.htm [https://perma.cc/EH98-23NF]; *see also Assets and Liabilities of Commercial Banks in the United States–H.8*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. tbl.3 (Apr. 2, 2021), https://www.federalreserve.gov/releases/h8/20210402 [https://perma.cc/A5GQ-2UP8].

The share of assets held by the five largest U.S. commercial banks has grown from 28% in 2000 to 47% in 2017. *See Federal Reserve Economic Data: 5-Bank Asset Concentration for the United States*, FED. RSRV. BANK ST. LOUIS, https://fred.stlouisfed.org/graph/?g=FHwS [https://perma.cc/E8L7-DA6R].

10. *Annual Report 2020*, FIN. STABILITY OVERSIGHT COUNCIL 77-78 (2020), https://home.treasury.gov/system/files/261/FSOC2020AnnualReport.pdf [https://perma.cc/A3MV-S4QP].

11. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 6 (2010). *See generally* GARY H. STERN & RON J. FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS (2004) (describing the issue of "too big to fail" banks and some possible policy solutions).

competition within the sector with the more prominent goal of preserving the stability of the banking system and solvency of individual institutions.[12] To the extent that these goals are inherently in tension, competition concerns remain subordinate to banks' "safety and soundness."[13] Even the TBTF problem, which clearly implicates antitrust-like concerns, is treated primarily as a matter of macroprudential regulation—a set of regulatory objectives and tools aimed at protecting the stable functioning of the financial system.[14] "Bigness" is not viewed as problematic, as long as big banks run their portfolios prudently under the watchful eye of their regulators and supervisors.[15] Accordingly, the goal is not to keep individual banking firms from becoming *too big* but to keep them from becoming *too risky*.[16]

The government's response to the financial crisis of 2008 reflected this logic. The bailout of Wall Street resulted in a smaller number of bigger banking institutions, and post-crisis regulatory reforms aimed to ensure that these reconstituted giants do not fail.[17] Fifteen years later, the domino-like failures of Silvergate, Silicon Valley Bank (SVB), Signature Bank, and First Republic Bank put a new spin on the same problem. By exposing multiple regional banks' vulnerabilities, this latest crisis refocused public attention on the need for good risk management and traditional prudential oversight.[18] Massive deposit flight, expansion of deposit insurance to protect large depositors, and emergency sales of troubled banks further increased the size of large banking conglomerates and led

12. 9 EARL W. KINTER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW § 68.1 (1989).

13. Steven T. Mnuchin & Craig S. Phillips, *A Financial System that Creates Economic Opportunities: Banks and Credit Unions*, U.S. DEP'T OF THE TREASURY 10 (2017). Competition concerns in financial services are typically raised as an argument for deregulation. *See, e.g.*, *id.* at 23 ("While the generally positive post-crisis trends in capitalization rates and stronger asset quality extend to many community banks, the increased regulatory burden imposed since the implementation of Dodd-Frank has had a disproportionate impact on the competitiveness and viability of community banks as reflected in the sustained decline in number of institutions."). *But see* Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 402 (1983) ("It is good that deregulation will leave banking more competitive, but we must ensure that banks will not be left vulnerable to runs.").

14. *See, e.g.*, Lawrence J. White, *Antitrust and the Financial Sector—with Special Attention to 'Too Big to Fail'* 3, 12-18 (N.Y.U. Working Paper No. 2451/33582), https://ssrn.com/abstract=2418954 [https://perma.cc/K95Q-AQUH].

15. *See* Saule T. Omarova, *The "Too Big to Fail" Problem*, 103 MINN. L. REV. 2495, 2514-16 (2019).

16. *Id.*

17. *See* Graham S. Steele, *The Tailors of Wall Street*, 93 U. COLO. L. REV. 993, 1000 (2022).

18. *See* Emily Flitter & Rob Copeland, *Silicon Valley Bank Fails After Run on Deposits*, N.Y. TIMES (Mar. 14, 2023), https://www.nytimes.com/2023/03/10/business/silicon-valley-bank-stock.html [https://perma.cc/K5YU-VTB6].

to calls for liberalizing federal bank merger policy.[19] Greater concentration and greater public subsidies once again became the price of banking sector stability.

The single-minded prioritization of safety and soundness makes bank regulation appear fundamentally different from antitrust law, which seeks to preserve fair competition and prevent monopolies. The two spheres are seen as doctrinally and normatively separate, with only a small area of overlap—primarily, bank merger review. Beyond this, antitrust currently has little impact on banks' daily operations.

This Essay challenges that widely accepted view. It offers an alternative understanding of the relationship between the principles of antitrust and banking law. We argue that, on a deeper level, U.S. bank regulation is designed to operate—and needs to be recognized—as a particular kind of sector-specific antitrust regime, rooted in the antimonopoly tradition in American law and policy.

In making this claim, we adopt a *structural* view of antitrust, which defines its core objectives in deliberately broad terms of preventing excessive concentration of private economic power. This view rests on a simple yet powerful notion that "antitrust policy doesn't operate in a vacuum; it is interwoven with the fabric of the economy."[20] From this perspective, the overarching purpose of antitrust is not simply to maintain some technical measure of "competitiveness" in specific product markets, but to create durable structural foundations for the healthy growth of a democratic economy.[21]

Historically, the principal federal antitrust laws—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—were a direct response to the growing threat corporate monopolies posed to American economic and political democracy.[22] Through these statutes, Congress sought to safeguard competitive markets and to prevent excessive concentrations of private power that threatened the nation's vitality and growth. Since the 1970s, however, U.S. antitrust jurisprudence has been myopically focused on consumer prices in specific product

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19. *See* Keith Noreika & Bryan Hubbard, *TD's Failed Acquisition Highlights Our Broken M&A Process*, AM. BANKER (May 9, 2023, 11:13 AM EDT), https://www.americanbanker.com/opinion/tds-failed-acquisition-highlights-our-broken-m-a-process [https://perma.cc/9QU9-7BAC].

20. Brian Deese, Dir., Nat'l Econ. Council, Remarks on President Biden's Competition Agenda (July 14, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/brian-deese-remarks-on-president-bidens-competition-agenda [https://perma.cc/74L2-GLTC].

21. *Id.* In this Essay, we refer to "structural antitrust" in this broader attitudinal sense and not as a specific set of doctrinal claims historically associated with the "structuralist" school of antitrust. *See* Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 75 (2012) (stating that the structuralist school is "dead and not likely to rise again").

22. *See infra* Section I.A.

markets.[23] Antitrust analysis and enforcement were reduced to technical application of microeconomic models, foreclosing broader political-economic concerns that animated the trustbusters and Progressives of the early twentieth century.[24]

It is those original understandings of antitrust, recently revived by the proponents of a progressive neo-Brandeisian movement, that underlie our project.[25] This Essay reframes the core narrative of U.S. banking law as a multilayered system of structural constraints on private banks' accumulation and abuse of economic power. It reveals the macrosystemic significance of federal bank regulation as a de facto antimonopoly regime that operates through a variety of mechanisms. Most of these mechanisms are routinely viewed solely as tools of prudential regulation and supervision. Their *other* role as structural means of preventing excessive concentration of corporate power over the supply and allocation of financial resources in a democratic economy is nearly entirely overlooked, in both academic discussions and policymaking.

We divide these mechanisms into three categories.

The first category includes three provisions of U.S. banking law that establish what is generally recognized as competition policy in banking: regulatory review of bank mergers and acquisitions, anti-tying rules, and prohibitions on management interlocks.[26] This modality represents *direct*, *or formal*, *application* of antitrust to banking institutions and remains the overwhelming focus of the scholarly literature on antitrust and banking.[27]

The second category includes elements of banking law that, while not explicitly labeled as such, nevertheless function as antitrust tools. These include liability and loan concentration limits, rate regulations, and authority to break up large banking organizations. Each of these provisions has a parallel, though not necessarily identical, principle in competition policy. This modality thus represents *functional replication* of traditional antitrust in bank regulation.

The third and final category comprises the key elements of U.S. bank regulation without direct parallels in antitrust law: market entry controls, activity

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23. *See* Khan, *supra* note 2, at 1661-62.

24. *See infra* Section I.A.

25. For more on neo-Brandeisians, see *infra* Section I.A. To clarify, our goal is not to enter theoretical debates on the proper limits and purposes of contemporary antitrust law, but to reframe the core narrative of U.S. banking law and regulation.

26. *See infra* Part III.

27. *See* Felix B. Chang, *Death to Credit as Leverage: Using the Bank Anti-Tying Provision to Curb Financial Risk*, 9 N.Y.U. J.L. & BUS. 851, 857-58 (2013); Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 449-51 (2020).

and affiliation restrictions, and regulation of inter-affiliate transactions.[28] Typically framed in terms of bank safety and soundness, these provisions are unique to banking law. On the surface, they reflect an uneasy choice in favor of financial stability at the expense of market competition. Below the surface, these familiar provisions operate as *unnatural monopoly regulation*: they structurally constrain potential abuses of government-granted private power over the nation's money and credit. This modality demonstrates the broader significance of prospective structural regulation as a potent antimonopoly tool. In this sense, it represents *operational deepening* of a structural approach to antitrust.

The government-granted monopoly on money creation is what ultimately explains the bank regulatory regime's focus on maintaining the public/private balance of power. Banks are "special" entities to which the federal government outsources the sovereign task of creating, distributing, and managing the supply of U.S. dollars. Banks' power comes from their uniquely privileged position as specially licensed and subsidized agents, or "franchisees," of the sovereign public.[29] In this arrangement, the government commits to accommodating and guaranteeing private banks' liabilities—the bulk of the nation's money supply—thereby shielding banks from the disciplining effects of market competition and potentially incentivizing them to engage in socially harmful risk-taking.

The task of bank regulation and supervision is to minimize the moral hazard built into this arrangement, maintain the stability of publicly subsidized franchisee banks, and prevent overissuance of money in relation to the needs and productive capacity of the nation's economy.[30] "Safety and soundness" is an umbrella concept that captures these concerns in the most readily recognizable ways. It also operationalizes the overarching imperative of preserving the delicate balance of power in the public/private financial system. In that sense, prudential regulation channels the same fundamental concerns as those traditionally associated with the progressive, structural approaches to antitrust—preventing private institutions from abusing their entrenched competitive advantages. This Essay seeks to recover that deeply rooted commonality and highlight the importance of overcoming mechanical reliance on the narrowly defined notion of "safety and soundness."

This Essay has potentially far-reaching implications. Reconsidering the aims of banking law to incorporate the forgotten goal of constraining excess corporate power expands the horizons of bank regulation and sharpens its focus. It reveals

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28. *See infra* Part V.

29. *See* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147 (2017).

30. *See* Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1240 (2021).

the multidimensional nature of competition concerns animating the existing regime of bank regulation by showing how some of its core elements—traditionally seen as limiting competition within the sector—are, in fact, designed to safeguard fair competition in the broader economy. Normatively, it shifts attention from the purely quantitative indicators of market concentration to the underlying substantive dynamics of concentrated private power over the vital public resource: the monetized full faith and credit of the United States. This more nuanced understanding, in turn, broadens the scope of policy choices and operational tools available to policymakers to include more structural, macrosystemic remedies.[31]

31. Our approach is broadly sympathetic towards the recent scholarship reenvisioning banking as a form of public utility. *See* Lev Menand & Morgan Ricks, *Rebuilding Banking Law: Banks as Public Utilities*, 41 YALE J. ON REGUL. (forthcoming 2024); MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS & UTILITIES: LAW & POLICY (2022); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621 (2018); Alan M. White, *Banks as Utilities*, 90 TUL. L. REV. 1241 (2016). While this literature does not constitute a conceptually cohesive body of scholarly work, we believe we all share the fundamental understanding of banks as quasi-public actors to whom the government delegated the task of providing a critical public good: sovereign credit-money. The broad "public utility" framing captures this core functional dynamic in an intuitively graspable and rhetorically powerful—indeed, metaphor-like—way. It conveys a strong normative message that modern banks should be regulated with an explicit view to their role as private operators of the public monetary infrastructure. We also agree with the proponents of the "public utility" view that the relationship between antitrust law and public-utility law is complex. *See* Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, *Introduction to the Symposium on Networks, Platforms, and Utilities: Law and Policy*, YALE J. ON REGUL. NOTICE & COMMENT (Jan. 17, 2023), https://www.yalejreg.com/nc/symposium-networks-platforms-utilities-00 [https://perma.cc/4NQW-B4H6].

Operationalizing this shared normative baseline, however, takes us on separate, albeit parallel, tracks. Laws governing public utilities generally rely on tools and pursue goals that are both quite specific and distinct from the tools and goals of banking law, as it exists today. Despite the importance of the Progressive Era's public utility tradition in shaping U.S. bank regulation, the decades-long process of financial sector deregulation has systematically weakened that historic connection. *See* Ricks, *supra*, at 769. In the last fifty years, the main utility-like elements of U.S. bank regulation—including interest rate controls, geographic restrictions, and community reinvestment requirements—have been either repealed or significantly diluted. *See infra* Parts IV, V. It is hardly surprising, therefore, that adopting the public utility view of banking channels academic inquiry primarily toward *future* reform possibilities. Scholars use this framework to develop elegant blueprints for bank regulation that would explicitly incorporate universal service and nondiscrimination mandates, direct rate regulation, and certain other elements traditionally found in nonfinancial infrastructure industries. Some iterations of this approach, however, advocate public utility regulation primarily as the cure for financial instability and runs on money, which they see as the central problem financial reforms must address. Framing the project in terms of "panic-proofing" the system makes banks' monetary function, rather than their lending and investment activities, the primary focus of analysis, The analysis presented in this Essay, moreover, fills an important gap in the contemporary vision of structural antitrust. While some neo-Brandeisian scholarship engages with aspects of financial regulation,[32] it has yet to advance a comprehensive account of the complex relationship between money, banking, and a democratic economy. A fuller appreciation of U.S. banking law as an antimonopoly regime is a critical component of a truly progressive economic policy agenda.

Rapid technological changes in finance and the broader economy make this reconceptualization exercise particularly timely.[33] The entry of Big Tech companies into financial services, in particular, threatens to take the familiar TBTF problem to a qualitatively new level, reigniting the old debate on the "curse of bigness." At the same time, upstart challengers in financial technology (fintech), cryptocurrency, and decentralized finance (DeFi) are reviving old arguments promoting the potential benefits to financial consumers from unfettered competition. The rhetoric of tech-driven "democratization" and "innovation," however, often masks the old dynamics of concentrated control replaying themselves in a new environment. Behind the shiny surface of innovation, the balance of public and private powers in finance is under tremendous pressure.[34]

with other distributional issues and policy tools generally playing ancillary roles. *See* Ricks, *supra*, at 771, 809-16. Moreover, as experience in nonfinancial sectors shows, the public utility regulatory paradigm is not necessarily effective at addressing multiple political economy concerns that arise when a regulated utility fails to operate in the public interest. *See* Josh Macey & Genevieve Lakier, *What Are Networks, Platforms, and Utilities and What Should We Do with Them?*, YALE J. ON REGUL. NOTICE & COMMENT (Jan. 24, 2023), https://www.yalejreg.com/nc/symposium-networks-platforms-utilities-07 [https://perma.cc/2QZT-A383]. It is important that proponents of extending this paradigm to today's banking sector more thoroughly engage with these, as well as many other, potentially thorny issues.

Our approach, by contrast, focuses not on what the bank regulatory regime *should* look like, if we were to accept the view of banking as a traditional utility, but on illuminating what the bank regulatory regime looks like *now*. Our goal is to elucidate how various provisions of banking law reflect the inevitably complex tensions between public and private interests and motivations—which are built into the hybrid banking model—and how consistently these provisions channel broad antimonopoly concerns. In doing so, our project seeks to recover the political economy considerations that motivated many key provisions of U.S. banking law. This approach lends itself to a wide range of prescriptive conclusions, some of which are aligned with the public utility model of banking. An elaboration of such prescriptions, however, exceeds the scope of this Essay.

32. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 794-96 (2017) (discussing the U.S. bank holding company regulation as a potential model for regulating technology companies).

33. *See* Saule T. Omarova, *Technology v Technocracy: Fintech as a Regulatory Challenge*, 6 J. FIN. REGUL. 75, 75 (2020) (showing how the ongoing technology-driven shifts in the structure and operation of the financial system increasingly demand a fundamental change in the paradigm of financial regulation).

34. *See* Saule T. Omarova, *New Tech v. New Deal: Fintech as a Systemic Phenomenon*, 36 YALE J. ON REGUL. 735, 790-92 (2019); Omarova, *supra* note 33, at 86.

In this context, it is vital to rethink the synergies between antitrust law and financial regulation, which share the fundamental normative focus on preserving the structural integrity of, and curbing the excesses of concentrated private power in, U.S. markets. This shift in perspective will empower policymakers to take a more forward-looking and proactive approach to the ongoing transformation of finance. It will enable them to identify and address emerging systemic threats that do not fit neatly into the standard "safety-and-soundness" framework—threats that, left undisturbed, may grow into problems too big to solve through existing regulatory means.

Explicitly embracing the antitrust spirit of U.S. banking law underscores the fact that strong regulatory oversight of the financial sector is not inimical to market competition, just as deregulation is not inherently procompetitive. From the perspective of individual banking firms, regulatory compliance is a cost that can create a competitive disadvantage vis-à-vis unregulated rivals and cut into their profits.[35] From a macrosystemic perspective, however, the regulations that generate these microlevel costs are often critical to the preservation of healthy market competition, not only in banking but also in the broader economy. Recognizing these dynamics is necessary in order to avoid privately beneficial but publicly harmful policy choices in the name of "promoting competition." The rapid advance of fintech and crypto-finance makes it particularly important to resist misleading rhetoric and to strengthen, rather than weaken, regulatory protections against excessive growth and abuses of structural power in finance.

In this Essay, we do not claim to provide an exhaustive account of antitrust law or history, nor to offer a comprehensive critique of how modern antitrust doctrine is (or should be) applied in the banking context. Moreover, this Essay does not argue that *every* provision of U.S. banking law operates as an antitrust tool in disguise—only that *many* do.[36] Our goal is not to downplay the

35. Of course, it is more appropriate to compare banks' private regulatory costs to (1) economic benefits they receive as a result of public subsidy; and (2) potential public costs likely to accrue in the absence of regulation. *See Fostering Economic Growth: Midsized, Regional, and Large Institution Perspective: Hearing on Examining the Current State of Midsized, Regional, and Large Institutions, Including Their Regulatory Requirements, Impact on Clients, and Their Role in Promoting Economic Growth Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 9-10 (2017) (statement of Saule T. Omarova, Professor of Law, Cornell University); Saule T. Omarova, *Testimony Before the U.S. Senate Banking Committee: "Fostering Economic Growth: Midsized, Regional and Large Institution Perspective"* (Cornell Law School Legal Studies Research Paper Series, Research Paper No. 17-31, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990570 [https://perma.cc/52KB-NNDP]; Steele, *supra* note 17, at 1042-44 (analyzing the costs and benefits of financial regulation).

36. Some of the key elements of the bank regulatory regime (including, for example, bank capital and liquidity requirements) may not lend themselves easily to such reinterpretation, which does not render them superfluous or ineffective. The scope of our analysis reflects these significance of prudential considerations in banking but to recover a lost motivation underlying many foundational provisions of banking law. By exposing the hidden antimonopoly roots of familiar banking principles, we seek to reconnect two strands of economic law and policy that recent popular conception holds as being only tangentially related. Much more remains to be written both about the complex interplay of antitrust and banking laws and about various competition-inspired elements of bank regulation. By advancing a new narrative of the field, this piece lays the foundation for a more productive and policy-relevant exploration of these issues.

The Essay proceeds as follows. Parts I and II outline the basic logic and common policy concerns underlying U.S. antitrust and banking laws. Part III discusses formal competition policy tools in banking. Moving beyond these familiar examples, Part IV analyzes regulatory provisions that channel traditional antitrust concepts in less direct, and sometimes even counterintuitive, ways. Part V examines well-known elements of banking law imposing structural constraints on private banks' government-granted, or unnatural, monopoly powers. Finally, Part VI draws out key public policy implications of this reframing, with a focus on two salient challenges currently facing financial regulators: the TBTF problem and the rise of digital finance.

I. ANTITRUST LAW AND BANKING: THE SHARED HISTORICAL TRADITION

Three federal statutes govern antitrust enforcement in the United States: the Sherman Antitrust Act of 1890 (Sherman Act)[37], the Clayton Antitrust Act of 1914 (Clayton Act)[38], and the Federal Trade Commission Act (FTC Act).[39] This Part briefly outlines the origins and principal goals of these statutes and highlights key points of overlap in the general evolution of U.S. antitrust and banking law.

A. *Basic Principles of Antitrust Law: A Brief Overview*

The first federal antitrust statute, the Sherman Act, was adopted in 1890 in response to the growth of anticompetitive trade arrangements and industrial

functional differences, without denying the importance or necessity of having targeted tools of traditional prudential regulation.

37. 15 U.S.C. §§ 1-38 (2018).

38. *Id.* §§ 12-27.

39. *Id.* §§ 41-58.

combinations.[40] By the late nineteenth century, a few corporate empires began rapidly accumulating control over entire sectors of the American economy. Their predatory monopolistic behavior created widespread concern that corporate profits were "no longer solely the reward of sturdy industry and enlightened foresight," but instead came from the "discriminating favor of the Government" and "undue extractions . . . ."[41]

The Sherman Act deems illegal any contract or combination in restraint of trade, as well as any monopoly or attempt to monopolize.[42] Using these provisions, the government sued and dismantled such powerful trusts as Standard Oil, Northern Securities, and American Tobacco. Courts, however, were wary of punishing private corporations for legitimate success.[43] Judicial attempts to narrow the practical reach of the Sherman Act underscored a need not just to break up established monopolies but to prevent their emergence in the first place.

Over two decades later, the Clayton Act of 1914 accordingly targeted incipient forms of unfair business conduct.[44] The statute prohibits unfair pricing schemes, including "tying," or conditioning the pricing or availability of a product on the use of another product.[45] It outlaws mergers and acquisitions that would substantially lessen competition or tend to create a monopoly.[46] Finally, the statute restricts "interlocking directorates," preventing corporate officers and directors from simultaneously serving as officers or directors of their companies' competitors.[47]

To administer the newly enhanced regime and to police against unfair methods of competition, Congress established the Federal Trade Commission (FTC) in 1914 as well.[48] Passage of the Clayton Act and the creation of the FTC were

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40. *See generally* H. REP. NO. 3112 (1888) (describing the growth of combinations and trusts and concern about their monopolistic behavior).

41. Grover Cleveland, President of the United States, Fourth Annual Message (Dec. 3, 1888) (transcript available at the University of Virginia Miller Center).

42. 15 U.S.C. §§ 1, 2 (2018).

43. *See* Standard Oil Co. v. United States, 221 U.S. 1, 63-66 (1910) (announcing a new "rule of reason," distinguishing conduct that is illegal per se from actions that are illegal only if they constitute an "unreasonable" restraint of trade, in light of the relevant circumstances and historical experience).

44. S. REP. NO. 63-698, at 1 (1914); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922).

45. 15 U.S.C. §§ 13-14 (2018); H. REP. NO. 63-627, pt. 1, at 1963-65 (1914); *Standard Fashion*, 258 U.S. at 355.

46. 15 U.S.C. § 18 (2018).

47. *Id.* § 19.

48. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 90-91 (2003).

championed by Justice Louis Brandeis, an iconic figure in the American Progressive movement who viewed monopoly as a matter both of economic harm and of political power. To Progressives, including Brandeis, competition law served an explicitly political-economic function by protecting "small businesses, consumers, the competitive process, and the political process."[49]

From the 1930s through the 1960s, antitrust law and policy were heavily influenced by the so-called "structuralist" school. Structuralism placed the emphasis of antitrust inquiry on the market structure that determined anticompetitive conduct, resulting in abusive pricing and other economic harms.[50] The competitiveness of a market was measured primarily in terms of concentration and barriers to entry in the relevant industries.[51] Structuralists investigated the competitive harms of "loose" and "tight" oligopolies,[52] criticized vertical integration and exclusive contracts,[53] and questioned markets' ability to self-correct.[54]

The structuralist paradigm fell out of favor by the early 1970s, with the rise of the Chicago School that redefined antitrust law in microeconomic terms.[55] The Chicago School argued that antitrust should be concerned strictly with economic efficiency and not with the curse of "bigness."[56] Rejecting traditional structural approaches, Chicagoans adopted a "price theory" as the foundation of competition analysis.[57] Eschewing critiques of corporate power and concentration, the Chicago School narrowed the aperture of relevant antitrust review factors to a sole "consumer welfare" standard.[58] The consequence of this shift was

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49. Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 283 (2010).

50. Charles E. Mueller, *The New Antitrust: A Structural Approach*, 12 VILL. L. REV. 764, 783-84 (1967). In this view, "an industry . . . [that did] not have a competitive structure [would] not have competitive behavior." *Id.* at 765 (quoting United States v. E.I. DuPont De Nemours & Co., 351 U.S. 377, 426 (1956) (Warren, C.J., dissenting)).

51. *Id.* at 766; Hovenkamp, *supra* note 21, at 75.

52. Mueller, *supra* note 50, at 788-89; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1073 (1979).

53. Hovenkamp, *supra* note 21, at 87-89.

54. *Id.* at 75. Following structuralist logic, courts invalidated a variety of anticompetitive schemes. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953).

55. *See* Hovenkamp, *supra* note 21, at 75, 87-96.

56. *See* Daniel Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 123 (2018).

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

58. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 830 (1965) (suggesting that the overriding test for competition policy should be "the maximization of wealth or consumer want satisfaction"). This welfare test included an antitrust policy that failed to recognize many unfair practices, so that "only explicit price fixing and very large horizontal mergers (mergers to monopoly) were worthy of serious concern."[59] Considerations related to income distribution or broader political economy were left out of antitrust analysis.[60]

For decades, the Chicago School dominated the U.S. competition policy space. Recently, however, a self-labeled neo-Brandeisian movement began revisiting the foundational principles of antitrust law and "recovering an approach to antitrust that is rooted in its antimonopoly values."[61] Neo-Brandeisians seek to incorporate issues of political economy and corporate power into antitrust theory and practice, taking it out of the narrow sphere of microeconomic analysis.[62] Viewing antitrust as a tool for restructuring markets, and economic relationships more broadly, they are resurrecting various pre-Chicago concepts[63] and contemplating a more robust role for structural regulation.[64]

This new thinking has gained traction primarily in response to the rise of Big Tech and dominant social media platforms, online marketplaces, and search engines.[65] The same issues, however, are increasingly visible in the financial sector, especially in light of ongoing technological change in the sector.[66] In this context, it is particularly important to remind ourselves of the role antitrust played in shaping the evolution of U.S. banking and financial law.

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not just consumer prices but also producer profits. *See* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 65-66 (2019).

59. Posner, *supra* note 57, at 933. The Chicago School recast collusion as an impractical and unlikely scenario, only profitable in the narrowest of circumstances, which did not warrant intervention. *Id*. at 932-33; *see also* Hovenkamp, *supra* note 58, at 75 ("[F]or practically every practice other than naked price fixing, Bork emphasized their efficiencies or harmlessness, while rejecting nearly all theories of competitive harm.").

60. Bush, *supra* note 49, at 295.

61. Khan, *supra* note 2, at 1676. For an example of practical implementation of this approach, see F.T.C., COMM'N FILE NO. P221202, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (2022).

62. Hovenkamp, *supra* note 58, at 81-86; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

63. TEACHOUT, *supra* note 4, at 8 ("Anti-monopolism is a broad philosophy standing in opposition to unaccountable private power. Campaign finance law, predatory pricing law, public utility regulation, laws that make co-ops easier to organize, and the right to sue big companies all count as ways to break up power.").

64. *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1065-90 (2019).

65. *See* Khan, *supra* note 32, at 710, 712-17, 773; sources cited *supra* note 4.

66. *See* Omarova, *supra* note 34, at 743-55, 770-91.

B. The Tangled Roots of Bank Regulation and Antitrust

While financial regulation and antitrust evolved over time into separate strands of public law, the leaders of the antitrust movement of the late nineteenth and early twentieth centuries were deeply concerned with the concentration of capital and its influence over industry.[67] Some of the nation's seminal banking and antitrust laws reflected these common policy motivations.[68] Recognizing the shared roots of these now-distinct branches enables a better understanding of the foundational logic and forgotten aims of banking regulation.

1. The "Money Trust"

The emergence of U.S. antitrust laws coincided with a turbulent period in the evolution of the nation's banking sector.[69] The modern era of U.S. banking began in 1863-64, with the creation of a uniform national currency that could only be issued by national banks chartered and supervised by the OCC.[70] The National Bank Acts of 1863 and 1864 (together, the NBA) established the basic framework that governs the national banking system to this day.[71] The NBA authorized federally chartered banks to engage only in a limited set of activities enumerated in the so-called "bank powers clause" and falling within the scope of the statutory concept of "business of banking."[72] It thus enshrined the federal

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67. *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 204-08 (2021); STAFF OF SUBCOMM. ON DOMESTIC FIN. OF THE H. COMM. ON BANKING & CURRENCY, 90TH CONG., 1 COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES: EMERGING INFLUENCE ON THE AMERICAN ECONOMY, at iv (Subcomm. Print 1968) (quoting former President Woodrow Wilson's observation that the "great monopoly in this country is the money monopoly. So long as that exists, our old variety and freedom and individual energy of development are out of the question").

68. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 221 (1985).

69. This Essay does not purport to offer a historical analysis of U.S. banking laws. For an overview of the relevant history, see MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 35-77 (3d ed. 2021).

70. *See Founding of the OCC and the National Banking System*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/about/who-we-are/history/founding-occ-national-bank-system/index-founding-occ-national-banking-system.html [https://perma.cc/5647-6ZFX].

71. National Bank Act of 1863, ch. 58, 12 Stat. 665, *repealed by* National Bank Act of 1864, ch. 106, § 62, 13 Stat. 99, 118 (codified as amended in scattered sections of 12 U.S.C. (2018)). The NBA's sponsor was Senator John Sherman, the namesake of the Sherman Act. *See* John Wilson Million, *The Debate on the National Bank Act of 1863*, 2 J. POL. ECON. 251, 251-52 (1894).

72. National Bank Act of 1863 § 11, 12 Stat. at 668; National Bank Act of 1864 § 8, 13 Stat. at 101 (codified as amended at 12 U.S.C. § 24 (2018)).

policy of separating banking from all other commercial activities.[73] While the NBA aimed to create a stable currency and a sound national banking system, Congress was also wary of the prospective political power that could be wielded by national banks, or the Comptroller of the Currency that oversaw them.[74]

In practice, regulatory oversight of the financial system remained weak and fragmented. During the famous panic of 1907, the federal government had to rely on J.P. Morgan to help stabilize the banking system.[75] This brought attention to the outsized role of a single financial institution and "fostered talk of an omnipotent Wall Street money trust."[76]

Louis Brandeis was a leading voice in this debate. His writings emphasized the symbiotic relationship between financial concentration and "big business."[77] To Brandeis, the financial industry's power manifested in three ways: (1) concentration of resources within the financial sector; (2) concentration of resources in industrial conglomerates that relied on giant "Money Trusts" to finance their operations; and (3) control of access to financing that constitutes the "life blood of business."[78] He was concerned with both the *accumulation* of financial resources and the *combination* of multiple financial functions.[79] In this view, banks abused the privilege of gathering the capital of others by directing that capital according to their preferences, controlling the objects of their investments, and extracting rents from those activities.[80] This enabled bankers to enrich themselves, suppress competition, and subordinate industrial liberty to the Money Trusts' interests.[81]

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73. *See* S. REP. NO. 106-44, at 71 (1999); Bernard Shull, *The Separation of Banking and Commerce: Origin, Development, and Implications for Antitrust*, 28 ANTITRUST BULL. 255, 265-70 (1983). While the degree to which the United States has followed the policy of separating banking from commerce has been the subject of vigorous debate, see Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1554-58 (2007), Congress has repeatedly reinforced this "keystone" principle in both legislative text and history. *See, e.g.*, S. REP. NO. 100-19, at 8 (1987).

74. *See* Million, *supra* note 71, at 274.

75. Winerman, *supra* note 48, at 21.

76. RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE 128 (2010); *see also* Winerman, *supra* note 48, at 21.

77. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 162-88 (Frederick A. Stokes Co. 1914).

78. *Id.* at 4-6.

79. *Id.* at 6. This resulted in banks "having their cake and eating it too" by buying bonds and stocks from corporations through the process of depositing the proceeds of said bonds and stocks to an account maintained for the corporation at the same bank. *Id.* at 21-22.

80. *Id.* at 17-23.

81. *Id.* at 46-50.

From 1912 to 1913, a special congressional subcommittee – the Pujo Committee – exposed the Money Trusts' control of vast amounts of financial wealth through shareholding and directorships in railroad companies, utilities, and industrial firms.[82] To execute this scheme, national banks were "exceeding their charter powers" by engaging in a range of securities activities rather than "supplying the needs of the commercial community."[83] The committee concluded that the harmful implications of such concentrated ownership and control were "fraught with too great peril to our institutions to be tolerated."[84] These findings rallied public support for the passage of the Clayton Act and the Federal Reserve Act of 1913 (FRA).[85] The FRA established the Federal Reserve System, the central bank tasked with maintaining an elastic currency supply and acting as a "lender of last resort" to which banks could pledge assets in exchange for liquidity.[86] This critical reform created an institutional platform for publicly backing private banks' liabilities in times of stress. In the early years of its existence, however, the Fed was not able to prevent a speculative stock boom that led to the 1929 market crash and subsequent banking crisis.[87] Nor was it able to stem the formation of new "Money Trusts."

2. *The New Deal Reforms*

Following the 1929 stock market crash, the U.S. Senate Committee on Banking and Currency established a special subcommittee to investigate unsound and abusive practices in the U.S. financial markets.[88] This body, known as the Pecora Commission, documented a range of speculative activities and proliferation of investment trusts, which gave rise to conflicts of interest, self-dealing, concentration of wealth, and undue enrichment.[89] Wall Street bankers, the Commission found, exhibited a "tendency toward" monopoly, steered capital to favored and

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82. *See* H.R. REP. NO. 62-1593, at 129-33 (1913).

83. *Id.* at 151-54.

84. *Id.* at 133.

85. Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251. (1913) (codified as amended in scattered sections of 12 U.S.C. (2018)).

86. *See* BARR, JACKSON & TAHYAR, *supra* note 69, at 42, 45.

87. *See* Parinitha Sastry, *The Political Origins of Section 13(3) of the Federal Reserve Act*, FRBNY ECON. POL'Y REV. 1 (Sept. 2018), https://www.newyorkfed.org/medialibrary/media/research/epr/2018/epr_2018_political-origins_sastry.pdf [https://perma.cc/VMT8-285X] (describing the pre-1933 limitations on the Fed's credit policy, which reflected its perceived role as a purely monetary authority).

88. *See* COMM. ON BANKING AND CURRENCY, STOCK EXCHANGE PRACTICES, S. REP. NO. 73-1455, at 1 (1934).

89. *See id.* at 333-48.

connected clients, and otherwise abused their access to the public's money.[90] The Commission's work galvanized public support for the New Deal reforms. While typically associated with federal securities laws, it was part of a broader legislative push against potential abuses of structural power by financial institutions that control market infrastructure.[91]

The Public Utility Holding Company Act of 1935 (PUHCA) exemplified this approach.[92] It used structural tools to curb corporate governance abuses by "utility holding companies" (UHCs) that embodied the excesses of "bigness."[93] PUHCA required UHCs to register with and submit to regulation by the Securities and Exchange Commission (SEC), restricted their business activities and intragroup transactions, and prohibited interlocking directorates.[94]

The Banking Act of 1933 was another essential component of the New Deal. It created the system of federal deposit insurance and sought to limit the risks of diverting publicly insured banking funds into speculative trading.[95] It included the so-called Glass-Steagall Act that separated commercial and investment banking and prohibited personnel interlocks between banks and securities firms.[96] It also restricted transactions between banks and their insiders[97] and affiliates.[98] These reforms reflected lawmakers' belief that unfettered competition in banking contributed to the panic and Great Depression.[99] The Banking Act was Brandeisian legislation in three key respects.[100] First, it sought to create arms-length relationships between banks, securities firms, and the companies that

90. *Id.* at 85-87, 101-10, 195-99, 214-20, 339.

91. *See* A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 U. VA. L. REV. 841, 843-44 (2009).

92. Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (codified as amended at 15 U.S.C. §§ 79 to 79z-6 (2018)), *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451-63.

93. Pritchard & Thompson, *supra* note 91, at 865 n.105; Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking up the Banks That Are Too-Big-To-Fail*, 62 HASTINGS L.J. 821, 846-50 (2011).

94. Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6, *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451-63. While PUHCA was a form of antitrust legislation, it pioneered a new approach by empowering the SEC, rather than courts, to restructure corporations raising antitrust concerns. Rahman, *supra* note 31, at 1662.

95. *See* S. REP. NO. 73-77, at 9-11 (1933).

96. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified at 12 U.S.C. § 227 (2018)).

97. *Id.* § 12.

98. *Id.* § 13.

99. *See* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 27 J. REPRINTS FOR ANTITRUST L. & ECON. 77, 84 (1997).

100. The House of Morgan bankers believed Brandeis to be personally responsible for the Glass-Steagall provision applicable to private banks, which J.P. Morgan was at the time. *See* CHERNOW, *supra* note 76, at 378-79.

they financed, using both structural separations and activity rules. Second, its structural limitations and separations struck at the political power of "bigness,"[101] making it easier for smaller banks to compete. Finally, it put securities activities outside the scope of public subsidy—including access to deposit insurance and Fed lending—to limit speculation fueled by "other peoples' money."

3. Financial Conglomerates

The New Deal legislation, however, did not address the use of the holding-company structure in banking.[102] The Fed's attempts to use the Clayton Act to stop the growth of large financial-industrial conglomerates, such as the Transamerica Corporation, were unsuccessful.[103] In 1953, a federal court blocked the Fed's order unwinding the interlocking ownership between Transamerica and Bank of America.[104] To address the inefficacy of antitrust laws in preventing socially harmful banking combinations, Congress enacted the Bank Holding Company Act of 1956 (BHCA).[105] The legislation was needed in order to prevent the "monopolistic control of credit [that] could entirely remold our fundamental political and social institutions."[106]

The BHCA aligned banking with the "general purposes of the antitrust laws—to promote competition and to prevent monopoly."[107] It required any company that owned or controlled a U.S. bank to register with the Fed as a "bank

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101. *See, e.g.*, S. REP. NO. 73-1455, at 109-110 (describing the practice of banks maintaining "preferred lists" to provide public officials special access to securities offerings).

102. In 1938, Roosevelt warned of the "multiplied evils" of the holding company structure and called on Congress to pass legislation curbing the activities and expansion of bank-holding companies. *See* Franklin D. Roosevelt, President of the United States, Message to Congress on Curbing Monopolies (Apr. 29, 1938), https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies [https://perma.cc/MKB2-CN9S].

103. Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 135-36 (2011).

104. Transamerica Corp. v. Bd. of Governors of Fed. Reserve Sys., 206 F.2d 163, 170-71 (3d Cir. 1953).

105. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-52 (2018)).

106. H.R. REP. NO. 84-609, at 2 (1955); *see also* H.R. REP. NO. 103-448, at 20 (1994) (explaining that the BHCA was motivated by "[c]oncerns about the growth of bank holding companies and concentration of financial power"). For a historical analysis of the BHCA's antimonopoly roots, see Jamie Grischkan, *Banking and the Antimonopoly Tradition: The Long Road to the Bank Holding Company Act*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY 204(Daniel A. Crane & William J. Novak eds., 2023).

107. S. REP. NO. 89-1179, at 2 (1966). The BHCA was modeled after PUHCA. Karmel, *supra* note 93, at 846; Shull, *supra* note 99, at 89-91.

holding company" (BHC).[108] Registered BHCs became subject to group-wide regulation and supervision by the Fed and were required to limit their activities to banking and activities "closely related" to banking.[109] The statute effectively precluded BHCs from dealing in securities, managing investment funds, or underwriting insurance. It also extended the principle of separating banking from commerce, built into the bank charter, to the entire conglomerate.[110]

The true systemic importance of the BHCA and its deliberately structural approach to bank regulation became apparent once policymakers weakened or dismantled many of its guardrails. Following decades of piecemeal deregulation, the Gramm-Leach-Bliley Act of 1999 (GLBA) repealed the most significant Glass-Steagall provisions.[111] It permitted well-capitalized and well-managed BHCs—"financial holding companies" (FHCs)—to conduct a broad range of financial activities, including trading and dealing in securities, commodities, and derivatives.[112] Congress has effectively blessed combining financial (and even certain commercial) activities under the same corporate roof resting on the foundation of bank subsidy.

Tellingly, this reform was justified by reference to competitive needs. The banking industry had attacked structural regulation as an "unprofitable straitjacket" that "discouraged competition and restricted innovation."[113] The pro-GLBA lobby claimed that deregulation would bolster the competitiveness of U.S. banks at risk of being supplanted by nonbanks and foreign banks.[114] Channeling Chicago School orthodoxy, they promised benefits to consumers from unleashing competition and enabling "one stop . . . shopping" at "financial supermarket[s]."[115]

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108. 12 U.S.C. §§ 1841(a), 1844(a) (2018).

109. *Id.* § 1843(c)(8).

110. *See* Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 274-75 (2013).

111. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342 (1999) (codified as amended at 12 U.S.C. § 1843(k) (2018)).

112. *Id.*

113. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 33-34 (2011).

114. S. REP. NO. 106-44, at 4 (1999) ("[O]verhaul of our financial services regulatory framework is necessary in order to maintain the competitiveness of our financial institutions . . . . By limiting competition, the outdated [banking] statutes also reduce incentives to develop new and more efficient products and services. This deprives consumers of the benefits of the marketplace."). Indeed, GLBA embedded this notion of competitiveness within its legal framework. *See* 12 U.S.C. § 1843(k)(3)(D) (2018).

115. Karmel, *supra* note 93, at 835, 839 (quotation omitted); *see also* H. REP. NO. 106-74, at 97 (1999) ("If Congress fails to enact legislation of this nature, American international preeminence in financial markets will come into question, American consumers will be denied the

In practice, the GLBA unleashed massive industry consolidation and the emergence of financial conglomerates that were larger and more complex than their predecessors.[116] Congress failed to erect effective regulatory safeguards around this new breed of financial entities capable of dominating multiple markets.[117] Nor did it strengthen the role of antitrust policy in banking. In a shift no less consequential than the rise of the Chicago School in antitrust, the traditional focus of banking policy on preserving healthy competition through regulation morphed into a belief that regulation is inimical to competition.[118] The GLBA operationalized this philosophy, setting in motion structural shifts that led to a global financial crisis. As the 2008 crisis demonstrated, Wall Street FHCs came to embody many of the dangers of "bigness" decried by Brandeis and his disciples.[119]

As this brief historical overview shows, traditional antitrust concern with the excessive concentration of private wealth and power is particularly salient in the context of banking.[120] Understanding why that is the case, however, requires a deeper inquiry into the functional logic of modern banking as a special form of public/private partnership.

II. THE NEXUS BETWEEN BANKING AND ANTITRUST

Understanding why and how U.S. banking law and regulation channel fundamental antitrust concerns first requires an appreciation for banks' unique role

benefits which would flow from greater comeptition [sic] within the financial arena, and many rural areas and small communities will be precluded access to a broad range of financial products.").

116. *See* Dafna Avraham, Patricia Selvaggi & James Vickery, *A Structural View of U.S. Bank Holding Companies*, 7 ECON. POL'Y REV. 65, 67 (2012) ("While it is difficult to prove causality, it is notable that the striking growth in the size and importance of nonbank BHC subsidiaries dates almost entirely to the period after the passage of the GLBA.").

117. Daniel K. Tarullo, *Financial Regulation: Still Unsettled a Decade After the Crisis*, 33 J. ECON. PERSPS. 61, 63 (2019); Karmel, *supra* note 93, at 835.

118. FIN. CRISIS INQUIRY COMM'N, *supra* note 113, at 34 (quoting former Fed Chairman Alan Greenspan as saying, "Those of us who support market capitalism in its more competitive forms might argue that unfettered markets create a degree of wealth that fosters a more civilized existence").

119. Arthur E. Wilmarth Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 1001-02 (2009) (arguing that, in the pre-2008 era, large financial conglomerates were embroiled in scandals that "revealed widespread abuses that resulted from conflicts of interest, promotional pressures, speculative financing and exploitation of investors – the same types of misconduct that caused Congress to separate commercial and investment banking in 1933").

120. *See generally* Grischkan, *supra* note 106 (providing a more detailed historical account of the BHCA).

in our financial and economic systems. Deposit-taking banks have long been considered a "special" kind of financial institution whose uninterrupted operations were vital to the public.[121] The regulatory preoccupation with the stability of the banking system is routinely interpreted as both the source and the principal manifestation of the divergent goals and methods of bank regulation and general antitrust. This Part argues, by contrast, that the "specialness" of banks as privileged public agents – their government-created monopoly on sovereign money creation – forms an essential nexus between these two areas of law.

A. Lines in the Sand: Stability vs. Competition, Risk vs. Structure

Regulated financial institutions, including banks, are not immune from federal antitrust laws. Generally, antitrust enforcement and substantive sector-specific regulatory schemes operate in tandem, except where there is a "plain repugnancy" between them.[122] It has long been accepted that banking law and policy embody a different approach to market competition than traditional antitrust law.[123]

The Supreme Court articulated this more nuanced vision in the seminal 1963 case, *United States v. Philadelphia National Bank*.[124] Affirming the applicability of the Sherman and Clayton Acts to commercial banking, the Court acknowledged that bank regulation sought to "minimize the hazards of intense competition."[125] At the same time, it noted that, because of the importance of banking to real-economy businesses, the existence of "concentration in banking accelerates concentration generally."[126] In the Court's opinion, the higher costs of credit and other anticompetitive banking practices posed risks to "the whole edifice of an entrepreneurial system."[127] On the tension between competition and regulation, the Court reasoned that "[t]he fact that banking is a highly regulated industry

121. *See generally* E. GERALD CORRIGAN, FED. RES. BANK OF MINNEAPOLIS, ANNUAL REPORT 1982: ARE BANKS SPECIAL? (1983) (arguing that banks are special because only they offer transaction accounts, serve as backup liquidity sources for all other institutions, and function as the means by which monetary policy has an effect on the financial market).

122. Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 686 (2011) (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973)).

123. Shull, *supra* note 99, at 106-08.

124. 374 U.S. 321 (1963).

125. *Id.* at 352.

126. *Id.* at 368-70.

127. *Id.* at 372.

critical to the Nation's welfare makes . . . competition not less important but more so."[128]

This view of banking as a distinctive sphere, in which competition is not an absolute value but an integral part of the broader set of regulatory objectives, shaped the prevailing understanding of bank antitrust. It is commonly recognized that banks' business activities are vested with a public interest.[129] Banks are crucial actors in the nation's system of payments and credit, their core deposit liabilities are federally insured, and their ability to function without interruption is critical from the public viewpoint.[130] Accordingly, preserving the solvency of individual banks and stable functioning of the banking system are the top regulatory priorities that often justify policy choices ordinarily seen as anti-competitive.

Since the beginning of the deregulation that started in the 1980s, this normative baseline has increasingly refocused on narrow safety and soundness considerations. By the late 1990s, bank regulators came to view industry consolidation as a beneficial mechanism of diversifying banks' risks and enhancing operational efficiencies.[131] Even in the post-2008 context, this idea remains deeply influential. As long as individual banking firms comply with prudential requirements, increasing levels of industry-wide concentration and consolidation are not seen as independently problematic. In short, the specter of bank runs, rather than the "curse of bigness," is—and should be—bank regulators' central concern.[132]

This is an artificial dichotomy. The structure of the banking industry is a critical factor determining the nature and distribution of risk in the banking

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128. *Id.* The Court was echoing the congressional belief that "[i]t [was] impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest." Shull, *supra* note 99, at 88 (quoting S. REP. NO. 86-196 at 16 (1959)).

129. *See* sources cited *supra* notes 31, 123-128.

130. *See* CORRIGAN, *supra* note 121.

131. MELANIE L. FEIN, FEDERAL BANK HOLDING COMPANY LAW § 12.01[1] (3d ed. 2014) (quoting *Mergers in the Financial Services Industry: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 105th Cong. 277-78 (1998) (statement of Andrew W. Hove, Acting Chairman, Fed. Deposit Ins. Corp.)).

132. *See, e.g.*, Tarullo, *supra* note 117, at 62-64 (providing a summary of relevant financial regulatory approaches from the New Deal to the Dodd-Frank Act); *see also* FIN. CRISIS INQUIRY COMM'N, *supra* note 113, at 170-71 ("Supervisors had, since the 1990s, followed a 'risk-focused' approach that relied extensively on banks' own internal risk management systems. . . . The New York Fed, in a 'lessons-learned' analysis after the crisis, pointed to the mistaken belief that 'markets will always self-correct.' 'A deference to the self-correcting property of markets inhibited supervisors from imposing prescriptive views on banks,' the report concluded.").

system.[133] In practice, treating financial stability issues as conceptually and normatively separate from issues of industry structure provides a seemingly "objective" basis for politically driven deregulatory arguments.[134] This heightens the need to revisit old assumptions by looking more closely at the basic dynamics of modern banking.

B. Deep Currents: Subsidy, Size, Structural Power

Banks are "special" in a deeper sense than is commonly acknowledged. They are not merely "financial intermediaries" that collect deposits and use them to make loans. They *create* deposits—the prevalent form of money circulating in our economy—when they extend loans by crediting borrowers' accounts.[135] In effect, banks are specially licensed agents to whom the federal government outsources the sovereign task of creating, distributing, and managing the supply of U.S. dollars.[136] The banking system is a public/private franchise arrangement, in which the government (as franchisor) commits to accommodating private banks' (its franchisees') liabilities and guarantees their convertibility into sovereign currency.[137]

This public subsidy, while necessary, shields banks from important disciplining effects of free market competition and creates perverse incentives for

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133. *Cf.* Investment Co. Inst. v. Camp, 401 U.S. 617, 629-34 (1971) (discussing how structural considerations in banking regulation—for example, the required separation of commercial and investment banking—are intended to protect against certain hazards in financial markets).

134. *See* Steele, *supra* note 17, at 1033-36.

135. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 326 (1962) ("[B]anks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply.").

136. *See* Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) ("[B]anks are instrumentalities of the federal government, created for a public purpose . . . ."); Morgan Ricks, *Money and (Shadow) Banking: A Thought Experiment*, 31 REV. BANKING & FIN. L. 731, 743 (2012) ("[O]ur existing system of *depository* banking can be understood as a joint venture with the state for the efficient distribution of the money supply.").

137. *See* Hockett & Omarova, *supra* note 29, at 1158-64. While courts and legislatures have never formally articulated the franchise view of banking as an official doctrine, they have traditionally understood banking as an important quasi-public function performed by private corporations that are chartered by the state to deal in government-created money and credit. *See* Van Reed v. People's Nat'l Bank, 198 U.S. 554, 557 (1905) ("National banks are quasi-public institutions . . . ."); Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 34 (1875)("The national banks . . . are instruments designed to be used to aid the government in the administration of an important branch of the public service."); BRANDEIS, *supra* note 77, at 64 ("[A] bank is a public-utility institution and cannot be treated as a private affair . . . . All banks in the United States, public and private, should be treated as public-utility institutions, where they receive public deposits." (quoting Sen. Robert Owen)).

excessive risk-taking by profit-seeking banks. It also gives banks an extraordinary structural advantage over all other private firms, financial and nonfinancial. This unique advantage is a direct product of government action rather than some "natural" efficiency imperative. Its presence is the root of antimonopoly concerns in banking.

In this context, bank regulation and supervision operate as an indispensable "quality control" mechanism.[138] Their macrolevel goal is to prevent banks from abusing their government-created monopoly powers and control over money flows, maintain their stability, and prevent overissuance of money in relation to the needs and productive capacity of the nation's economy. The concept of "safety and soundness" captures these concerns in the most readily recognizable ways. Not explicitly defined by Congress, this phrase is "widely used in the regulatory statutes and in case law" and often denotes the absence of "unsound and unsafe" practices in banks' operations.[139] Recognizing potentially enormous and direct public harms of imprudent but lucrative risk-taking by privately run banks, Congress gave bank regulators and supervisors great latitude to define and prohibit various "unsafe and unsound" banking practices.[140] Below the surface, therefore, safety and soundness—or prudential—regulation operationalizes the overarching imperative of preserving the delicate balance of power in our public/private financial system.

The importance of limiting potentially distortive effects of the extraordinary bank subsidies is deeply embedded in this notion.[141] In that sense, prudential regulation channels the same concerns as those traditionally associated with the progressive, structural approaches to antitrust. This continues to be the case despite the increasingly narrow technocratic interpretation of the scope of

138. *See* Hockett & Omarova, *supra* note 29, at 1164, 1212-15; Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 953-54 (2021).

139. Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978).

140. *Id.* ("[O]ne of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such [unsafe and unsound] practices to the expertise of the appropriate regulatory agencies."); Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 281 (2022) (noting that banking agencies have statutory authority "to prohibit 'unsafe or unsound' banking practices, which can include just about anything a bank is doing that may materially affect its financial soundness" (footnote omitted)). For an enumeration of relevant legal provisions "aimed at ensuring sound banking practices," including many discussed herein, see *Phila. Nat'l Bank*, 374 U.S., at 329-30.

141. Recognizing this fundamental link, Congress gave the Federal Deposit Insurance Corporation (FDIC) broad supervisory and enforcement powers tied specifically to "unsafe" and "unsound" practices or condition of individual institutions it insures. *See, e.g.*, 12 U.S.C. § 1818 (2018) (giving the FDIC power to terminate deposit insurance or take enforcement actions against insured depository institutions).

prudential regulation in recent decades.[142] Today, as in the past, "safe and sound" operation of publicly subsidized purveyors of the nation's credit-money is as much a matter of political economy as it is a matter of financial stability.

Broadening the analytical lens to encompass these dynamics exposes the core category error in the ongoing debate over the benefits and costs of financial sector consolidation and conglomeration. Though rhetorically framed around the *size* of individual banking entities and its non-linear relationship to the operational efficiency and stability of the banking sector, this debate is not about finding the "right" quantitative limits on banking firms' assets and liabilities. The balance-sheet size, aggregate market share, or the number of the largest banking institutions are crucial as measurable indicators of these private entities' power vis-à-vis the sovereign public, whose monetized full faith and credit they distribute for profit.[143] On this macrosystemic level, "bigness" serves as a proxy for the degree of concentration of control over the supply and allocation of sovereign money and credit—a fundamentally *public* good—in the hands of a few dominant *private* conglomerates. It is the quantitative benchmark for the underlying qualitative balance of public and private powers in our hybrid financial system.

This macrolevel balancing motivates, informs, and unifies the day-to-day operation of federal bank regulation and supervision. That regime seeks not only to preserve banks' safety and soundness but also to keep them from misusing their privileged position. To illuminate these dynamics, this Essay reframes U.S. banking law as a system of structural constraints on private banks' ability to accumulate and abuse economic power. It reveals the macrosystemic significance of federal bank regulation as an antitrust regime that operates through a variety of mechanisms.

As referenced in the Introduction, these mechanisms can be divided into three groups.

The first category includes those provisions of U.S. banking law that establish what is officially recognized as competition policy in the banking sector: bank merger review, anti-tying rules, and prohibitions on management interlocks.[144] These provisions operate by *formally applying* antitrust principles to banking entities and activities.

The second category includes what we call functional antitrust tools: concentration limits on banks' balance sheets, regulation of rates and prices of

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142. *See* Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1529-30 (2018).

143. *See* Hockett & Omarova, *supra* note 29, at 1156, 1158-64 (explaining the institutional structure and the process through which the central bank accommodates and monetizes private banks' deposit liabilities, effectively putting the sovereign public's full faith and credit behind private deposit-money).

144. *See infra* Part III.

certain banking products, and authorities to break up banking organizations.[145] Their connection to traditional antitrust law is more attenuated, with other regulatory goals—including systemic risk mitigation and access to credit—defining their role in the regulatory scheme. Nevertheless, a focus on limiting structural power connects these provisions to traditional antitrust concepts. Rather than directly applying antitrust rules to banking, these tools *functionally replicate* them.

The third category comprises elements of U.S. bank regulation that do not have direct parallels in contemporary antitrust law: special chartering requirements, restrictions on bank activities and affiliations, and rules governing banks' transactions with affiliated entities.[146] These provisions are traditionally viewed as tools of micro- and macroprudential oversight. Yet, by structurally constraining potential abuses of private power over publicly produced and backed financial resources, they also function as hidden antitrust tools in banking. Reflecting the "special" nature of banks as sovereign franchisees, these provisions are not only systemic stability safeguards, but also a form of *unnatural monopoly regulation*. It is a deeper and more assertive form of structural antitrust.

Banking regulators once understood the goals of the laws that they implemented, and by extension their own administrative responsibilities, to include preventing monopolization of money and credit and diffusing banks' political power.[147] They also appreciated the heightened capacity of their unique regulatory toolkit to achieve these goals in practice.[148] In recent decades, however, the essential antimonopoly spirit of U.S. banking law has faded out of public view. Instead of vigilantly monitoring the changing patterns of distribution and use of structural power in publicly subsidized financial markets, regulators have recast their task in superficially "objective" technocratic terms. Today, regulation is focused primarily on discrete technical solutions to narrowly identified and cabined micro- and macroprudential problems.[149] Even policy decisions with obvious structural and distributional effects are typically justified by reference to quantifiable economic "efficiencies."[150]

145. *See infra* Part IV.

146. *See infra* Part V.

147. *See* Jamie Grischkan, The Past and Future of Bank Merger Policy 6-8 (unpublished manuscript) (on file with authors) (quoting the first U.S. Comptroller of the Currency, Hugh McCulloch).

148. *Id.* at 9-10.

149. *See* Steele, *supra* note 17, at 1036-41.

150. *Id.* at 1033-37 (describing the Fed's creation of an extralegal "efficiency" mandate for macroprudential regulation); Omarova, *supra* note 33, at 79-83 (analyzing the technocratic paradigm of financial regulation).

In this Essay, we seek to recover the fuller, more capacious and nuanced understanding of bank regulation as not merely a technical exercise in keeping banks solvent but as a broader enterprise of maintaining the structural integrity of the financial system and channeling the flow of financial resources in a democratic society. To rebuild this picture, we need to examine the three modalities of antitrust in banking: (1) the "formal antitrust" modality; (2) the "functional antitrust" modality; and (3) the "unnatural monopoly control" modality.

III. FORMAL ANTITRUST TOOLS IN BANKING

The U.S. bank regulatory regime directly incorporates three formal tools of traditional competition policy: mandatory reviews of bank mergers and acquisitions, prohibitions against interlocking bank management, and a ban on tying arrangements. Targeting business practices widely acknowledged as anticompetitive, these three types of provisions effectively define the entire area of "banking antitrust" in today's discussions.

Much of the conventional wisdom on the ostensibly conflicting goals of antitrust law and bank regulation is based on interpretations of these provisions. For example, the standards for merger review and the scope of anti-tying rules, as they apply to banks, explicitly allow for certain anticompetitive practices deemed necessary or conducive to banks' successful performance of their "special" functions in the service of the economy.[151] Such deviations from general competition policy are easily mistaken for a product—or proof—of the ostensibly diverging goals of bank regulation and antitrust law.

Analyzed in the broader context of bank regulation, however, the key tradeoffs in the application of antitrust rules to banks expose complex dynamics of structural power in finance—and policymakers' efforts to grapple with it in imperfect and messy ways.

A. Bank-Merger Review

Bank-merger policy is the key tool for preventing dangerous consolidation of corporate control over the nation's credit and money flows and the emergence of new "money trust" variants. High levels of banking-industry concentration

151. *See, e.g.*, 12 U.S.C. § 1828(c)(5)(B) (2018) (providing that a transaction, the outcome of which would be "substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade," may be permissible if "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served"); *see also id.* § 1972(1)(a) (exempting any loan, discount, deposit, or trust service from the prohibitions on certain bank tying arrangements).

implicate a variety of potential harms for consumers, the financial system, and the economy more broadly.[152] Banks that achieve a certain national or international scale may lack the proper competitive incentives to serve every local community within their areas of operation. To achieve greater cost efficiencies, these banks may close branches and offices, depriving multiple small businesses and households of access to vital financial products and services. They may use their dominant presence in certain localities to raise the interest rates they charge on loans or lower the interest they pay on deposits. As banks grow bigger and more complex, they may shift into volatile trading markets and take outsized risks, relying on the implicit promise of government support in the event of failure. These problems expose the intimate connection between prudential policy goals central to banking law and the broader political-economic concerns of antitrust.

Not surprisingly, the existing legal scholarship on the antitrust aspects of banking has focused primarily on the bank-merger process.[153] Mergers are traditionally salient points of antitrust review and enforcement. Under the Hart-Scott-Rodino Act of 1976, DOJ and FTC review proposed mergers and acquisitions over a certain size and can challenge transactions that adversely affect U.S. commerce.[154] Generally, the purpose of the review is to evaluate whether a proposed transaction would "create, enhance, or entrench market power or to facilitate its exercise."[155] The review scheme differentiates between "horizontal" and "vertical" mergers, which raise distinct market-power issues.[156] In both cases, the baseline inquiry involves a highly technical exercise of defining the scope of relevant product and geographic markets.[157] To assess competitive effects of proposed transactions in relevant markets, the agencies use quantitative measures

152. José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 227, 227-30 (2022); FIN. STABILITY OVERSIGHT COUNCIL, STUDY OF THE EFFECTS OF SIZE AND COMPLEXITY OF FINANCIAL INSTITUTIONS ON CAPITAL MARKET EFFICIENCY AND ECONOMIC GROWTH 7 (2011).

153. Kress, *supra* note 27, at 435; Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 519 (2022); Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets*, 13 FORDHAM J. CORP. & FIN. L. 581, 582 (2008); BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT 1-3 (2001).

154. 15 U.S.C. § 18(a)-(d) (2018).

155. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES].

156. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 1-2 (2020) [hereinafter VERTICAL MERGER GUIDELINES].

157. HORIZONTAL MERGER GUIDELINES, *supra* note 155, at 7-14; VERTICAL MERGER GUIDELINES, *supra* note 156, at 3-4.

of market concentration, such as the Herfindahl-Hirschman Index (HHI).[158] Mergers in markets that both exceed a certain HHI threshold and would increase the concentration of such markets by a certain amount are subject to a rebuttable presumption that they reduce competition.[159] Vertical mergers are also evaluated for potential "foreclosure" against rivals.[160]

Bank mergers and acquisitions, however, are subject to review under a separate regime, governed by the BHCA and the Bank Merger Act of 1960 (Bank Merger Act).[161] The latter is the principal statute containing substantive and procedural requirements for regulatory approval of bank mergers. It places the primary responsibility for review on the banking agencies—the Fed, the OCC, and the FDIC—while preserving DOJ's right to weigh in on the process and challenge a merger within thirty days after the banking agency grants approval.[162] Upon the expiration of this waiting period, DOJ cannot block the approved bank merger.[163]

This procedural scheme reflects the familiar tension between specialized prudential regulation and broader antitrust enforcement. On the one hand, "[b]anking is a licensed and strictly supervised industry that offers problems acutely different from other types of business," and bank supervisory agencies "have a thorough knowledge of the banks, their personnel, and their types of business."[164] On the other hand, the factors considered in bank mergers "extend beyond the nature of those primary in importance to bank supervisory authorities."[165] This type of analysis requires regulators to engage in the "contemplation of the prevention of undue concentration of control in the banking field to the

158. HHI is calculated by squaring each firm's market share in a particular product and then adding those squared market shares. The HHI scale ranges from 1 to 10,000. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 155, at 18-19.

159. The general HHI threshold for horizontal-merger review is any merger in a market that exceeds 2,500 that would increase the market's HHI by more than 200 points. *Id.*

160. VERTICAL MERGER GUIDELINES, *supra* note 156, at 4-6.

161. The appropriate scope of bank-merger review was not always clear. For many decades, policymakers believed that the Sherman and Clayton Acts did not apply to banking as an area distinct from "commerce." Shull, *supra* note 99, at 82-86; Kress, *supra* note 27, at 444. The ambiguity persisted until 1963, when the Supreme Court affirmed in *Philadelphia National Bank* that bank mergers are subject to the Clayton Act. 374 U.S. 321, 323-24 (1963). Subsequently, Congress explicitly recognized the role of antitrust laws in governing mergers or acquisitions by BHCs and banks. *See* 12 U.S.C. §§ 1831u(c)(2), 1842(d)(4) (2018).

162. 12 U.S.C. §§ 1828(c)(4), (c)(6), 1849(b)(1) (2018).

163. *Id.* §§ 1828(c)(7)(C), 1849(b)(1). The interaction between general antitrust enforcement and specialized bank-merger review is complex and technical. A detailed analysis of these interagency dynamics is beyond the scope of this Essay.

164. Shull, *supra* note 99, at 95 (quoting the House Report accompanying the Bank Merger Act).

165. S. REP. NO. 84-1095, at 10 (1955).

detriment of public interest and the encouragement of competition in banking."[166]

Substantively, a bank regulator must deny a proposed merger that "would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States."[167] The agency must also block any merger exhibiting the following characteristics:

> [W]hose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[168]

The goal of the Bank Merger Act is not merely preventing the creation of a monopoly but also "arrest[ing] the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger."[169]

In assessing competitive effects of a proposed transaction, regulators focus on the "cluster of products . . . and services . . . denoted by the term 'commercial banking,'" which includes deposit accounts, trust services, and some forms of credit.[170] The review is based on a series of screening tests for potentially anticompetitive transactions. Initially, the agencies analyze the postmerger concentration of deposits in the relevant market using the HHI.[171] Mergers that do not exceed specified concentration thresholds typically escape further scrutiny. A transaction that fails the HHI-based screening test may still be approved, for example, if the regulators find "mitigating factors" that offset its anticompetitive

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166. *Id.*

167. 12 U.S.C. §§ 1828(c)(5)(A), 1842(c)(1)(A) (2018).

168. *Id.* § 1828(c)(5)(B); *see also id.* § 1842(c)(1)(B) (denying approval to anticompetitive transactions unless these anticompetitive effects are "clearly outweighed" by "the convenience and needs of the community to be served"). These provisions have been implemented under the Fed's Regulation Y. *See* 12 C.F.R. § 225.13(a)(2) (2023).

169. United States v. Phila. Nat'l Bank, 374 U.S. 321, 367 (1963) (emphasis omitted).

170. *Id.* at 356.

171. Bank Merger Competitive Review: Introduction and Overview, U.S. Dep't of Just. 1 (2000), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf [https://perma.cc/HS6W-YYUC]. Generally, a bank merger is not subject to further review on competition grounds if it would not result in an HHI exceeding 1,800 or an increase in HHI of more than 200 unless the merger results in a market concentration of greater than thirty-five percent. *Id.* The general HHI threshold for horizontal-merger review is 2,500. Horizontal Merger Guidelines, *supra* note 155, § 5.3.

impact.[172] In addition to the number and type of competitors remaining in the market, these mitigating factors include potential gains in "efficiencies" that can be difficult to quantify or validate.[173] Coupled with the statutory allowance for anticompetitive mergers that meet the "convenience and needs of the community" test, this process gives regulators significant interpretive latitude in determining the desirability of a bank merger or acquisition.

The BHCA complements the Bank Merger Act by creating a parallel framework for the Fed's review of mergers and acquisitions involving banks' corporate parents. As noted above, the BHCA is a fundamentally antimonopoly law.[174] It is also the principal federal statute operationalizing the separation of banking from commerce.[175] For example, Section 3 of the BHCA, which governs BHC mergers and acquisitions of banking subsidiaries, effectively replicates the Bank Merger Act scheme.[176] In practice, this establishes a streamlined process of regulatory approval for all bank mergers and acquisitions.

The BHCA also governs BHCs' ability to acquire nonbank subsidiaries.[177] Before 1999, BHCs were allowed to engage only in activities "closely related" to banking.[178] The GLBA enabled the formation of large, diversified FHCs combining deposit taking with securities dealing and underwriting, insurance, asset management, and even commercial operations.[179] This has magnified the scale, speed, and systemic significance of BHCs' nonbank acquisitions. In effect, the GLBA has introduced a new qualitative dimension into banking antitrust: the need to grapple with potential dangers and benefits of *cross-market* financial consolidation and conglomeration. Critically, however, this problem is framed predominantly, if not exclusively, in terms of prudential regulation and the safety and soundness of the banking system. As discussed below, this narrow framing

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172. Shull, *supra* note 99, at 105.

173. HORIZONTAL MERGER GUIDELINES, *supra* note 155, § 10; Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Peter G. Peterson Institute for International Economics: Regulating Systemically Important Financial Firms 4-7 (June 3, 2011), https://www.federalreserve.gov/newsevents/speech/files/tarullo20110603a.pdf [https://perma.cc/75D3-CDEN].

174. *See supra* notes 105-110 and accompanying text.

175. *Id.*

176. *See* Kress, *supra* note 27, at 448; *see also* 12 U.S.C. § 1842 (2018).

177. 12 U.S.C. § 1843 (2018).

178. *See* Omarova & Tahyar, *supra* note 103, at 119.

179. *See supra* notes 111-116 and accompanying text.

prevents us from appreciating the full potential of the BHCA as a structural antitrust tool.[180]

Since the 1980s, the bank-merger review process became increasingly permissive.[181] The number of mergers has increased, the number of banks has shrunk, and the share of banking assets held by the largest institutions has grown.[182] Since 1994, a series of tie-ups and crisis-era rescues transformed networks of regional banks into the four largest financial conglomerates that exist today: JPMorgan Chase, Bank of America, Wells Fargo, and Citigroup.[183] The lengthy process of deregulation, which enabled BHCs to acquire banks, securities firms, insurance companies, and other nonbank financial companies, raised the stakes and importance of merger reviews as a means of restraining the financial industry's power. Yet, in recent decades, bank mergers have largely proceeded unchallenged.[184]

The increasing frequency of periods of instability in the financial sector further entrenches this trend by encouraging emergency mergers and acquisitions of troubled banks by healthy institutions. The 2023 crisis that ensnarled several midsize banks with concentrated deposit liabilities and high interest-rate risk exposures vividly exemplifies these dynamics.[185] It is hardly surprising that, in the wake of the SVB failure, a more permissive approach to bank merger policy seems to have found new appeal as a stability-enhancing measure.[186]

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180. *See infra* Section V.B. Even as a macroprudential tool, the current BHCA regime does not meaningfully constrain expansion of FHCs' nonbanking activities. *See, e.g.*, 12 U.S.C. § 1843(j) (2018) (creating exceptions to prior approval requirements).

181. *See* Shull, *supra* note 99, at 105-06.

182. Robert M. Adams, *Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010*, at 8-13 (Fed. Rsrv. Bd. Fin. & Econ. Discussion Series, Working Paper No. 2012-51, 2012); Michal Kowlik, Troy Davig, Charles S. Morris & Kristen Regehr, *Bank Consolidation and Merger Activity Following the Crisis*, ECON. REV., Q1 2015, at 31, 34; Xavier Vives, *Competition Policy in Banking*, 27 OXFORD REV. ECON. POL'Y 479, 482 (2011).

183. *See* Donald I. Baker, *From* Philadelphia National Bank *to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 358-60 (2015).

184. Kress, *supra* note 27, at 455-56. However, it is difficult to ascertain how many acquisition plans were abandoned based on preliminary negotiations with bank regulators.

185. *See* Lauren Hirsch, *Silicon Valley Bank Sold to First Citizens in Government-Backed Deal*, N.Y. TIMES (Mar. 27, 2023), https://www.nytimes.com/2023/03/27/business/silicon-valley-bank-first-citizens.html [https://perma.cc/UR7A-LYB5]; Hugh Son, *JPMorgan Chase Takes over First Republic After Biggest U.S. Bank Failure Since 2008*, CNBC (May 1, 2023, 12:22 PM EDT), https://www.cnbc.com/2023/05/01/first-republic-bank-failure.html [https://perma.cc/2ZWA-BUU5].

186. *See* Andrew Ackerman, *Midsize Bank Panic to Test Regulators' Skepticism of Mergers*, WALL ST. J. (May 12, 2023, 9:00 AM ET), https://www.wsj.com/articles/midsize-bank-panic-to-test-regulators-skepticism-of-mergers-dd0893bf [https://perma.cc/V7YS-45EX].

In the long run, however, regulatory laxity toward bank mergers comes at a high price. A decades-long process of consolidation in the banking sector has already "severely compromised the broader policy of preventing excessive concentration of credit."[187] Allowing consolidation and concentration in the banking sector to proceed virtually unconstrained not only defies core antitrust principles, ultimately, it defeats the very purposes of banking law and policy: fair and efficient capital allocation, access to credit, and stable provision of banking services. This further underscores the dangers of separating "safety and soundness" from broader issues of structural power in finance, both in peacetime and during a crisis.

B. Management Interlocks

Formal bank mergers are not the only way to achieve a dominant market position. The same result can be obtained by accumulating voting and managerial control over multiple banking corporations. This type of concentrated power poses similar risks to the banking system, both from the perspective of competition policy and as a matter of prudent and efficient credit allocation.

As discussed above, Congress has long sought to prevent the emergence of monopolistic structures through heavily overlapping and interlocking ownership and management of technically separate firms.[188] Initially, the Clayton Act's prohibition against excessive management interlocks applied to banks.[189] The Banking Act of 1933 adopted the Clayton Act framework to prevent banks and securities firms from sharing officers and directors. In 1978, the Depository Institution Management Interlocks Act (Interlocks Act) broadened this prohibition to all manner of depository institutions and their affiliates.[190]

Under the current scheme, the managers of any depository institution, its corporate parent, or affiliate with more than $10 billion in total assets are generally prohibited from serving as managers of another such entity.[191] A regulator may grant discretionary exemptions if an interlock "would not result in a

187. Omarova & Tahyar, *supra* note 103, at 123.

188. *See supra* Part I.

189. S. Rep. No. 63-698, at 14-15 (1914).

190. Pub. L. No. 95-630, §§ 201-209, 92 Stat. 3641, 3672-75 (1978) (codified in scattered sections of 12 and 15 U.S.C. (2018)).

191. *See* 12 C.F.R. § 26.3(c) (2022). From 1996 until 2019, the threshold for applicability was $2.5 billion as to the management official's own depository institution and $1.5 billion as to the unaffiliated depository institution; the banking regulators increased both thresholds to $10 billion by regulation. *See* Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules, 84 Fed. Reg. 54465, 54466-67 (Oct. 10, 2019).

monopoly or substantial lessening of competition and would not present safety and soundness concerns."[192] As with the Clayton Act before it, the Interlocks Act does not forbid "institutional interlocks" whereby bankers sit on the boards of nonfinancial businesses, including client companies, and vice versa – the concern expressed about the dominance of the original Money Trusts.[193]

Other statutes have prohibited interlocking management and ownership between banks and nonbanks. Until its 1999 repeal,[194] Section 32 of the Glass-Steagall Act prohibited interlocking management or employment between banks and securities firms.[195] The Dodd-Frank Act of 2010 (Dodd-Frank Act) extended the prohibition against interlocks to any nonbank financial company that "could pose a threat to the financial stability of the United States," and prohibited regulators from exercising their exemptive authority with respect to interlocks between such nonbanks and any BHC with $250 billion or more in total assets.[196]

Generally, the purpose of restricting interlocks is to "foster competition" by restricting arrangements that "likely would have an anticompetitive effect,"[197] defined as any "monopoly or substantial lessening of competition."[198] In pushing for the Interlocks Act, for example, the Fed argued that "[interlocking] relationships between institutions that compete for the funds of the public involve a risk of abuse" that "outweighs any reasonable expectation of benefits."[199] Congress was similarly concerned that concentrated ownership would stifle "innovation

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192. 12 C.F.R. § 26.6(a) (2022). Exemptions may be granted where an interlock "would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns." *Id.* According to the House committee report on the legislation, exemptions were originally to be granted where they would have a "pro-competitive effect." H.R. Rep. No. 95-1383, at 15 (1978). In 1994, Congress amended this provision to codify the specific types of institutions to which agencies had granted exemptions until that point under their general exemptive authority – those that were "(i) located in low income or economically depressed areas, (ii) owned by women or minorities, (iii) new institutions that are just getting organized, or (iv) troubled institutions that are in an unsafe or unsound condition." H.R. Rep. No. 103-652, at 181 (1994). This evolution demonstrates how a provision originally intended to address competitive issues has taken on additional meaning based upon the special role that banks play in local communities and economies.

193. *See* Chernow, *supra* note 76, at 181.

194. *See infra* Section V.B.2.

195. *See* Pub. L. No. 73-66, § 32, 48 Stat. 162, 194 (1933) (codified as amended in scattered sections of 12 U.S.C. (2018)).

196. 12 U.S.C. § 5323, 5364 (2018). These nonbank financial companies are often referred to as "systemically important financial institutions," or SIFIs.

197. 12 C.F.R. § 26.1(b) (2022).

198. *See id.* § 26.6(a)-(b).

199. *Bank Supervision, Bank Directors, and Conflicts of Interest: Hearings Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 95th Cong. 17 (1977) (statement of Stephen S. Gardner, Vice Chairman, Board of Governors of the Federal Reserve System).

and new competition" in the banking industry.[200] Interlocking ownership and control were seen as potentially impacting "the flow of credit and financial policies and practices to the detriment of communities, neighborhoods, small businessmen, home buyers, farmers, consumers, and others in need of credit on the best terms possible."[201] Officials holding interlocking ownership, control, or management positions in financial and nonfinancial corporations can use their influence to steer those corporations into conflicted business arrangements, foreclose competitors' access to products and services on reasonable terms, or generally amass significant concentrated wealth.[202]

As with other banking antitrust provisions, however, the measures preventing interlocking ownership and control have been weakened through piecemeal and often highly technical amendments. The conversion of this basic antitrust tool into a formalistic exercise risks undermining regulators' ability to prevent misuse of banks' structural privileges through conflicted managerial oversight.[203]

C. *Tying Arrangements*

Anti-tying is another banking law provision restricting a practice viewed as anticompetitive in most business contexts.[204] The Clayton Act generally prohibits tying arrangements that "substantially lessen competition or tend to create a monopoly in any line of commerce."[205] In the banking context, this generalized policy concern takes on heightened importance because of banks' legal monopoly on money creation and access to public subsidy.[206] An unconstrained ability to exploit their unique structural advantages creates potentially unacceptable risks not only to banks' competitors but also to their customers and the broader economy. Due to the specific nature and importance of banking relationships, a bank could coerce its customers into purchasing unwanted products and

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200. *See* H.R. REP. NO. 95-1383, at 14 (1978).

201. *Id. See also* 123 CONG. REC. 629 (1977) (statement of Sen. Proxmire) ("Where small groups of individuals are able to control various types of lending institutions in a community by interlocking relationships, the public suffers.").

202. *See, e.g.*, S. REP. NO. 73-1455, at 385-91 (1934); H. REP. NO. 95-1383, at 14-15 (1978).

203. *See* Jeremy C. Kress, *Who's Looking Out for the Banks?*, 93 U. COLO. L. REV. 897, 927-33 (2022).

204. For the definition of tying, see *supra* note 45 and accompanying text.

205. 15 U.S.C. § 14 (2018).

206. *See* Dibidale of La., Inc. v. Am. Bank & Trust Co., 916 F.2d 300, 305 (5th Cir. 1990) (footnote omitted) ("The economic power of the banking industry stems from the aggregate control of banks over credit. In light of this unique economic role that banks play, Congress perceived conditional transactions involving credit as inherently anti-competitive, operating to the detriment of banking and non-banking competitors alike . . . .").

services, either from itself or from its nonbank affiliates. That could harm competitors that have no affiliation with a bank able to leverage its deposit relationships.[207]

Section 106 of the BHCA Amendments of 1970 specifically prohibits banks from conditioning access to credit or other banking services on customers' willingness to obtain additional services or products.[208] An illegal tying arrangement involves two or more financial products—the customer's desired product(s) and the tied product(s)—where a bank forces its customer to purchase the tied product from the bank or its affiliate to get the desired product.[209] The tying prohibition is broader than that contained in the Clayton Act. It does not require a showing that (1) the seller has market power in the market for the tying product; (2) the tying arrangement has had an anticompetitive effect in the market for the tied product; or (3) the tying arrangement has had a substantial effect on interstate commerce.[210]

Recognizing that the "misuse of economic power is possible regardless of the size of the bank," Congress sought to "provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition or unfair competitive practices."[211] Moreover, the bank anti-tying rule reflected a particular "congressional concern that banks' unique role in the economy, in particular their power to extend credit, would allow them to create a competitive advantage for their affiliates in the new, nonbanking markets that they were being allowed to enter."[212]

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207. Banks' deposit relationships tend to be "sticky," in part because of the transaction costs associated with establishing or severing a banking connection and the loss of confidential financial data that can result from changing banks. *See id.* at 306-07.

208. Pub. L. 91-607, § 106(b), 84 Stat. 1760, 1766-67 (1970) (codified as amended at 12 U.S.C. § 1972(1) (2018)).

209. *See* Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, 68 Fed. Reg. 52024, 52027-29 (proposed Aug. 29, 2003).

210. *See id.* at 52027.

211. S. REP. NO. 91-1084, at 16 (1970).

212. Bank Holding Companies and Change in Bank Control (Regulation Y), 62 Fed. Reg. 9290, 9313 (Feb. 28, 1997) (codified at 12 C.F.R pt. 225); Dibidale of La., Inc. v. Am. Bank & Trust Co., 916 F.2d 300, 305 (1990) ("[T]he unique nature of the banking industry renders it more important to prohibit conditional transactions in that context than in other less sensitive sectors of the economy."). While GLBA expanded the activities that BHCs could engage in, Congress required the banking agencies to clarify anti-tying restrictions to ensure that consumers were not being coerced, or otherwise being led to believe, that deposit products are tied to investment or insurance offerings. *See* H.R. REP. NO. 106-74, at 143-44 (1999).

Importantly, however, anti-tying restrictions do not apply to "traditional bank products" that include loans, deposits, and trust services.[213] Furthermore, the Fed has authority to grant other exemptions that "will not be contrary to the purposes" of the anti-tying prohibition.[214] While the statutory text listed only four specific "traditional bank products," the Fed expanded the exemption to sixteen products and services, including notoriously controversial credit derivatives.[215] In 1997, the Fed rescinded application of the anti-tying restriction to BHCs and their nonbank subsidiaries, determining that BHCs lacked adequate market share in nonbanking activities.[216] The Fed has also required coercion as an essential element of illegal tying, which has limited the scope of the prohibition.[217]

The feebleness of the current anti-tying regime came into plain view in March 2023, with the collapse of SVB. A powerful player in Silicon Valley's startup ecosystem, SVB routinely required its predominantly technology industry customers to use the bank for their depository, operating, and investment accounts.[218] Tech companies interested in accessing SVB's vast venture capital financing network were effectively forced to tie up their large cash reserves in SVB's deposit liabilities and obtain other services from the bank. The resulting concentration of SVB's liabilities was one of the key contributors to its dramatic failure when its uninsured depositors—venture capital and tech startup firms—executed a coordinated run on the bank. Nevertheless, the Fed has concluded that SVB's practices were properly exempt from the illegal tying prohibitions as "prudent credit risk management tools" that provided the lender "insight into a borrower's financial condition and ability to repay a loan."[219] From this perspective, anti-tying is an example of an area where the steady proliferation of bank-permissible activities and the expansion of FHCs into nonbanking services have significantly weakened the practical impact of a longstanding competition policy.

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213. 12 U.S.C. § 1972(1) (2018); Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, 68 Fed. Reg. at 52024.

214. 12 U.S.C. § 1972(1) (2018).

215. Chang, *supra* note 27, at 861-65; Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, 68 Fed. Reg. at 52030.

216. Bank Holding Companies and Change in Bank Control (Regulation Y), 62 Fed. Reg. at 9313.

217. Chang, *supra* note 27, at 880-85.

218. *See* Rohan Goswami, *Silicon Valley Bank Signed Exclusive Banking Deals with Some Clients, Leaving Them Unable to Diversify*, CNBC, (Mar. 13, 2023 8:22 AM EDT), https://www.cnbc.com/2023/03/12/silicon-valley-bank-signed-exclusive-banking-deals-with-some-clients.html [https://perma.cc/X65N-TM8H].

219. *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. 78-79 (Apr. 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf [https://perma.cc/MX93-QDPP].

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In sum, U.S. banking law contains an established set of formal antitrust provisions that aim to curb the tendency toward "bigness" and unfair competition it enables. This direct application of antitrust to banking, however, follows a subtly complex pattern. On the one hand, these provisions are distinct from their antitrust-law counterparts in their attentiveness to banks' unique role in supplying credit, payments, and other vital services to the rest of the economy. On the other hand, despite this sensitivity to banks' specialness, the decades of deregulation and consolidation in banking have undermined the practical efficacy of many of these protections.

IV. FUNCTIONAL ANTITRUST TOOLS IN BANKING

Adjacent to the well-known antitrust aspects of U.S. banking law is a more complex layer of what we call "functional antitrust tools." These mechanisms have counterpart principles in antitrust law but operate in a distinct manner reflecting the unique nature of market power and anticompetitive behavior in the banking sector. Banking law contains provisions explicitly targeting "bigness" but grounded in a broader set of criteria than pure competition. Banks are also subject to certain forms of rate regulation designed to prevent them from leveraging cheap government funding into windfall profits through unfair pricing. Finally, bank regulators have authority to break up banking firms—a well-known antitrust remedy—the exercise of which depends on regulators' assessment of a wider range of factors, including financial-stability risks.

While not framed in explicitly antitrust terms, these provisions of U.S. banking law function as important structural brakes on the excessive concentration of power in the publicly subsidized banking sector. This Part examines three principal sets of sector-specific modifications of antitrust reasoning: concentration limits, price regulation, and corporate breakups.

A. Concentration Limits

Traditional antitrust has long recognized concentration limits as a way to restrict monopolistic tendencies and prevent accumulation of excessive market power.[220] In the banking world, balance-sheet constraints are a core element of both microprudential (firm-level) and macroprudential (system-level) regulation, designed to prevent excessive concentrations of credit risk.[221] Some bank balance-sheet limitations, however, function as antimonopoly mechanisms

220. *See supra* notes 154-160 and accompanying text.

221. 12 U.S.C. §§ 84(a), 5365(e) (2018).

straddling prudential regulation and antitrust. Unlike typical prudential regulations, they seek to constrain banks' market power. Unlike typical antitrust tools, they do so primarily (though not exclusively) by targeting the *liability* side of banks' balance sheets.

This imposition of concentration limits on banks' liabilities reflects their privileged status as agents to whom the public outsources the fundamental task of sovereign money creation.[222] As the most ubiquitous form of money circulating in the economy, bank deposits are both a uniquely profitable financial "product" and a key public good. The liability concentration limits, discussed below, can therefore be understood as means of (1) constraining the excessive growth of a financial product that is the direct result of banks' special relationship to the government and (2) preventing the leveraging of this relationship to attain harmful levels of concentration.

1. Deposit Limits

Banking law prohibits the Fed from approving any merger or acquisition if it would result in any single banking firm accumulating more than ten percent of the nation's deposits or more than thirty percent of the deposits within any state.[223] These limits were included in the Riegle-Neal Act of 1994, which repealed restrictions against interstate branching as a way to prevent banks from accumulating "undue financial power."[224] Notwithstanding its desire to allow banks to achieve national scale, Congress was "sensitive to the need to guard against undue levels of concentration in the banking industry" and felt compelled to "address concerns about potential concentration of financial power at the state and national levels."[225]

This provision, however, is not an absolute cap on deposits. Organic deposit growth above the statutory level is permitted, as are mergers or acquisitions involving failing institutions. Moreover, during both the global financial crisis of 2008 and the regional banking crisis of 2023, regulators utilized the "failing

222. *See supra* Section II.B.

223. 12 U.S.C. §§ 1828(c)(13), 1831u(b), 1842(d) (2018). The idea of general market concentration limits was originally proposed by then-Fed Chairman Paul Volcker several years before the passage of the specific deposit concentration limits. *See* Patrick Mulloy & Cynthia Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. LEGIS. 255, 260 (1995).

224. S. REP. NO. 103-240, at 18 (1994).

225. H. REP. NO. 103-448, at 65 (1994).

bank" exception to permit systemically important banks that already exceeded the deposit-concentration limit to acquire additional deposits.[226]

Recognizing that the deposit-concentration limit is not a panacea, the legislative history of this provision makes clear that mergers and acquisitions could and should be rejected on antitrust grounds, even if they do not exceed deposit-concentration thresholds established by the law.[227]

2. *Nationwide Liabilities Limit*

In addition to the Riegle-Neal deposit limits, Section 622 of the Dodd-Frank Act prohibits mergers and acquisitions resulting in any BHC with consolidated liabilities exceeding ten percent of the aggregate consolidated liabilities of all financial companies.[228]

Enacted in response to the 2008 crisis, this provision sought to "promote financial stability and address the perception that large financial institutions are 'too big to fail.'"[229] In this sense, it is designed as a macroprudential tool. Nevertheless, by its nature, the liability-concentration limit is also a structural constraint that *could* enhance competition for financial services by protecting U.S. markets from domination by a small number of large financial institutions.[230]

Like many banking antitrust tools, the liability-concentration limit is conceptually straightforward but convoluted in its implementation.[231] It contains qualifications and exceptions that reduce its effectiveness and require "numerous

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226. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 988-90 (2011) (documenting financial crisis-era mergers that resulted in banking conglomerates that exceeded the ten percent nationwide deposit concentration limit); *see also*, Letter from Stephen A. Lybarger, Deputy Comptroller for Licensing, to John H. Tribolati, Sec'y of JPMorgan Chase Bank (May 1, 2023), https://www.occ.treas.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf [https://perma.cc/P652-K4TH] (stating that the ten percent deposit-concentration cap did not apply to JPMorgan's acquisition of certain assets and deposits of First Republic Bank due to the placement of First Republic into FDIC receivership).

227. H. REP. NO. 103-448, at 22 (1994).

228. 12 U.S.C. § 1852 (2018); *see also* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1397 (2011) (explaining the "original Volcker Rule," which "would prohibit banks from gaining more than a ten percent market share in loans or deposits").

229. FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS REGARDING CONCENTRATION LIMITS ON LARGE FINANCIAL COMPANIES 3 (Jan. 2011).

230. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 152, at 12.

231. *See* Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., University of Pennsylvania Law School Distinguished Jurist Lecture 23 (Oct. 10, 2012); Macey & Holdcroft, *supra* note 228, at 1399.

subjective decisions and interpretations by regulators."[232] As with the deposit cap, organic balance-sheet growth is not restricted, and mergers with failing institutions are permitted even where the relevant BHC's liabilities might exceed the concentration threshold.[233]

These technical exceptions make it unlikely that the liability concentration limit, applicable only to the largest U.S. BHCs, would meaningfully reduce moral hazard or improve competitive dynamics in the banking industry, at least in the near term.[234] Over time, however, it might have some marginal beneficial effects on competition by preventing extreme forms of market concentration in the financial sector.[235]

3. Lending Limits

While the most prominent concentration limits explicitly targeting banks' size and market power operate on the liability side of bank balance sheets, the same technique is used to prevent excessive loan concentration on their asset side.[236]

Federal banking law limits a bank's unsecured and secured credit extensions to any one party. Generally, a bank can lend no more than fifteen percent of its capital to a single borrower if the loan is unsecured, plus an additional ten percent if the loan is fully secured by liquid collateral.[237] So, for example, a bank with $100 million in capital could not lend more than $25 million to a single company.[238] This figure can include any extensions of credit to that company's officers under certain circumstances.[239]

Lending limits have long been recognized as a traditional tool of microprudential regulation, protecting banks from excessive exposure to a single

232. Macey & Holdcroft, *supra* note 228, at 1401.

233. *See* 12 U.S.C. § 1852(c) (2018).

234. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 229, at 8, 10-12.

235. *Id.* at 12.

236. Lending limits have been part of U.S. bank regulation since at least 1863. William B. Glidden, *National Bank Lending Limits and the Comptroller's Regs: A Clarification*, 101 BANKING L.J. 430, 430 (1984).

237. 12 U.S.C. § 84(a) (2018); 12 C.F.R. § 32.1 (2022).

238. This is only a simple illustration of the main rule, as there are various statutory exceptions to this particular limit. *See* 12 U.S.C. § 84(c) (2018) (providing specific exceptions to the lending limits).

239. *See* Del Junco v. Conover, 682 F.2d 1338, 1341 (9th Cir. 1982) (holding that, where there is sufficient evidence showing that a loan to an executive will be used for the benefit of a corporation, that loan could be aggregated with other loans to the corporation for the purpose of calculating whether lending limits had been violated).

borrower's default risk.[240] Just as importantly, this mechanism also helps to prevent the concentration of credit flows, ensuring that bank resources gathered in the form of deposits from the community are made available to the entire community.[241] It precludes a socially undesirable situation in which "a few large borrowers . . . monopolize the bank's facilities."[242] Through this lens, "risk-diversification" and "benefit-spreading" have long been seen as complementary and mutually reinforcing goals.[243]

This complementarity illustrates, once again, the multifaceted interplay of antitrust and banking laws. By allocating credit, banks play a crucial role in shaping the structure and power dynamics in other markets. Thus, a basic microprudential constraint on bank loan portfolios functions as an important, albeit indirect, means of precluding excessive concentrations of market power *in the broader economy*. Limitations on concentrated lending by banks seek to prevent the undesirable accumulation of financial power and ensure that credit and financial services are channeled to the broader community.

B. Rates and Pricing

The most immediately visible and direct danger of monopolies and other forms of excessive market power is their potentially distortive impact on prices. U.S. antitrust law and policy target anticompetitive business combinations and practices, in large part, in order to prevent this type of abusive pricing and other harms. In general, however, antitrust is not a direct rate-setting or price-control scheme—an approach associated with public-utility regulation instead.[244]

U.S. banking law has a more complex relationship with rate and price regulation. To begin with, the Fed conducts monetary policy through rates, which banks transmit to the rest of the economy.[245] More important for present purposes, numerous banking laws and regulations target pricing of bank products.

240. *See* 12 C.F.R. § 32.1(b) (2022) (stating that part of lending limits' purpose is "to protect the safety and soundness of national banks and savings associations"); Corsicana Nat'l Bank v. Johnson, 251 U.S. 68, 83 (1919) ("The statutory limit is a special safeguard prescribed by Congress for the very purpose (among others) of preventing undue reliance upon the financial standing of borrowers.").

241. Glidden, *supra* note 236, at 433 (stating that the lending limit statute was "intended to safeguard the bank's depositors by spreading the loans among a relatively large number of persons engaged in different lines of business").

242. *Id.* at 432.

243. *Id.* at 433.

244. *See, e.g.*, Rahman, *supra* note 31, at 1651-54 (discussing the public-utility regulation of Internet Service Providers).

245. *See infra* notes 252-254 and accompanying text.

For decades, banks were restricted in their ability to pay interest to their depositors.[246] Multiple state and federal rules seek to limit the cost of bank credit to address predatory lending arrangements.[247] Banking laws also dictate the terms of credit that banks offer to insiders and affiliated entities.[248]

In popular textbooks and policy discussions, these rate regulations are treated as fundamentally different tools serving different purposes. Only deposit rate ceilings are seen as implicating antitrust-like concerns.[249] Even there, the key lesson is that of contrast: the limits on deposit rates are interpreted as deliberate (and unsuccessful) restrictions on competition in the name of stability in the heavily regulated banking sector.[250]

A closer look at these provisions, however, reveals their deeper interconnection as tools that constrain banks' ability to abuse the structural power stemming from their "special" position in today's financial and economic systems. Banks' legal monopoly on public money creation gives them a unique structural advantage vis-à-vis other financial firms. On a deeper level, it also operates as an extraordinary lever of social influence. As publicly anointed suppliers of the universal economic input—the nation's credit-money—private banks hold the power to determine who gets to participate in the economic exchange, at what price, and under what conditions. By controlling the price of access to critical financial infrastructure—deposits, payments, and credit services—banks can effectively shape the distribution of economic citizenship rights.

Seen through this lens, various limits on banks' pricing power function as sector-specific adaptations of the broader antimonopoly paradigm.[251] They help to support the competitive structure of the economy as a whole.

1. *Rate Ceilings*

As discussed above, in our franchise system of finance, the Fed modulates the supply of credit-money, while private banks allocate credit.[252] The Fed controls the money supply primarily through the federal funds rate—the rate at which banks lend to one another on a short-term basis—by conducting open market operations, encouraging or discouraging discount window loans,

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246. *See infra* notes 255-258 and accompanying text.

247. *See infra* notes 263-266 and accompanying text.

248. *See infra* Section IV.B.2.

249. *See* Lawrence J. White, *Antitrust and Financial Regulation in the Wake of* Philadelphia National Bank*: Complements, Not Substitutes*, 80 ANTITRUST L.J. 413, 420-21 (2015).

250. Shull, *supra* note 73, at 273.

251. *See* Khan, *supra* note 32, at 722-30.

252. Hockett & Omarova, *supra* note 29, at 1213.

varying the interest rate on bank reserves, and so on.[253] Rather than direct rate *regulation*, the central bank's monetary policy is a form of economy-wide rate *management*, a notoriously indirect mechanism for influencing the price of credit.[254]

More directly, however, U.S. banks have long been subject to specific restrictions on their pricing policies. The Banking Act of 1933 prohibited interest payments on demand deposits and authorized the Fed to limit the rate of interest on time and savings deposits.[255] The Fed implemented these provisions in its Regulation Q.[256] These restrictions were meant to protect banks' profitability by removing the need to compete for deposits and reducing incentives to invest in high-risk assets.[257] Congress also sought "to encourage country banks to lend more in their local communities rather than hold balances with large banks in financial centers."[258]

Banks found multiple ways around these restrictions. Various financial instruments emerged as interest-yielding alternatives to bank deposits.[259] This has critically altered the systemic landscape, stimulating the rise of so-called "shadow banking."[260] After decades of political fights over the competitive disadvantages suffered by banks,[261] followed by a period of functional irrelevance, the statutory restrictions and Regulation Q were ultimately repealed in the Dodd-Frank Act.[262]

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253. *See* Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 773-801.

254. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 327-28 (1963) (stating that the Fed's operations are "not, however, rate regulation").

255. Banking Act of 1933, Pub. L. No. 73-66, § 11 (repealed 1999).

256. Prohibition Against Payment of Interest on Demand Deposits, 76 Fed. Reg. 20892, 20892 (proposed Apr. 14, 2011) (codified at 12 C.F.R. pts. 204, 217, 230 (2022)).

257. *See* White, *supra* note 249, at 421.

258. R. Alton Gilbert, *Requiem for Regulation Q: What It Did and Why It Passed Away*, 68 FED. RSRV. BANK OF ST. LOUIS REV. 22, 22 (1986). Large banks could attract funds from smaller banks by paying high rates of interest and then channel those deposits toward "speculative purposes, thus depriving businesses and individuals in smaller communities of credit that could have been used productively." *Id.*

259. *See, e.g.*, Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 458 (2017) (discussing the advent of money-market mutual funds, which were not subject to Regulation Q); Graham S. Steele, *Banking on the Edge*, 2 U. CHI. BUS. L. REV. 171, 189 (2023) (describing banks' use of Eurodollar markets to evade Regulation Q).

260. *See* Tarullo, *supra* note 117, at 63, 72.

261. *See* S. REP. NO. 97-536, at 18 (1982).

262. Prohibition Against Payment of Interest on Demand Deposits, 76 Fed. Reg. 42015, 42015-16 (July 18, 2011) (codified at 12 C.F.R. pts. 204, 217, 230 (2022)). Notwithstanding Regulation

While the direct controls on banks' deposit pricing have long since disappeared, the price of bank credit remains subject to regulatory oversight, albeit under a complex scheme of federal and state rules. While the Fed's monetary policy influences *minimum* rates that banks charge their borrowers, there is generally no federal *maximum* interest rate on loans.[263] Instead, banks are subject to applicable state usury laws.[264] Technically, therefore, "[i]n the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies . . . bankers are free to price their loans as they choose."[265]

In practice, things are more complicated. Banks' loan pricing regulation is traditionally seen as a tool of consumer protection, implicating issues of federal preemption of state laws. These issues became increasingly controversial with the rise of subprime and predatory lending in the 1990s, which led many states to pass tougher laws protecting borrowers from abusive practices.[266] In 2004, at the height of the subprime mortgage boom, the OCC issued a rule preempting the application of state anti-predatory-lending laws to national banks and their subsidiaries.[267] Subsequent regulatory decisions and court rulings effectively precluded states from regulating subprime mortgages in the run-up to the 2008 crisis.[268] In Dodd-Frank, Congress responded to widespread criticism of this policy by arguably "undoing broader standards" of preemption in the OCC's precrisis rule and restoring, at least in part, states' ability to regulate interest rates on consumer loans.[269]

Q's repeal, nonbank financial institutions continue replicating, or "shadowing," certain key functions of the banking business without being subjected to bank-like regulation and supervision, including chartering, activity restrictions, and the full range of prudential oversight. *See* Hockett & Omarova, *supra* note 29, at 1164, 1175-93; *see also* Graham S. Steele, *Banking as a Social Contract*, 22 U.C. DAVIS BUS. L.J. 65, 76-78 (2021) (detailing the proliferation of shadow banking).

263. 12 U.S.C. §§ 85-86 (2018). Exceptions to this rule include interest-rate caps under the Military Lending Act, 10 U.S.C. § 987(b) (2018), which enacted a maximum interest rate of thirty-six percent a year, and the Servicemembers Civil Relief Act, 50 U.S.C. § 3937(a) (2018), which limits interest rates to six percent per year.

264. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007).

265. United States v. Phila. Nat'l Bank, 374 U.S. 321, 328 (1963).

266. Raphael W. Bostic, Kathleen C. Engel, Patricia A. McCoy, Anthony Pennington-Cross & Susan M. Wachter, *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47, 49 (2008).

267. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1904-05 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7, 34 (2022)).

268. S. REP. NO. 111-176, at 15-17 (2010) (explaining how regulatory action and inaction contributed to the mortgage crisis); *Watters*, 550 U.S. at 14-15 (holding that the NBA preempts state mortgage lending laws).

269. S. REP. NO. 111-176, at 175-76 (2010).

Within the U.S. dual banking system, usury laws can be viewed as a means of preventing banks from misusing the federal charter and access to central bank support to legitimize pricing practices prohibited by states. Importantly, however, laws like the Dodd-Frank Act have approached interest-rate regulation as part of a more seamlessly unified consumer-protection scheme aiming to limit banks' ability to leverage their allocative powers into unfair, deceptive, or abusive behavior. More recently, restrictions on predatory lending, in particular, have been explicitly framed as promoting fair competition that ultimately benefits consumers.[270]

2. *Preferential Pricing*

There is a long history of bank managers and directors using their positions of control to steer credit to themselves, their businesses, and other favored parties at lower interest rates and on more liberal terms than those available to the public.[271] Congress had once been so concerned about banks' insider-lending practices that the Banking Act of 1933 initially imposed a flat prohibition against any bank executive borrowing from their bank.[272] Today, bank loans to insiders are subject to statutory limitations under Sections 22(g) and 22(h) of the FRA[273] and the Fed's implementing Regulation O.[274] These rules govern banks' extensions of credit to their and their affiliated entities' executive officers, directors, or principal shareholders.[275] Thus, to prevent preferential pricing, Regulation O mandates that banks extend credit to insiders on substantially the same terms as those available to their outside customers in comparable transactions.[276] All

270. *See* Exec. Order No. 14036, § 5(t)(ii), 86 Fed. Reg. 36987, 36998 (July 14, 2021) (reasoning that the "prohibition on unfair, deceptive, or abusive acts or practices in consumer financial products or services" ensures that "actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law").

271. *See* H.R. Rep. No. 95-1383, at 7-14 (1978). This type of price distortion became a policy concern in the wake of the banking crisis of 1933, when Congress enacted the first federal prohibition on banks' transactions with affiliates: Section 23A of the Federal Reserve Act, discussed *infra* Section V.C.

272. *See* Banking Act of 1933, Pub. L. No. 73-66, at § 12 (1933).

273. 12 U.S.C. § 375(a)-(b) (2018). While these provisions apply only to banks that are members of the Federal Reserve System, 12 U.S.C. § 1828(j)(2) (2018) extends their application to all FDIC-insured banks.

274. 12 C.F.R. § 215 (2022).

275. *Id.* §§ 215.1(b)(1), 215.3(a). The rules also apply to any extension of credit by a bank to insiders' "related interests," including political or campaign committees that benefit or are controlled by a bank insider. *Id.* § 215.1(b)(3).

276. *Id.* § 215.4(a).

insider loans must comply with the generally applicable lending-concentration limits[277]—and any loan exceeding certain thresholds requires prior approval of the bank's disinterested directors.[278]

The concerns most frequently cited in relation to insider transactions implicate unsafe and unsound behavior and inadequate corporate governance controls.[279] Congress was aware, however, of the related competitive implications and saw insider-lending restrictions as being of a piece with regulation of interlocking directorates.[280] Insider lending can lead to the diminishment or loss of vital financing through "failures, abuses, anticompetitive situations, mismanagement, or poor regulation" which, in turn, leads to dire results for local economies.[281] Conversely, preventing self-dealing by bank insiders ensures that communities have a "safe, sound, *and* responsive financial system."[282] Restricting insider lending ensures that credit and other financial resources are channeled to the community, rather than hoarded and abused for personal benefit by powerful individuals or companies with close connections to, or control over, banks. In this sense, insider-lending restrictions operate as a form of broadly conceived antimonopoly measure, a direct control on banks' ability to abuse their structural power as privileged providers of credit to the economy.

Concerns with the structure and dynamics of financial markets are more clearly visible in the context of Section 23B of the FRA, which governs a broader universe of banks' transactions with affiliates. Enacted in 1978, Section 23B requires nearly all business transactions between FDIC-insured banks and their affiliates to be conducted on terms that are at least as favorable to the bank as those for comparable transactions involving nonaffiliated companies.[283]

By prohibiting preferentially priced dealings—including credit extensions, sales and purchases of assets, rendering of services, and so on—the statute precludes a bank from intentionally incurring economic loss in an effort to benefit its affiliate. Preserving individual banks' safety and soundness, however, is not the statute's sole purpose. Section 23B explicitly seeks to limit the leakage of

277. *Id.* §§ 215.2(i), 215.4(d). For the general lending limits, see 12 U.S.C. § 84 (2018).

278. 12 C.F.R. § 215.4(b) (2022). The thresholds are the higher of $25,000 or five percent of the bank's unimpaired capital and unimpaired surplus, or an increase that results in the aggregate extension of credit to the insider above $500,000. *Id.*

279. *See* U.S. GEN. ACCT. OFF., BANK INSIDER ACTIVITIES: INSIDER PROBLEMS AND VIOLATIONS INDICATE BROADER MANAGEMENT DEFICIENCIES 15-16 (1994).

280. *See* H.R. REP. NO. 95-1383, at 10 (1978).

281. *Id.* at 9.

282. *Id.* (emphasis added).

283. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 102, 101 Stat. 552, 564.

public subsidy arising from banks' access to the federal safety net.[284] Being part of a BHC confers a structural advantage on nonbank firms: access to a guaranteed source of cheaper funding or easy revenue. Restricting that access, therefore, is designed to prevent potentially significant competitive distortions in nonbank markets where bank affiliates operate.

As discussed below, Section 23B is not the only statute aiming to shield competition outside of the banking sector from the distortive effects of bank-subsidy abuse, particularly in the context of conglomeration.[285] Affiliation between deposit-taking banks and other business entities has long been a critical source of risk and instability in the financial sector. Accordingly, the ability to break apart certain affiliations is one of the most potent, albeit least actively used, tools in U.S. bank regulators' arsenal.

C. *Corporate Breakups*

The government's power to force a split of a single monopolistic firm into multiple entities has long been recognized as the "most drastic, but most effective, of antitrust remedies."[286] The most famous cases in the history of U.S. antitrust enforcement—from *Standard Oil Co. v. United States* to *United States v. AT&T*—involved court-ordered breakups of monopolistic corporate structures.[287] Today, however, the role of corporate breakups as an explicitly structural remedy for "bigness" is a hotly contested issue in antitrust policy, heavily focused on prices and efficiency considerations.[288]

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284. Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76560, 76560 (Dec. 12, 2002) (codified at 12 C.F.R. pt. 223 (2022)).

285. *See infra* Section V.C.

286. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

287. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982); Frederick Reese, *15 Companies the U.S. Government Tried to Break Up as Monopolies*, STACKER (Oct. 22, 2019), https://stacker.com/business-economy/15-companies-us-government-tried-break-monopolies [https://perma.cc/QN6B-JDQ9].

288. Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1956-58 (2020).

In recent years, the increasing salience of Big Tech platforms' economic and political power has brought the corporate-breakup remedy back on the antitrust enforcers' agenda. In October 2020, DOJ and eleven states filed a lawsuit against Google. *See* Complaint, United States v. Google, No. 20-cv-3010, 2023 WL 4999901 (D.D.C. Oct. 20, 2020). FTC later sued Facebook seeking, among other forms of relief, its "divestiture or restructuring." *See* Complaint for Injunctive and Other Equitable Relief at 52, FTC v. Facebook, 581 F. Supp. 3d 34 (D.D.C. Dec. 9, 2020) (No. 20-cv-3590). Many in the antitrust community, however, remain opposed to

In banking, corporate "bigness" presents an especially complex problem. Large banking organizations' balance-sheet size is not only a measure of their market power but also a source of potentially extraordinary systemic stability risks—and a proxy for their disproportionate access to public subsidies. Corporate breakups offer a direct, individually targeted structural solution to this multifaceted problem. This case-by-case approach offers a more flexible and facts-based way to reduce the size of individual institutions relative to the financial system and the economy as a whole, separate risky business lines from publicly supported depository services, and address the competitive and other distortions created by the TBTF phenomenon.[289] That is why the authority to break up financial institutions is such an important tool in the federal bank regulators' arsenal.

Unlike DOJ and FTC, federal bank regulators have statutory powers to unilaterally force the divestiture and restructuring of banking conglomerates, primarily (though not solely) on financial-stability grounds. The ability to order corporate breakups without relying on courts is a crucial modification of this traditional antitrust remedy. It reflects the "specialness" of publicly subsidized banks and the heightened importance of preventing abuses of their unique structural advantages.

The Federal Deposit Insurance Act grants regulators the authority to order any federally insured bank or BHC (including any of its subsidiaries) to cease and desist engaging in any unsafe or unsound practice or violating any law, rule, order, or condition imposed on them by the regulators.[290] If the institution fails to comply, regulators can restrict the growth of its assets, force disposition of any assets, and limit its business activities.[291] In practice, however, bank regulators have rarely used this provision to force divestiture.[292]

The BHCA grants the Fed an additional set of powers to break up bank-centered financial groups. Under Section 5 of the BHCA, the Fed can force any BHC to divest any subsidiary that "constitutes a serious risk to the financial safety, soundness, or stability" of an insured depository institution within such BHC's

"wholesale restructuring" of technology companies. Diana L. Moss, *Breaking up Is Hard to Do: The Implications of Restructuring and Regulating Digital Technology Markets*, ANTITRUST SOURCE 1, 1 (2019).

289. *See* Wilmarth, *supra* note 226, at 1044-52.

290. 12 U.S.C. § 1818(b)(1), (3) (2018).

291. *See id.* § 1818(b)(6)-(7).

292. Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 216 (2019). Recently, the Fed used this power to cap the asset size of Wells Fargo until it improves its risk management and compliance systems. Written Agreement Between Wells Fargo & Co. and Federal Reserve Bank of Minneapolis, Docket No. 18-007-B-HC (Feb. 2, 2018).

structure.[293] Under Section 4 of the BHCA, the Fed can mandate divestiture of any FHC's nonbank subsidiaries if the company or any of its insured depository subsidiaries fail to meet the supervisory standards for being "well capitalized" and "well managed," as required to qualify for the FHC status.[294] Though conditioned on technically different regulatory findings, both of these BHCA provisions can be used to order an effective breakup of a large financial conglomerate, separating its publicly subsidized banking operations from securities trading and other nonbank business lines. Yet, to date, the Fed has not used either of these authorities to order any banking institution's restructuring.[295] In an important sense, the Fed's continuing reluctance to employ breakup powers, despite the nation's decades-long history of failures of TBTF banks,[296] reflects not just reasonable regulatory caution but also the lack of appreciation of the broader structural concerns this remedy seeks to address.

In the wake of the 2008 crisis, widespread popular anger with Wall Street created an opening for potential breakups of large financial conglomerates.[297] While Congress declined to do so by law, it expanded regulators' powers to force divestiture and restructuring of financial institutions on a case-by-case basis. The Dodd-Frank Act of 2010 added new tools to the regulators' antimonopoly arsenal, tying them to conventional concerns with financial stability.

Section 165(d) of the Dodd-Frank Act requires large BHCs and nonbank SIFIs to periodically submit to the FDIC and the Fed entity-wide plans for rapid and orderly resolution through the bankruptcy process—what is often referred to as a "living will."[298] If the agencies jointly determine that an individual company's living will is "not credible or would not facilitate an orderly resolution," they may subject the company to more stringent prudential requirements and impose restrictions on its growth and activities.[299] If the identified deficiencies are not remedied within two years after the imposition of such additional requirements, the agencies can force the asset divestiture and breakup of the

293. 12 U.S.C. § 1844(e) (2018).

294. *See id.* § 1843(l)-(m).

295. Thomas M. Hoenig, Vice Chairman, Fed. Deposit Ins. Corp., Can We End Financial Bailouts?, Presentation to the Boston Economic Club 5 n.5 (May 2014); Kress, *supra* note 292, at 178.

296. *See* Lee Davison, *Continental Illinois and "Too Big to Fail," in* 1 FED. DEPOSIT INS. CORP., HISTORY OF THE EIGHTIES—LESSONS FOR THE FUTURE 235 (1997).

297. *See* Wilmarth, *supra* note 226, at 962.

298. 12 U.S.C. § 5365(d)(1) (2018). SIFIs are designated by the Financial Stability Oversight Council (FSOC) and are supervised by the Fed. *See id.* §§ 5321(a), 5322(a)(2)(H), 5323(a)(1). Currently, there are no nonbank SIFIs under the Fed's supervision.

299. *Id.* § 5365(d)(5); 12 C.F.R. §§ 243.5-.6, 381.5-.6 (2022). These decisions are subject to detailed procedural requirements.

firm.[300] Since the "living will" regime went into effect, the Fed and FDIC have declared some of the largest U.S. banking conglomerates' resolution plans "not credible."[301] In none of these cases, however, were the deficiencies found to persist long enough to necessitate divestitures.

Finally, Section 121 of Dodd-Frank authorizes the Fed, with FSOC's approval, to require any BHC with at least $250 billion in assets, or any nonbank financial company supervised by the Fed, to terminate any activities and to sell any assets if such entity poses "a grave threat to the financial stability of the United States."[302] The exercise of this authority is subject to stringent procedural requirements and reserved for extraordinary situations.[303] The Fed has not yet exercised this power.

Generally, federal bank regulators' breakup authority is designed to be invoked in rare circumstances, as a last-resort measure necessary to protect the financial system from serious harm. The underlying notion of harm, however, encompasses far more than individual banks' safety and soundness or narrowly drawn notions of financial stability. Alongside these traditional banking-policy considerations, the relevant statutes invoke concerns more directly associated with "bigness": organizational complexity and mismanagement, excessive asset growth, and strategic abuse of bank subsidy as a competitive tool outside of the banking sector.[304] The nature of this structural remedy makes it a potent antimonopoly mechanism embedded in the existing regime of bank regulation, capable of constraining banks' impulse to leverage their privileged position within the financial system and the broader economy.

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300. 12 U.S.C. § 5365(d)(5)(B) (2018). The Fed and FDIC must make this decision in consultation with the FSOC.

301. *See, e.g.*, Press Release, Fed. Deposit Ins. Co., Agencies Announce Determinations and Provide Feedback on Resolution Plans of Eight Systemically Important, Domestic Banking Institutions (Apr. 13, 2016), https://www.fdic.gov/news/news/press/2016/pr16031.html [https://perma.cc/9PRW-XATD]; Press Release, Federal Deposit Insurance Corporation, Agencies Announce Determinations on October Resolution Plan Submissions of Five Systemically Important Domestic Banking Institutions (Dec. 13, 2016), https://www.fdic.gov/news/press-releases/2016/pr16109.html [https://perma.cc/376M-3ULU].

302. 12 U.S.C. § 5331(a) (2018).

303. *Id.* § 5331.

304. As others have argued at length, breakups have the potential to address the financial stability risks posed by giant financial conglomerates, promote competition among smaller banking rivals, and limit the political influence of firms that effectively control a significant portion of the economy. *See* JOHNSON & KWAK, *supra* note 11, at 200-22; ARTHUR E. WILMARTH JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT 335-56 (2020).

To sum up the preceding discussion, U.S. banking laws contain multiple provisions that functionally replicate certain core elements of antitrust law and policy. As adapted to banking, these elements take on a different character, reflecting the unique role of money and credit in the economy and the status of banking as a quasi-public service. Concentration limits, price regulation, and breakup authorities in the banking sector are typically interpreted with reference to safety and soundness, systemic risk, or consumer-protection concerns. This framing obscures the fact that these measures also seek to prevent excessive industry consolidation, constrain systematic abuses of market power, and ensure the fairness and efficiency of credit allocation.[305]

Banking laws, however, do not simply adopt and adapt existing tools of antitrust. In fundamental respects, U.S. banking law embodies an even more assertive and cohesive structural approach to containing and managing excessive concentration of private power. These core elements of the bank regulatory regime effectively operationalize the deeper, more explicitly structural view of antitrust. Rediscovering this view would enhance regulators' capacity to craft more effective and comprehensive solutions to various problems on their agenda.

V. UNNATURAL MONOPOLY CONTROLS IN BANKING

Many key provisions of U.S. banking law—market-entry controls, balance-sheet constraints, and activity and affiliation restrictions—are commonly interpreted as different from, and even antithetical to, traditional competition policy. These provisions are seen as a product of an uneasy but necessary compromise between promoting competition and preserving the safety and soundness of the nation's banking system.[306] By prioritizing the latter goal, banking laws give regulators and supervisors powerful tools that do not exist in U.S. antitrust enforcement.

These distinctive elements of the bank regulatory regime, however, also act as sector-specific antimonopoly tools. Their macrolevel goal is not simply to protect banking institutions from failure but to preserve the system-wide balance of public and private power. From this perspective, U.S. bank regulation operationalizes a fundamentally Brandeisian approach to preserving the structural integrity and democratic potential of financial markets.

This Part examines this hidden side of structural regulation in banking as a uniquely capacious and underappreciated antimonopoly regime. By reframing the narrative, it highlights the dangers of undermining this regime, ostensibly—and ironically—in the name of competition.

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305. *See supra* Section II.B.

306. Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133, 1142-43 (1981).

A. Market-Entry Controls

Requiring a special charter as a condition for engaging in a particular business activity is typically viewed as a direct constraint on competition. In the context of modern banking, however, the legal controls on entry serve important public purposes, including the fundamentally procompetitive goal of containing bank-specific public subsidies inside a tightly regulated perimeter.

In the United States, conducting banking business requires a special government-issued charter. The chartering process is lengthy and document-intensive and entails a thorough regulatory review.[307] Charter applications contain extensive financial information, business plans, and personal disclosures about prospective bank managers.[308] Bank charters come with legal requirements and conditions, including activity and affiliation restrictions, mandatory deposit insurance, minimum capital standards, and extensive reporting. Bank supervisors closely monitor compliance with the applicable rules. Failure to meet supervisors' standards can lead to enforcement actions and, in certain egregious cases, revocation of the bank's charter, or "forfeiture of franchise."[309]

This statutory language highlights the essential function of bank charter as a form of "franchise license" that both conveys special money-creation privileges on chartered banks and constrains their ability to abuse those privileges for private gain.[310] The latter aspect of bank chartering makes it a critical, albeit commonly misinterpreted, tool of promoting healthy competition in a market economy. While restrictive entry requirements and continuous charter conditionality protect banks from outside competition, they also prevent them from using their unique funding advantages to compete with nonbank firms for nonbanking business—a vital but routinely underappreciated antimonopoly benefit of the apparently strict approach to bank chartering. It is the balancing of these system-level policy considerations, rather than an oversimplified protectionist drive, that explains the sharp contrast between the bank-chartering regime and the modern process of general incorporation.[311]

307. David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1400-1401 (2020).

308. *See* 12 C.F.R. § 5.20(g)-(h) (2022).

309. 12 U.S.C. § 93 (2018).

310. Saule T. Omarova, *The "Franchise" View of the Corporation: Purpose, Personality, Public Policy*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 201, 203 (Elizabeth Pollman & Robert B. Thompson eds., 2021); *see also* Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1407-09 (2021) (explaining regulators' shift "from a procurement model to something resembling a licensing model" over time).

311. *See supra* note 310.

Historically, the intensity and selectivity of bank chartering reflected the underlying appreciation of banks' role as monetary institutions and economy-wide allocators of credit. Accordingly, an assessment of local economic conditions and the "convenience and needs of the community" was the crucial factor in bank-chartering decisions.[312] By the late 1970s, however, bank chartering came to be seen not as a necessary control on overextension of publicly granted privileges but as a crude anticompetitive device.[313] In this view, bank-charter requirements create a "regulatory moat" protecting incumbents from competitors[314] and, therefore, the default for regulators should be in favor of issuing new charters.[315] Since 2008, the pressure to loosen bank market-entry controls has intensified. The postcrisis slowdown in de novo chartering[316] bolstered arguments for making banking just like any other industry with lower barriers to entry, fewer restrictions, and greater transparency.[317] More recently, the OCC announced its readiness to accept fintech companies' applications for national bank charters as a way to promote "consumer choice, economic growth, modernization, and competition."[318]

These claims trade on a thin notion of competition and ignore the deeper, structural advantages that bank charters convey. Eliminating regulatory discretion in the outsourcing of sovereign money-creation power to profit-seeking private firms is not an appropriate means of meeting demand—real or perceived—for more convenient or cheaper banking products. The public subsidy that comes with the banking charter is a deliberately targeted tool for moderating

312. Menand & Ricks, *supra* note 310, at 1407.

313. *See* H.R. Rep. No. 95-1383, at 14 (1978). This shift reflected the "prevailing deregulatory ethos" of the era. Menand & Ricks, *supra* note 310, at 1408.

314. *See* Zaring, *supra* note 307, at 1428-32.

315. *See* Menand & Ricks, *supra* note 310, at 1407-09 (describing regulators' expansion of chartering).

316. *See* Anthony Gaeta, Jr., *The Future of Community Banking*, 20 N.C. Banking Inst. 1, 2-3 (2016).

317. *See* Zaring, *supra* note 307, at 1432-47.

318. Off. of the Comptroller of the Currency, Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters 1-2 (2018), https://www.occ.treas.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf [https://perma.cc/S9YH-6PFF]. More recently, fintech firms have sought to acquire banks in order to access the funding benefits provided by bank deposits. *See* Yizhu Wang & Thomas Mason, *Fintechs Still Eyeing Banks, See the Deals Bringing Funding Benefits*, S&P Glob. Mkt. Intel. (June 12, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/fintechs-still-eyeing-banks-see-the-deals-bringing-funding-benefits-76024915 [https://perma.cc/K8T8-6HSG].

unhealthy market competition. Limiting entry into the banking market keeps this subsidy, and the associated risk of its abuse, structurally contained.[319]

B. Activity and Affiliation Restrictions

Unlike most other firms, U.S. banking institutions are subject to legal restrictions on their business activities and organizational affiliations. These

319. Historically, U.S. banking law also imposed strict controls on geographic market entry and expansion of banks' activities. This was, in large part, a product of the dual banking system, which necessitated managing the competition between state-chartered and national banks. *See* BARR, JACKSON & TAHYAR, *supra* note 69, at 42-44; Ginsburg, *supra* note 306, at 1139-41. Prohibitions on interstate branching and other geographic restrictions were meant both to prevent undue concentration of financial power and to maintain close relationships between bankers and their customers. *See* S. REP. NO. 103-240, at 4 (1994). In 1994, the Riegle-Neal Interstate Banking and Branching Efficiency Act removed most significant barriers to interstate branching and bank acquisitions. *See* Pub. L. No. 103-328, §§ 101-103, 108 Stat. 2338, 2339-54 (1994). The Dodd-Frank Act repealed remaining limits on de novo interstate branching. *See* Pub. L. No. 111-203, § 613, 124 Stat. 1376, 1614 (2010).

Geographic limitations were often framed as anticompetitive measures protecting local bank monopolies. Segmenting banks into geographic regions, however, helped to prevent excessive concentration in the banking sector and kept local bankers in touch with, and serving the needs of, their communities. *See* H.R. REP. No. 84-609, at 6 (1955) ("Like yeast cells in a loaf of bread, each working in its immediate area, our banks scattered throughout the country have cooperated to produce the greatest and most general economic development the world has known."); Roosevelt, *supra* note 102 ("It is hardly necessary to point out the great economic power that might be wielded by a group which may succeed in acquiring domination over banking resources in any considerable area of the country. That power becomes particularly dangerous when it is exercised from a distance . . . ."). Removing these restrictions has triggered massive industry consolidation that led to the spread of banking "deserts," mainly in low- and moderate-income communities. *See* Community Reinvestment Act, 85 Fed. Reg. 66410, 66411 n.4, 66430 (Oct. 19, 2020).

Today, the principal legal means of ensuring banks' continuing responsiveness to local needs is the Community Reinvestment Act (CRA) of 1977, which seeks to encourage banks to "meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(b) (2018). Enacted as an antiredlining law, the CRA is meant to address "market failures in low-income communities." Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005). In practice, however, the CRA's efficacy in achieving these noble goals has been limited. The statute is enforced through examinations and ratings, which only come into play when banks seek to engage in certain activities, including opening new branches and merging with or acquiring other banks. *See id*. Despite the federal bank regulators' recent revision of the outdated CRA rules, the future of this inherently geographically based scheme remains unclear in the face of the increasing industry consolidation and rapid growth of online retail banking. *See* Community Reinvestment Act, 87 Fed. Reg. 33884, 33964-65 (June 3, 2022); *Interagency Overview of the Community Reinvestment Act Final Rule*, BD. GOVERNORS FED. RSRV. SYS.; FED. DEPOSIT INS. CORP. & OFF. COMPTROLLER CURRENCY (Oct. 2023), https://www.occ.gov/news-issuances/news-releases/2023/nr-ia-2023-117b.pdf [https://perma.cc/A8FR-VS9V].

measures are widely recognized as reflecting lawmakers' concerns with the safety and soundness of federally insured banks. Less well appreciated, however, is the fact that they also manifest the broader goals of preserving structural integrity, functional efficacy, and competitive fairness in the U.S. financial system. These provisions prevent banks from abusing their unique advantages as the stewards of "other peoples' money."[320] They differ from traditional antitrust measures, insofar as they are designed to operate as built-in structural constraints on banks' ability to leverage the extraordinary public subsidies they enjoy as monetary institutions to extract outsized gains in other markets. By precluding or limiting banks' business activities and organizational affiliations, U.S. banking statutes protect the rest of the economy from potential domination by a few financial-industrial complexes.[321] In this sense, these core structural elements of federal bank regulation, typically framed in familiar prudential-oversight terms, play an important role in supporting the economic foundations of American democracy.

1. *The "Bank Powers Clause"*

Activity limitations are at the core of the bank-chartering regime. The NBA's "bank powers clause" authorizes federally chartered banks to exercise only "such incidental powers as shall be necessary to carry on the business of banking."[322] This notoriously ambiguous clause has generated decades of debate among banking-law experts struggling to decipher the congressional intent behind it.[323]

Conceptually, the bank powers clause is best understood as the grant of the sovereign "franchise license" and the accompanying delineation of its scope. The clause conveys the essence of the bargain: a chartered bank is a dedicated vessel for carrying out its delegated sovereign powers, as opposed to a regular private entity free to conduct any lawfully profitable activity. By granting banks a limited set of corporate powers, therefore, the NBA prevents publicly subsidized

320. *See supra* notes 77-79 and accompanying text.

321. Japan's *keiretsu* and *zaibatsu* are well-known examples of such conglomerate structures. *See generally* Artur F. Tomeczek, *The Evolution of Japanese Keiretsu Networks: A Review and Text Network Analysis of Their Perceptions in Economics*, 62 JAPAN & WORLD ECON. 101132 (2022) (describing the function and evolution of *keiretsu* networks).

322. 12 U.S.C. § 24 (2018). While the NBA applies to national banks, state-chartered banks are generally prohibited from conducting activities impermissible for national banks. *Id* § 1831a(a)(1).

323. *See* Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking*," 63 U. MIAMI L. REV. 1041, 1048-55 (2009) (tracing the evolution of interpretive approaches to the language of the bank-powers clause in the NBA).

banking entities from unfairly competing with other firms for nonbanking business.[324]

Since the late 1980s, however, the OCC and the courts have gradually loosened the scope of the bank powers clause and significantly expanded the range of business activities deemed to fall within the statutory definition of the business of banking.[325] This deregulatory strategy was justified by reference both to safety and soundness and to competitive benefits banks purportedly receive from diversifying their assets and exposure.[326] While that may be true for individual banks in booming markets, the systematic erosion of this foundational structural safeguard is bound to undermine the long-term health and stability of the financial system.

2. *The Glass-Steagall Act*

In 1933, Congress responded to the Pecora Commission's findings of widespread stock-price manipulation by brokerages and their sister-banks that funneled credit into speculative trading and pump-and-dump schemes.[327] Specifically, the Glass-Steagall Act amended the NBA by generally prohibiting national banks from underwriting and dealing in securities.[328] Glass-Steagall as a whole comprised four sections of the Banking Act. In addition to the Section 16 prohibition on banks' securities activities, Section 20 banned commercial banks from affiliating with businesses "engaged principally" in securities activities, Section 21 prohibited nonbanks from issuing deposits, and Section 32 banned interlocking directorates between banks and securities firms.[329] These four sections established an organizational and market wall between banking and securities, which lasted until 1999.

Glass-Steagall sought to "prevent the undue diversion of funds into speculative operations"[330] by outlawing any "unduly extensive connections between

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324. Historically, the statutory language is traceable to the Bank of England's royal charter that limited its powers in order to protect merchants from being oppressed by the new entity with a monopoly franchise. Shull, *supra* note 73, at 259-61. Whether or not the American adopters of this approach were aware of that fact, it underscores the fundamentally structural reasons for limiting permissible activities of uniquely privileged sovereign franchisee-banks.

325. *See* Omarova, *supra* note 323, at 1077-90 (analyzing the decades-long process of regulatory and judicial expansion of derivatives activities permissible under the NBA).

326. *Id.*

327. *See* DAVID H. CARPENTER, EDWARD V. MURPHY & M. MAUREEN MURPHY, CONG. RSCH. SERV., R44349, THE GLASS-STEAGALL ACT: A LEGAL AND POLICY ANALYSIS 3-5 (2016).

328. 12 U.S.C. § 24 (2018).

329. Banking Act of 1933, Pub. L. No. 73-66, §§ 20-21, 32, 48 Stat. 162, 188-89, 194.

330. Banking Act of 1933, Pub L. No. 73-66, 48 Stat. 162, 162.

banking and other businesses."[331] According to the canonic Supreme Court case interpreting Glass-Steagall, the Act was "a prophylactic measure" directed at multiple evils associated with speculative trading, including the conflicts of interest that inhibited "disinterested investment advice" and the temptation to divert credit to affiliates or to bail them out of risky investments.[332] Ultimately, the Court said, Glass-Steagall "reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial dangers' that arise" when the two lines of business are commingled.[333]

This understanding was lost in the long battle for the repeal of Glass-Steagall, as the industry succeeded in reducing the debate to microlevel trade-offs between risks and returns of securities underwriting and theoretical benefits of bank-portfolio diversification.[334] Following the industry's lead, federal bank regulators gradually expanded the range of bank-permissible activities. For example, the OCC determined that the brokerage of annuities was "necessary to carry on the business of banking"[335] and "dismantled piecemeal" the restrictions on banks' securities brokerage activities.[336] It also gradually reinterpreted the NBA's bank powers clause to authorize derivatives trading and dealing.[337] The Fed, for its part, loosened the Glass-Steagall prohibition on banks affiliating with entities "engaged principally" in the underwriting and distribution of securities.[338]

In 1999, GLBA formally repealed Glass-Steagall prohibitions on affiliations and management interlocks between banks and securities firms.[339] Nonetheless, both Sections 16, prohibiting banks from securities underwriting and dealing, and 21, prohibiting securities firms from accepting deposits, remain in force.[340] Thus, while banks and nonbanks are free to affiliate within the same holding company structure, banking and securities are still nominally separate industries.

331. S. REP. NO. 89-1179, at 2 (1966).

332. Inv. Co. Inst. v. Camp, 401 U.S. 617, 639, 629-33 (1971).

333. *Id.* at 630.

334. Wilmarth, Jr., *supra* note 259, at 510-19.

335. NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 264 (1995).

336. Am. Bankers Ass'n v. SEC, 804 F.2d 739, 741 (D.C. Cir. 1986).

337. Omarova, *supra* note 323, at 1057-58.

338. Sec. Indus. Ass'n v. Bd. of Governors, 468 U.S. 207, 213, 221 (1984).

339. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 101-103, 113 Stat. 1338, 1341-51 (1999).

340. John Crawford, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 3-4 (2017).

Whether or not Glass-Steagall correctly targeted the problems of its time has long been debated in policy circles, academia, and popular literature.[341] Understanding banking as a public/private franchise, however, shifts attention from conflicting narratives to the underlying logic of using sectoral segmentation to preserve both the long-term stability and structural integrity of financial markets. Because banks have special quasi-public duties of creating and allocating the nation's money and credit, they must be free from the "promotional pressure[s]" of the stock-selling game.[342] To fulfill this systemically important role, banks have to be—and be *seen* as—neutral agents channeling the sovereign public's full faith and credit to its most productive uses in the economy.[343] By the same token, banks should not be able to extract extraordinary profits from leveraging their unique funding advantages outside of their core franchise.[344] Put simply, banks should not be able to dominate the entire system of U.S. capital markets just because the government has empowered them to issue the nation's money. Finally, the heightened vulnerability of securities markets to speculation-driven instability and competitive distortions supports the notion of limiting publicly subsidized banks' ability to trade and deal in securities.[345] Institutions entrusted with the issuance of sovereign money should not be allowed to jeopardize the stability and safety of their core operations.

Approaching the old Glass-Steagall debate from this angle brings into a sharp relief the underlying fact that, ultimately, structural separation is less about protecting individual banks' balance sheets than it is about preventing systemic imbalances and controlling the leakage of public subsidy enjoyed by banks in their capacity as special franchisees of the sovereign. In other words, it is a form of unnatural monopoly regulation.

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341. *See, e.g.*, Joe Asher, *Glass-Steagall Folklore . . . Debunked*, 1991 ABA BANKING J. 33, 34-35; Randall S. Kroszner & Raghuram G. Rajan, *Is the Glass-Steagall Justified? A Study of the U.S. Experience with Universal Banking Before 1933*, 84 AM. ECON. REV. 810, 829-830 (1994); Arthur E. Wilmarth, Jr., *Was Glass-Steagall's Demise Both Inevitable and Unimportant?*, CLS BLUE SKY BLOG (Sept. 18, 2018), https://clsbluesky.law.columbia.edu/2018/09/18/was-glass-steagalls-demise-both-inevitable-and-unimportant [https://perma.cc/N4XY-8PXY].

342. Inv. Co. Inst. v. Camp, 401 U.S 617, 629-33, 636 (1971).

343. *See id.* at 633 (discussing the "potential hazard" that arises from conflict between the investment banker's promotional interest and the corporate banker's obligation to offer disinterested investment advice).

344. *See id.* at 631.

345. *See id.* at 631-32 (explaining how concerns about speculation motivated the passage of Glass-Steagall).

3. *The Bank Holding Company Act*

The BHCA reinforced Glass-Steagall's policy of structural separation by generally prohibiting companies that own or control U.S. banks, or BHCs, from running nonbanking businesses.[346] It is the main federal law operationalizing the long-standing U.S. principle of separation of banking from commerce.[347] Although the BHCA is currently viewed primarily as a vehicle of macroprudential regulation and financial-stability oversight,[348] it is intimately rooted in the antitrust tradition and Americans' distrust of concentrated financial power.[349]

The BHCA was a legislative response to accelerated accumulation and perceived abuses of market power by large financial and commercial corporations acquiring multiple banks in multiple locations.[350] The holding-company structure had enabled companies to circumvent then-existing geographic restrictions on bank branching and absorb numerous local banks into their growing business empires.[351] To policymakers, this largely unfettered expansion threatened to create a banking system that "tends toward concentration in all lines, cartels, the stifling of new enterprises, and stagnation."[352] The drafters of the BHCA were concerned about the concentration of deposits among a small number of BHCs[353] and bank funds being misused by insiders to enrich themselves or to finance risky activities.[354] In the Brandeisian tradition, they linked decentralization and competition with political autonomy and democracy, and concentration and centralization with a corresponding loss of freedom.[355] By passing the

346. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended in scattered sections of 12 U.S.C. (2018)).

347. S. REP. NO. 106-44, at 71 (1999).

348. Omarova & Tahyar, *supra* note 103, at 127-29.

349. H.R. REP. NO. 103-448, at 20 (1994); FEIN, *supra* note 131, at ¶ 7.02[1]. For a historical analysis of the BHCA's antimonopoly origins, see generally Grischkan, *supra* note 106.

350. As noted earlier, the immediate impetus for the passage of the BHCA was the expansion of Transamerica's business empire, which the Fed was not able to stop via conventional antitrust means. *See supra* notes 102-106 and accompanying text. Transamerica infamously combined banking with nonbanking activities like "life, fire, automobile, and marine insurance," as well as commercial enterprises like "oil and gas, fish canning and processing, frozen foods, castings, forge equipment, kitchen tools, and agricultural equipment." *See* H.R. REP. NO. 84-609, at 4 (1955).

351. H.R. REP. NO. 84-609, at 3-4 (1955).

352. *Id.* at 6.

353. *Id.* at 8-9.

354. *Id.* at 4-5.

355. *Id.* at 2 (arguing that the United States had "adopted a democratic ideal of banking" and that the BHC structure "threatens to destroy this democratic grassroots institution" of independent banking).

BHCA, Congress reaffirmed that a "nation that would not allow a monopoly over tobacco certainly will not condone one over the lifeblood of its economy, money, and credit."[356]

Originally, the BHCA restricted BHCs and their subsidiaries to banking activities and activities "so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto."[357] The Fed's Regulation Y contains the "laundry list" of permissible activities, which reflects the gradual expansion of the statutory exception through regulatory interpretation.[358]

Generally, the BHCA requires BHCs to receive the Fed's approval before acquiring control of any nonbanking business or commencing a new nonbanking activity.[359] The Fed must analyze whether the proposed transaction provides "benefits to the public, such as greater convenience, increased competition, or gains in efficiency," which would "outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system."[360]

These statutory standards clearly channel the antimonopoly spirit of the BHCA. They are explicitly focused on the impact of the proposed nonbanking activity or acquisition on the levels of competition, concentration of resources, and other metrics of the structural integrity and stability of the U.S. financial system. More broadly, the statutory language reflects the drafters' commitment to policing against the dangers of the banking business becoming co-opted and abused as an engine of the firm's expansive growth in commercial markets. In this sense, one of the BHCA's goals is preventing nonbanking firms from gaining an unfair structural advantage by controlling publicly subsidized banks.[361] It is about protecting healthy competition in the nation's economy.

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356. *Id.*; *see also* S. REP. NO. 84-1095, at 1 (1955) ("[B]ecause of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities. The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking in our present national economy.").

357. Bank Holding Company Act of 1956, Pub L. No. 84-511, § 4(c)(6), 70 Stat. 133, 137.

358. 12 C.F.R. § 225.28 (2022). The list is a product of the decades-long process of the Fed accommodating the banking industry's requests and includes, for example, loan servicing, property appraising, trust functions, and dealing in government obligations.

359. 12 U.S.C. § 1843(j)(1) (2018).

360. *Id.* § 1843(j)(2)(A); 12 C.F.R. § 225.26(a) (2022).

361. H.R. REP. NO. 84-609, at 16 (1955) ("Whenever a holding company thus controls both banks and nonbanking businesses, it is apparent that the holding company's nonbanking businesses may thereby occupy a preferred position over that of their competitors in obtaining bank credit.").

The BHCA's balancing test for nonbank activities and acquisitions, however, is less analytically developed than the HHI's analysis of bank mergers and acquisitions.[362] Such analyses generally consist of high-level discussions of the potential trade-offs resulting from the relevant transaction, based upon the submissions of the relevant BHC and other commenters.[363] Moreover, the statute contains multiple exemptions from this prior-approval requirement.[364] As a result, the BHCA's complex and seemingly strict procedural requirements have largely failed to constrain the expansion of BHCs' nonbanking operations. Particularly in recent years, the Fed's scrutiny of nonbank acquisitions has rarely posed an obstacle to cross-sectoral conglomeration.[365]

The passage of GLBA, which created FHCs—financial conglomerates combining banking with securities, insurance, asset management, and various other "financial in nature" activities—further eroded the BHCA's original purpose of structural segmentation. It also significantly undermined the wall between banking and commerce.[366] First, GLBA allowed FHCs to make private-equity investments in commercial companies under the "merchant banking" authority.[367] Second, it enabled FHCs to conduct any commercial activities determined to be "complementary" to a financial activity.[368] Finally, GLBA provided a special grandfathering clause for commodity activities of firms that became subject to

362. *See supra* Section III.A.

363. *See, e.g.*, *Order Approving Formation of Bank Holding Companies*, Bd. of Governors of the Fed. Rsrv. Sys. 6-7 (Sept. 21, 2008), https://www.federalreserve.gov/newsevents/pressreleases/files/orders20080922a1.pdf [https://perma.cc/5VGV-Q9WS] (reviewing Goldman Sachs' nonbanking activities pursuant to its application to convert to a BHC); *see also Order Approving the Acquisition of a Savings and Loan Holding Company and Certain Nonbanking Subsidiaries*, Bd. of Governors of the Fed. Rsrv. Sys. 6-9 (Sept. 30, 2020) [hereinafter *Order Approving Acquisition*], https://www.federalreserve.gov/newsevents/pressreleases/files/orders20200930b1.pdf [https://perma.cc/PD57-X48T] (approving Morgan Stanley's acquisition of the online brokerage firm E*TRADE because "markets for these activities are regional or national in scope, with numerous competitors").

364. For example, BHCs are permitted to make nonbanking acquisitions in the "ordinary course of business" without the Fed's prior approval. 12 C.F.R. § 225.22(d)(7) (1984). "Well-capitalized" and "well-managed" BHCs can also bypass the Fed's pretransaction review under certain conditions. 12 C.F.R. § 225.23(c) (2022).

365. *See, e.g.*, *Order Approving the Acquisition of a Savings Association and Nonbanking Subsidiaries*, Bd. of Governors of the Fed. Reserve Sys. 38 (Feb. 14, 2012), https://www.federalreserve.gov/newsevents/pressreleases/files/order20120214.pdf [https://perma.cc/R2DK-MDXU] (approving Capital One's acquisition of ING Bank); *Order Approving Acquisition*, *supra* note 363, at 25 (approving Morgan Stanley's acquisition of E*TRADE).

366. Omarova, *supra* note 110, at 278-92.

367. 12 U.S.C. § 1843(k)(7) (2018).

368. *Id.* § 1843(k)(1)(B).

the BHCA after November 12, 1999.[369] As a result, large U.S. FHCs—including JPMorgan, Goldman Sachs, and Morgan Stanley—grew substantial commercial operations, especially in physical commodities and energy, which raised concerns about conflicts of interest, market manipulation, and excessive concentration of economic power in the hands of publicly subsidized "universal banks."[370]

Compounding the problem, the Fed's post-GLBA actions have often been at odds with the broader, historical understanding of its regulatory mission. One example of the Fed deliberately narrowing its own authority to police structural boundaries established by the statute is its recent revision of the definition of "control" for the purposes of the BHCA.[371]

The finding of "control" is a legal trigger for the BHC registration requirement, as well as the basis for monitoring and regulating existing BHCs' activities and acquisitions.[372] The history of banking in the U.S. is replete with examples of entities seeking the *benefits* of substantial ownership or influence over banks without the *obligations* that accompany such ownership or influence.[373] Large commercial companies—such as today's Big Tech giants—often seek the economic benefits of having a captive bank within their corporate structures,[374] but they cannot afford to be found to legally "control" that bank. The status of a "controlling" entity would subject these companies to the BHCA as if they were full-blown banking institutions—and, accordingly, force them to divest their core commercial business operations. Such potentially unacceptable

369. *Id.* § 1843(o).

370. Omarova, *supra* note 110, at 346-51.

371. For the purposes of the BHCA, "control" is defined in the Fed's Regulation Y. *See* 12 C.F.R. § 225.41 (2022).

372. *See generally* 12 U.S.C. § 1843 (2018) (establishing prohibitions, exemptions, and conditions applicable to the ownership or control of nonbanking entities); *id.* § 1851 (applying prohibitions against proprietary trading and investment fund sponsorship to a variety of control arrangements).

373. *See* H.R. REP. NO. 95-1383, at 19-20 (1978) (describing a "Texas Rent-a-Bank Scheme" that necessitated passage of the Change in Bank Control Act); STAFF OF SUBCOMM. ON DOMESTIC FIN., 89TH CONG., REP. ON BANK STOCK OWNERSHIP AND CONTROL 83-85 (Subcomm. Print 1966) (discussing bank stock ownership structures and their impact on existing legal regimes); H.R. REP. NO. 89-1179, at 3-5 (1965) (discussing the exemption from the BHCA for long-term trusts, charitable institutions, and investment companies).

374. For example, it was reported that Elon Musk, the owner of the social media company X (formerly Twitter), recently told company employees that he plans to facilitate his customers' "entire financial life" on the platform, adding, "If it involves money. It'll be on our platform." Jacob Kastrenakes & Alex Heath, *Elon Musk Gives X Employees One Year to Replace Your Bank*, VERGE (Oct. 26, 2023, 9:25 PM EDT), https://www.theverge.com/2023/10/26/23934216/x-twitter-bank-elon-musk-2024 [https://perma.cc/LNT7-HWPC]. Musk's plan reportedly does not envision obtaining a banking charter for X, relying instead on its registration as a state-licensed money transmitter. *See id.*

consequences of inadvertently acquiring "control" of a U.S. bank explain why the stakes in this seemingly mundane and technical area of the Fed's jurisdiction are so high. As the Big Tech example demonstrates, however, the stakes are also high from the perspective of the fundamental public interest in precluding the formation of contemporary "money trusts."[375]

As initially passed, the BHCA defined "control" as either (1) ownership of twenty-five percent or more of any class of an entity's voting shares, or (2) power to determine the election of a majority of its directors.[376] Subsequent congressional examinations of the role of banks as investors in nonfinancial companies, however, noted that whether an investor exercises control is a fundamentally "qualitative judgment" based on a variety of context-specific factors.[377] In 1970, Congress accordingly expanded the statutory definition by allowing the Fed to determine whether a person "directly or indirectly exercises a controlling influence over the management or policies of the bank or company."[378] This open-ended qualitative test was added in recognition of the fact that a firm's affairs can be controlled without exceeding quantitative thresholds.[379]

The definition of "control" in the Federal Reserve's Regulation Y reflected the complex and fact-dependent nature of the analysis, involving factors like the number of voting shares owned, the level of board representation, the nature of consultations with the management, and the extent of business relationships.[380] Regulation Y established a rebuttable presumption of "control" where an entity acquires ten percent or more of any class of voting shares in a bank or BHC and

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375. As discussed above, the Fed's "control" determinations are also directly relevant to existing BHCs' ability to expand by acquiring stakes in nonbanking businesses. *See supra* notes 361-363 and accompanying text.

376. S. Rep. No. 84-1095, at 5. These definitions have roots in PUHCA as well as the Investment Company Act of 1940. *See* H.R. Rep. No. 84-609, at 13; 15 U.S.C. § 80a-2(a)(9) (2018).

377. Staff of Subcomm. on Domestic Fin., 90th Cong., Rep. on Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy 22 (Subcomm. Print 1968). Factors identified by the subcommittee included "interlocking directorships; control and voting power over large blocks of stock; indirect control over directorships and voting of stock; . . . substantial loans to and bond holdings of a corporation," and informal social relationships and affiliations. *Id.*

378. 12 U.S.C. § 1841(a)(2)(C) (2018).

379. *See* Bd. of Governors of the Fed. Rsrv. Sys., Control and Divestiture Proceedings, 85 Fed. Reg. 12398, 12399 (Mar. 2, 2020) (to be codified at 12 C.F.R. pts. 225, 238). There is also a presumption against control where a party owns less than five percent of a class of voting shares. *See* 12 U.S.C. § 1841(a)(3) (2018).

380. *See* Bd. of Governors of the Fed. Rsrv. Sys., Control and Divestiture Proceedings, 85 Fed. Reg. at 12399.

is the largest holder of such class of securities.[381] It thus operationalized the long-standing understanding that "control is often exercised through ownership of much less than a majority of the shares of a corporation."[382]

In January 2020, the Fed revised its definition of "control" in Regulation Y, ostensibly to provide greater clarity, transparency, and certainty to market participants in the control-determination process.[383] The revised rule sought to codify the Fed's interpretations of "controlling influence," purportedly to make it easier for companies to make their investments.[384] It introduced a set of tiered

381. *See* 12 C.F.R. § 225.41(c) (2022). The "control" definition contains an exemption for shares held in a fiduciary capacity. *See* 12 U.S.C. § 1841(a)(5)(A) (2018). Similarly, the Hart-Scott-Rodino Act exempts from its notification requirements acquisitions of less than ten percent of a company's voting securities that are acquired "solely for the purpose of investment." 15 U.S.C. § 18a(c)(9) (2018). An acquirer relying on the exemption must have "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1) (2022). Thus, large asset managers are permitted to accumulate significant shares in banks and BHCs without triggering a control determination. Since at least 2019, the banking agencies have repeatedly granted investment-fund complexes relief from complying with Regulation O's insider-lending restrictions, despite their holding more than ten percent of banks' voting securities that should otherwise qualify as controlling interests under Regulation O. *See* Div. of Supervision & Regul., *Status of Certain Investment Funds and Their Portfolio Investments for Purposes of Regulation O and Reporting Requirements Under Part 363 of FDIC Regulations*, BD. GOVERNORS FED. RSRV. Sys. (Dec. 27, 2019), https://www.federalreserve.gov/supervisionreg/srletters/sr1916.htm [https://perma.cc/J9ES-WSWX]; *see also* Div. of Supervision & Regul., *Status of Certain Investment Funds and Their Portfolio Investments for Purposes of Regulation O and Reporting Requirements Under Part 363 of FDIC Regulations*, BD. GOVERNORS FED. RSRV. SYS., (Dec. 15, 2023), https://www.federalreserve.gov/supervisionreg/srletters/SR2310.htm [https://perma.cc/CV8C-WN6P] (stating that federal banking agencies can exercise discretion over whether to "take enforcement action against either an asset manager that is a principal shareholder of a bank, or a bank for which an asset manager is a principal shareholder").

382. H.R. REP. NO. 84-609, at 12-13 (1955).

383. *See* Bd. of Governors of the Fed. Rsrv. Sys., Control and Divestiture Proceedings, 84 Fed. Reg. 21634, 21655 (May 14, 2019) (stating the rule would "enhance transparency to the public around the Board's views on controlling influence" and thereby "enhance the efficiency of investments into and by banking organizations by providing greater clarity and certainty on the Board's views") (to be codified at 12 C.F.R. pts. 225, 238).

384. *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Invites Public Comment on Proposal to Simplify and Increase the Transparency of Rules for Determining Control of a Banking Organization (Apr. 23, 2019), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190423a.htm [https://perma.cc/D32A-ARFZ] (quoting Vice Chair Randal Quarles's statement that the "control framework has developed over time through a Delphic and hermetic process"); *see also* Arthur Long & James Springer, *Potential Reform to the Federal Reserve Board's "Control Rules,"* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL. (Sept. 7, 2018), https://corpgov.law.harvard.edu/2018/09/07/potential-reform-to-the-federal-reserve-boards-control-rules [https://perma.cc/37NC-J4TA] (finding that the control regime is "challenging for corporate lawyers and clients alike — one may be presumptions of control and noncontrol, based upon a combination of the amount of voting shares (using 5%, 10%, and 15% as principal thresholds) and other potential indicia of control, such as board seats, management interlocks, business relationships, and contractual arrangements.[385] These additional factors are further calibrated and keyed to ownership levels exceeding specified thresholds.[386]

In effect, the final rule provides thirty-six different scenarios, with the presumptions of control depending on specific combinations of quantitative and qualitative factors.[387] This technical complexity shows the deliberate one-sidedness in the Fed's ostensible quest for clarity and transparency. The dilution of the Fed's context-based determination powers makes it easier for private companies to structure their transactions to fit outside the specific enumerated presumptions, while making it harder for the Fed to assert the existence of "controlling influence" in such carefully engineered situations. The more granular "tailoring" of the relevant criteria effectively cabins regulatory discretion and inhibits the Fed's ability to review or intervene in future control determinations. The revisions to the control framework are therefore likely to lead to more concentrated ownership in the banking sector and more permissive standards for control acquisitions.[388] In this sense, the Fed's hypertechnical approach potentially undermines the practical efficacy and role of structural constraints as basic tools of bank regulation.

Despite the gradual erosion of the line dividing U.S. banking and commerce, the BHCA regime remains the principal source of regulatory power to limit or control the growth of large financial conglomerates around the core banking business. Its purpose is not only to enable consolidated prudential supervision of diversified financial-services firms—as held by the currently dominant view of the BHCA—but also to impose structural constraints on the growth of

greeted with 'That can't be right!' when explaining the likely Federal Reserve view of control").

385. *See* Bd. of Governors of the Fed. Rsrv. Sys., Control and Divestiture Proceedings, 85 Fed. Reg. 12398, 12402-07 (Mar. 2, 2020) (to be codified at 12 C.F.R. pts. 225, 238).

386. *Id.*

387. *See* Mark Van Der Weide et al., *Final Rule to Revise the Board's Framework for Determining Whether a Company Has Control over Another Company Under the Bank Holding Company Act and the Home Owners' Loan Act*, BD. GOVERNORS FED. RSRV. SYS. 9 (Jan. 23, 2020), https://www.federalreserve.gov/aboutthefed/boardmeetings/files/control-rule-memo-20200130.pdf [https://perma.cc/48CB-GK89].

388. *See* Bd. of Governors of the Fed. Rsrv. Sys., Control and Divestiture Proceedings, 84 Fed. Reg. at 21635 ("[C]ompared to past practice, the proposal would permit an investor to have a greater number of director representatives at the target company without triggering a presumption of control, and would allow investors seeking to terminate an existing control relationship to do so while retaining greater levels of ownership.").

megaconglomerates wielding outsized financial power across multiple economic sectors. The passage of GLBA has amplified the practical need for, and the political-economic significance of, such structural constraints. On a systemic level, the Fed's role administering the BHCA is not merely to examine BHCs' balance sheets but to manage the delicate balance of private and public power in a democratic economy. This fundamentally Brandeisian antimonopoly motivation underlying the BHCA is inseparable from its more commonly recognized safety and soundness objectives.[389]

Recovering and reinforcing this core motivation is particularly urgent in today's context of rapid digitization and the entry of Big Tech companies into financial services. As discussed below, these structural shifts require structural responses that build upon the original antimonopoly tradition in U.S. banking law.[390] Recent trends in banking law and regulation, however, show that the transformative potential of this tradition remains untapped.

4. *The Dodd-Frank Act*

While the 2008 financial crisis created a political opening for regulatory reforms on the scale of the New Deal, the Dodd-Frank Act of 2010 proved to be a mixed response. On the one hand, it reflected the sharp rhetorical shift to macroprudential, or more consciously systemic, regulatory goals and tools.[391] On the other hand, U.S. lawmakers stopped short of a comprehensive structural overhaul of the financial sector, opting instead for incremental adjustments to the existing regime. Congress chose not to break up, restructure, or more decisively limit organizational affiliations of U.S. banking institutions.[392] Even in those few instances when the law made use of structural remedies, the practical impact of these provisions was blunted by congressional drafters' preference for limiting both their scope and their intended outcomes.

Two provisions of the Dodd-Frank Act—the Volcker Rule and the Lincoln Amendment—exemplify this approach.

389. *See* Grischkan, *supra* note 106, at 207 (finding that the bank-holding-company movement "reflected a broader Progressive vision, one that understood concentrated financial power as a dire threat not only to economic prosperity, but to constitutional democracy itself").

390. *See infra* Section VI.B.

391. Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Reserve Sys., Address at the Federal Reserve Bank of Chicago Bank Structure Conference 1 (May 8, 2014), https://www.federalreserve.gov/newsevents/speech/files/tarullo20140508a.pdf [https://perma.cc/F49C-U5GT]; Mark Van Der Weide, *Implementing Dodd-Frank: Identifying and Mitigating Systemic Risk*, 36 ECON. PERSPS. 108, 109 (2012) (describing how the Fed has implemented Dodd-Frank to regulate "the most systemic firms").

392. Steele, *supra* note 17, at 1000.

Section 619 of Dodd-Frank, known as the "Volcker Rule" after former Fed Chair Paul Volcker, generally prohibits all "banking entities" from proprietary trading in financial instruments[393] and from investing in private equity and hedge funds.[394] The Volcker Rule was envisioned as a tool of both prudential regulation and competition policy. Its goal was to "limit threats to financial stability, and eliminate any economic subsidy to high-risk activities that is provided by access to lower-cost capital because of participation in the regulatory safety net."[395] By focusing on proprietary trading, the statute also targeted anticompetitive conflicts of interest between large financial companies and their customers.[396]

Section 716 of Dodd-Frank, known as the "Lincoln Amendment," generally prohibited Fed lending and FDIC guarantees to entities dealing in equity and commodity derivatives. This provision was meant to force U.S. banks to "push out" derivatives business into nondepository affiliates, thereby eliminating public subsidy of risky speculative trading.[397] Like the Volcker Rule, the Lincoln Amendment aimed both to protect the financial soundness of federally insured banks and to prevent them from using public subsidies to destabilize the financial system.[398]

While both the Volcker Rule and the Lincoln Amendment hearken back to the Glass-Steagall paradigm of structural separation,[399] in practice they embody a different—cautiously targeted, architecturally complex, and technically granular—approach to containing the bank subsidy.[400] The Lincoln Amendment, for example, excluded from its coverage hedging and dealing in bank-permissible derivatives.[401] The Volcker Rule contains a notoriously complex web of exclusions and exemptions that effectively puts multiple activities and asset classes outside of its operation.[402] These generous carve-outs include trading U.S.

393. 12 U.S.C. § 1851(a)(1)(A) (2018).

394. *Id.* §§ 1851(a)(1)(B), 1851(f).

395. S. Rep. No. 111-176, at 90 (2010).

396. *Id.*; Sen. Jeff Merkley & Sen. Carl Levin, *The Dodd-Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 Harv. J. on Legis. 515, 539 (2011).

397. Thomas M. Hoenig, Vice Chairman, Fed. Deposit Ins. Corp., Statement on Congressional Moves to Repeal Swaps Push-out Requirements (Dec. 10, 2014), https://archive.fdic.gov/view/fdic/1865 [https://perma.cc/KYK2-6EGE].

398. *See* Wilmarth, *supra* note 226, at 1030-31.

399. Macey & Holdcroft, *supra* note 228, at 1397; Merkley & Levin, *supra* note 396, at 538-39.

400. *See* Wilmarth, *supra* note 226, at 1024.

401. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-176, § 716(d), 124 Stat. 1376, 1648 (2010) (codified at 15 U.S.C. § 8305(d) (2018)).

402. *See* 12 U.S.C. § 1851(d)(1) (2018).

Treasury securities and conducting so-called "market making" activities. The former activity was exempted to further the broader U.S. government interest in Treasury-market liquidity, while the latter was ostensibly meant to accommodate customer-focused activities.[403] Such exemptions and exclusions, however, make the Volcker Rule a source of "little meaningful limitation on the riskiness of big banks or their interconnectedness or systemic importance."[404]

Post-adoption, both the Volcker Rule and the Lincoln Amendment were diluted even further. The Lincoln Amendment was effectively defanged in 2014, when Congress narrowed its application to certain asset-backed securities.[405] The banking industry and its supporters lobbied for these changes using standard arguments against structural constraints on BHCs' ability to expand their activities by leveraging privileged access to public subsidy. The core of their arguments was that limiting the public subsidy for derivatives activities would raise the costs of derivatives products and hurt U.S. banks' ability to compete for derivatives business in the global arena.[406] In an ironic twist, the very practices revealed by the 2008 crisis to be risky and anticompetitive were successfully reframed as publicly beneficial services necessitating government subsidies. In 2019-2020, the regulations implementing the Volcker Rule significantly expanded the scope of statutory exclusions and exemptions from its prohibitions and loosened many of its requirements.[407] While this "tailoring" simplifies compliance for banking entities, it weakens the substantive reach and efficacy of the Volcker Rule as a structural constraint on speculative finance.[408]

This post-2008 hollowing out of the concept of structural reform has serious policy implications. Increasingly, abuses of bank subsidies and related structural advantages are treated not as problems of political economy and democratic finance but as context-specific *technical* issues that can be fixed through more finely tuned—individualized and minimally invasive—regulations.[409] In effect,

403. *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5536, 5640 (Jan. 31, 2014) ("The Agencies believe banking entities will continue to provide significant support and liquidity to the U.S. government and agency security markets through permitted trading."); *see also* Merkley & Levin, *supra* note 396, at 542 ("Despite the broad restrictions on proprietary trading discussed above, banking entities are permitted to engage in a range of customer-serving, risk-mitigating, and other traditional banking activities that may involve conduct otherwise banned by the provisions.").

404. Macey & Holdcroft, *supra* note 228, at 1402-03.

405. BARR, JACKSON & TAHYAR, *supra* note 69, at 208.

406. *See* H.R. REP. No. 113-229, pt. 1, at 2-3 (2013); *id.* pt. 2, at 2.

407. Steele, *supra* note 17, at 1021-22.

408. *See id.*

409. *See* Macey & Holdcroft, *supra* note 228, at 1417.

this new policy consensus recasts *macrolevel* problems of financial power allocation as matters of misaligned *microlevel* incentives. It thus quietly undermines the antimonopoly character of U.S. bank regulation.

C. *Regulation of Affiliate Transactions*

U.S. antitrust law does not generally interfere with private companies' internal economic interactions. By contrast, U.S. banking law restricts federally insured banks' ability to provide funding to affiliated nonbank entities. This policy choice reflects the critical role of structural segmentation—including by mandating intracompany "firewalls"—as a tool for preventing or minimizing the anticompetitive effects of bank subsidy abuses on the broader financial and economic systems. Allowing federally subsidized banks to "transfer" their extraordinary economic privileges to nonbank affiliates would give these entities a tremendous—and unfair—advantage vis-à-vis their many competitors outside the banking sector. Because controlling the spread of these anticompetitive effects across different economic markets would be extremely difficult after the fact, it is critical to preclude that possibility upfront by erecting structural barriers to undesirable intrafirm subsidy transfers.

Section 23A of the FRA[410] and the Fed's Regulation W[411] exemplify this approach. These provisions impose quantitative limitations on certain "covered transactions" between banks and their affiliates, based on the amount of the bank's capital and surplus.[412] "Covered transactions" include loans and other extensions of credit[413] to an affiliate, investments in the securities issued by an affiliate, purchases of assets from an affiliate, issuances of guarantees on behalf of an affiliate, and other transactions exposing a bank to an affiliate's credit or investment risk.[414] In addition, section 23A requires all covered transactions to be on terms and conditions consistent with safe and sound banking practices[415] and prohibits banks from purchasing certain "low-quality" assets from their

410. 12 U.S.C. § 371c (2018). While section 23A applies only to members of the Federal Reserve System, 12 U.S.C. § 1828(j) (2018) extends it to all federally insured banks' affiliate transactions.

411. 12 C.F.R. pt. 223 (2022).

412. 12 U.S.C. § 371c(a)(1) (2018). The limitations are ten percent of the bank's capital stock and surplus in the case of transactions with any one affiliate, and twenty percent of the bank's capital stock and surplus in the case of transactions with all affiliates. *Id.*

413. "Extension of credit" includes "the making or renewal of a loan, the granting of a line of credit, or the extending of credit in any manner whatsoever, including on an intraday basis, to an affiliate." 12 C.F.R. § 223.3(o) (2022).

414. 12 U.S.C. § 371c(b)(7) (2018).

415. *Id.* § 371c(a)(4).

nonbank affiliates.[416] Finally, the statute mandates that all extensions of credit by the banks to their affiliates be secured by a statutorily mandated amount of collateral.[417]

Section 23A was added to the FRA in 1933, as part of the broader legislative package that included the Glass-Steagall Act. In adopting this provision, Congress was responding to the perception that imprudent loans to insiders were a contributing cause of widespread bank failures during the Great Depression.[418] Consistent with other provisions of banking law discussed above, section 23A serves the dual purposes of protecting the banking system from excessive risk and preventing intragroup transfers of the federal subsidy to support speculative activities.[419]

Importantly, section 23A seeks to promote competition and to prevent banks from favoring their affiliates in allocating credit.[420] The precise scope and severity of the legal restrictions on nonbank firms' access to sister banks' balance sheets have potentially enormous consequences for the growth of various cross-subsidized financial products. That systemic aspect of section 23A regime became particularly salient once the GLBA authorized combining banking with a wide range of financial and nonfinancial activities under the same corporate umbrella. In effect, the partial repeal of the Glass-Steagall regime left section 23A as the principal structural divide between publicly subsidized banks and affiliated trading and dealer entities.[421]

Before 2008, however, there was little appreciation of section 23A's potential as a tool of structural regulation. Federal bank regulators consistently missed the crucial connection between the free flow of bank subsidy inside banking conglomerates and the growth of shadow-banking markets—a fundamental structural shift—in the broader financial system. For example, the Fed's seemingly technical decision not to include derivatives contracts in Regulation W's definition of a "covered transaction" enabled securities broker-dealers to shift their rapidly growing derivatives exposures on client trades to federally insured sister banks.[422] This intragroup arbitrage fueled the growth of over-the-counter derivatives markets in the run-up to the 2008 crisis. Later, when the crisis hit, the

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416. *Id.* § 371c(a)(3).

417. *Id.* § 371c(c).

418. Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. Rev. 1683, 1692 (2011).

419. S. Rep. No. 106-44, at 66 (1999); Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76560, 76560 (Dec. 12, 2002) (codified at 12 C.F.R. pt. 223 (2022)).

420. Omarova, *supra* note 418, at 1686-87.

421. *See id.* at 1687.

422. Hockett & Omarova, *supra* note 29, at 1196-97.

Fed used its exemptive authority to suspend the operation of section 23A and allow banks to provide publicly supported financing to their nearly defunct securities and derivatives affiliates.[423] In Dodd-Frank, Congress amended section 23A by applying it to securities lending and derivatives transactions and requiring the Fed to consult with the FDIC prior to granting any exemption.[424] Yet, the practical effect of these amendments remains unclear.[425]

Ultimately, the post-GLBA trajectory of section 23A shows that it needs to be viewed not in isolation but as an integral part of the broader toolkit of structural regulation of the banking sector. Certain activities and affiliations of federally insured banks require prospective restrictions or prohibitions, while others may be managed through conditioning intragroup credit flows. Determining which activities fall into these categories is a policy judgment that should reflect not only technical considerations of banks' safety and soundness but also antitrust concerns with the structure and fairness of financial markets in a democratic society.

* * *

As the foregoing discussion demonstrates, some of the most distinctive elements of U.S. banking law—chartering requirements, restrictions on permissible activities and investments, and regulation of banks' transactions with affiliates—have deep roots in the American antimonopoly tradition. These critically important regulatory tools are designed to operate as structural safeguards against excessive concentrations and abuse of economic and political power that private banks enjoy by virtue of their special relationship with the sovereign state.[426] In this context, structural separation functions to counter potential anticompetitive effects of banks' privileged position and the accompanying public subsidy.

Unfortunately, as a result of the decades-long process of financial-sector deregulation, this side of U.S. banking law has largely faded from view. The relevant legal and regulatory provisions have come to be seen as almost exclusively prudential rules, concerned mainly with entity-level risk management and transactional efficiencies. This distorted interpretation creates a bias against their use

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423. *See* Omarova, *supra* note 418, at 1729-50.

424. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 608, 124 Stat. 1376, 1608-11 (2010) (codified at 12 U.S.C. § 371c(b)(7) (2018)).

425. Omarova, *supra* note 418, at 1763-75; Steele, *supra* note 259, at 240-44 (discussing the inapplicability of section 23A to Edge Act subsidiaries). Indeed, during the period of financial instability created by the onset of the COVID-19 pandemic, regulators again announced that they were prepared to offer section 23A exemptions, which some institutions used to support their money-market mutual-fund and securities broker-dealer affiliates. *See* Steele, *supra* note 262, at 109.

426. *See supra* Section II.B.

in all but very limited circumstances, thus depriving regulators of potent levers for keeping the financial system both stable *and* structurally sound.

Recovering these regulatory levers—and reviving the forgotten antitrust spirit of U.S. banking laws—is particularly urgent today, in the face of increasingly pressing problems posed by new digital technologies and persistent power asymmetries in the financial markets.

VI. BANKING LAW AS ANTITRUST: POLICY IMPLICATIONS

The conceptual reframing of U.S. banking law as a system of structural constraints on private power of publicly backed banking firms, as outlined in this Essay, has significant policy implications. Its paradigm-shifting potential is especially pronounced in the context of two hotly debated problems: (1) eliminating TBTF in the banking sector and (2) containing the risks posed by the digital transformation of finance. Both of these problems are rooted in the structural allocation of private and public power in our hybrid financial system. This Part shows how rediscovering the core synergies between antitrust law and financial regulation, with their shared normative focus on preserving the structural integrity of the U.S. economy, enables a more effective and coherent regulatory response to these challenges. As argued above, U.S. banking regulators already have at their disposal multiple legal tools to check the excessive growth of financial and techno-financial conglomerates disproportionately benefitting from direct or indirect public subsidies. To put these tools to their much-needed use, however, today's policymakers need to regain the historically grounded holistic view of banking laws as advancing both financial stability and antimonopoly goals.

A. *The "Too Big to Fail" Problem*

TBTF is a popular metaphor for "the recurrent pattern of government bailouts of large, systemically important financial institutions."[427] Direct rescue of big banks is an explicit form of public subsidy generally unavailable to smaller entities. By creating market-wide expectations of future bailouts, it also becomes the source of *implicit* public subsidy of these institutions' private risk taking.[428]

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427. Omarova, *supra* note 15, at 2495.

428. Thomas Hoenig, *TBTF Subsidy for Large Banks—Literature Review*, FED. DEPOSIT INS. CORP. 5 (Aug. 2014), https://www.fdic.gov/news/speeches/literature-review.pdf [https://perma.cc/KY55-FJPS].

In essence, TBTF denotes the complex of dysfunctions rooted in the inherently fragile public/private balance of power in our hybrid financial system.[429] Rather than being simply a matter of poor risk management by individual banks, it is fundamentally a matter of concentrated private power over a vital public resource. It implicates both (1) a government-sponsored competitive advantage that certain "special" financial firms enjoy (institutionalized market distortion); and (2) systemic stability risks that this advantage creates (institutionalized source of market fragility).

These structural aspects of TBTF were on full display in 2008. Yet, postcrisis reforms continued framing TBTF as a problem of enhancing financial stability, by preventing or minimizing the fallout from the failure of individual big banks. For instance, Section 165 of the Dodd-Frank Act subjects BHCs with $250 billion or more in assets to "enhanced prudential standards" established by the Fed.[430] These include heightened risk-based capital and leverage ratios, more stringent liquidity standards, mandatory stress testing, requirements to submit resolution plans, and so forth.[431] Dodd-Frank also added a requirement that, in reviewing proposed bank mergers, the regulators consider the impact of the transaction on financial stability.[432] These enhanced measures seek primarily to minimize the likelihood and cost of the failures of TBTF banks.[433]

While necessary and important, these reforms approach TBTF as a matter of safety and soundness of—and institutional risk management by—the key players in the financial system. Systemic stability is presumed to flow from stronger prudential safeguards at the entity level. In that sense, the post-2008 emphasis on "macroprudential" regulation essentially expands the traditional microprudential toolkit. It does not represent a new, independently *macrosystemic* regulatory philosophy.[434] Accordingly, even postcrisis, the prevailing approach has been to separate the TBTF problem from the problem of institutional market power and to treat it as unrelated to antitrust policy.[435] Put simply, TBTF is about

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429. Omarova, *supra* note 15, at 2500-01.

430. 12 U.S.C. § 5365(a)(1) (2018).

431. *Id.* §§ 5365(b)(1), (i)(1).

432. *Id.* §§ 1842(c)(7), 1828(c)(5).

433. 78 Fed. Reg. 51101, 51103 (Aug. 20, 2013).

434. For a recent elaboration of this argument, see Jeremy C. Kress & Jeffery Y. Zhang, *The Macroprudential Myth*, 112 GEO. L. J. (forthcoming 2024) (manuscript at 5-10) (on file with authors).

435. White, *supra* note 14, at 17-18. Worse still, in the wake of the failures of Silicon Valley Bank and First Republic, financial-industry players opportunistically claimed that increasing banking-sector concentration was the key to ensuring financial stability. *See, e.g.*, Hugh Son, *The American Banking Landscape Is on the Cusp of a Seismic Shift. Expect More Pain to Come*, CNBC (July 10, 2023, 5:30 AM EDT), https://www.cnbc.com/2023/07/10/american-banks-face-more-pain-huge-shift.html [https://perma.cc/9RNC-2U9P].

controlling risk on banks' balance sheets and not their outsized functional significance or sectoral concentration levels.

This distinction is artificial and unhelpful. As a macrosystemic phenomenon, TBTF cannot be reduced to issues of bank insolvency or even bank size. It is a far more fundamental *public/private boundary* problem.[436] At the heart of this problem is the unique structural advantage certain *private* firms enjoy by virtue of their privileged access to *public* subsidy.[437] That, in turn, directly implicates traditional antitrust policy concerns. The combination of explicit public support, in the form of the "safety net,"[438] combined with the implicit public subsidy resulting from the market perception that the government will not allow certain firms to fail, enables TBTF entities to borrow more cheaply than they otherwise would, given their risk profiles.[439] Because this tremendously important funding advantage is based on precommitted public support and its associated risk-reducing guarantees, it creates significant competitive distortions.[440] This is where the size and cross-market power of individual banking institutions matter.

The mere perception of TBTF status "reinforces the impulse to grow," perpetuating the self-fulfilling nature of the TBTF problem.[441] It generates perverse incentives for TBTF firms not to downsize voluntarily, even where such corporate restructuring would be efficiency-enhancing.[442]As the movement of deposits during the banking panic that followed the failure of SVB demonstrated, depositors generally view TBTF banks as safe havens for their money in times of market stress.[443] This widespread presumption of guaranteed safety attached to the TBTF status for large, diversified banks reduces competitive pressures to pass interest-rate increases along to depositors and allows them to capture

436. Omarova, *supra* note 15, at 2501.

437. Gary H. Stern & Ron J. Feldman, *Too Big to Fail: The Hazards of Bank Bailouts*, FED. RSRV. BANK MINNEAPOLIS (Dec. 1, 2003), https://www.minneapolisfed.org/article/2003/too-big-to-fail-the-hazards-of-bank-bailouts [https://perma.cc/4849-2VEE].

438. *See infra* Section II.B.

439. Tryggvi Gudmundsson, *Whose Credit Line Is It Anyway: An Update on Banks' Implicit Subsidies* (IMF Working Paper No. 16/224, 2016), https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Whose-Credit-Line-is-it-Anyway-An-Update-on-Banks-Implicit-Subsidies-44406 [https://perma.cc/4V73-682S]; João A. C. Santos, *Evidence from the Bond Market on Banks' "Too-Big-to-Fail" Subsidy*, 2014 FRBNY ECON. POL'Y REV. 29, 30.

440. Tarullo, *supra* note 173, at 3-4.

441. Tarullo, *supra* note 231, at 23.

442. *See* Mark J. Roe, *Structural Corporate Degradation Due to Too-Big-To-Fail Finance*, 163 U. PA. L. REV. 1419, 1423, 1450 (2014).

443. *See* Stephan Luck, Matthew Plosser & Josh Younger, *Bank Funding During the Current Monetary Policy Tightening Cycle*, LIBERTY ST. ECON. (May 11, 2023), https://libertystreeteconomics.newyorkfed.org/2023/05/bank-funding-during-the-current-monetary-policy-tightening-cycle [https://perma.cc/2QBA-6HQB].

outsized profits relative to smaller banks.[444] It also creates additional opportunities for TBTF banks to cross-sell or tie their and their affiliates' products as a condition of opening accounts or providing other banking services to retail and wholesale customers. The growth of giant financial firms also raises political-economy concerns, including the notoriously outsized influence of finance over other businesses and public authorities.[445] In this sense, TBTF dynamics directly implicate Brandeis's concerns about the political power of "money trusts." In short, there are many ways in which the TBTF subsidy is "unfair to smaller companies, damaging to fair competition, and tends to artificially encourage further consolidation and concentration in the financial system."[446]

Simply keeping banks from growing above a certain size threshold will not necessarily solve the underlying problem. The multitude of small private firms that collectively control the flow of sovereign credit-money throughout the economy can produce its own inefficiencies and inequities, rooted in the same public/private power imbalances and abuses of federal subsidies. As the 2023 regional bank crisis has shown, even institutions that have not been identified as systemically important can count on an extraordinary government rescue, if their failure threatens a broader panic or disruption of essential banking services on a sufficiently large scale.[447] In such situations, private losses are socialized in order to prevent greater devastation from a potentially violent halt in the private provision of critical public goods: safe deposit-money and access to bank credit. Deregulatory "tailoring" of banking rules entirely exempting banks below certain size metrics has effectively written this problem out of the regulators' agenda.[448] By contrast, the SVB failure and subsequent events are a stark reminder of the complex interplay between systemic significance, public subsidy, and structural integrity of the banking sector.

To combat TBTF as a structural phenomenon, policymakers must expand their focus beyond the familiar prudential oversight and resolution tools.

444. *See* Stephen Gandel, *Top Four US Banks Grab a Growing Share of Industry's Profits*, FIN. TIMES (Nov. 11, 2023), https://www.ft.com/content/153b192e-5600-4b6a-9980-01c9a48f31cb [https://perma.cc/2Y49-JYWG] (noting that the four largest U.S. banks accounted for forty-five percent of banking-industry profits in the third quarter of 2023 and arguing that "the biggest reason for the divide is the fact that the big banks, perhaps because of technological advantages or perceived safety due to their size, have not had to pay up as much to keep depositors").

445. Bush, *supra* note 49, at 308.

446. 78 Fed. Reg. 51101, 51103 (Aug. 20, 2013).

447. *See supra* notes 218-219 and accompanying text; Graham Steele, Assistant Sec'y, Dep't of the Treasury, Remarks by Assistant Secretary for Financial Institutions Graham Steele at the Americans for Financial Reform Education Fund, (July 25, 2023), https://home.treasury.gov/news/press-releases/jy1648 [https://perma.cc/53T3-BQA3].

448. *See* Steele, *supra* note 17, at 1037-42, 1053-57.

Recognizing the deeper power dynamics this phenomenon represents, they need to mobilize and coordinate the use of the entire arsenal of antitrust tools built into our system of bank regulation and supervision. As this Essay has demonstrated, many of the necessary regulatory *tools* are already in place but their underlying *motivations* have been obscured. Rediscovering these lost motivations will breathe new life into familiar regulatory levers.

Banking agencies should undertake more stringent reviews of proposed bank mergers, explicitly incorporating analysis of a broader range of qualitative factors and concerns specific to banking.[449] Such factors may include, for example, the proposed merger's potential to create or exacerbate geographic or demographic disparities in the availability and quality of financial services, to amplify the quantity or broaden the scope of implicit public subsidies flowing to the merged firm, or to produce undesirable macroeconomic consequences.[450]

Federal bank regulators should also revive and more strictly enforce the anti-tying rules and restrictions on bank affiliate transactions. The FRA sections 23A and 23B can be used more effectively and directly to limit the socially undesirable diversion of bank subsidy toward trading activities. The agencies should not be swayed by the typical bank-produced evidence of internal savings, transactional efficiencies, or customer convenience. Rather, the agencies should scrutinize the potential impact of specific "product suites" and "intragroup synergies" on the institutions' business and risk profiles, the their ability to exercise outsized market power, and the broader potential effects of these practices on systemic stability. Limiting available avenues for this presently ubiquitous form of exploiting bank subsidy would reduce institutional incentives for excessive growth and conglomeration.

Similarly, instead of continuously expanding the list of permissible activities for banks and BHCs, based on their revenue diversification benefits or various "financial innovation" claims, the OCC and the Fed should approach these developments as structural channels for improperly extending bank subsidy beyond its intended scope. Accordingly, regulators should scrutinize such activities not only for their immediate riskiness but also for their potential systemic impact, including on the overall structure of financial markets and on credit-allocation patterns in the relevant segments of the economy.[451] Rediscovering the

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449. *See* Kress, *Reviving Bank Antitrust*, *supra* note 153, at 583-98.

450. *See id.* at 593-98.

451. Generally, an institution's true "systemic" footprint constitutes a combination of activities, critical services, market positions, and overall economic significance not currently captured in traditional measures of systemic importance. *See* Ata Can Bertay, Asli Demirgüç-Kunt & Harry Huizinga, *Do We Need Big Banks? Evidence on Performance, Strategy and Market Discipline*, 22 J. FIN. INTERMEDIATION 532, 533 (2013) (finding that banks with higher ratios of antimonopoly spirit of U.S. banking law frees regulators and supervisors to treat factors like entity-level profitability or industry incumbents' competitive position as relevant but not dispositive in their assessments of the legal permissibility or practical prudence of banking organizations' business expansions.

Finally, banking agencies should be less reluctant to use their existing special authority to order corporate breakups and divestments of large BHCs' assets when necessary to protect the long-term stability and structural soundness of the U.S. financial system. While this is a drastic remedy, it is no more extraordinary an intervention than government bailouts of multitrillion-dollar financial giants. Again, a fuller appreciation of the fundamental aims and logic of bank regulation as a particularly capacious form of structural antitrust provides the necessary foundation for this recalibration of enforcement tools.

These examples are not meant to provide recommendations on specific matters in front of the banking agencies. Our goal is to show that recognizing and applying all available antimonopoly tools as part of a coherent and dynamic regulatory strategy offers a viable path to solving, or at least significantly reducing, the TBTF problem. The key here is a fundamental attitudinal shift that refocuses policymakers' attention on the interplay of bank subsidy, the size and composition of banking institutions' balance sheets, and the effects of banking institutions' operations on financial markets and the broader political economy. This consciously systemic, structure-oriented mindset is by far the most powerful weapon against the threats posed by modern-day "money trusts."[452]

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liabilities to home-country GDP are not subject to market discipline in the form of greater funding costs). For example, the Fed's framework for identifying GSIBs underestimates the risks posed by highly concentrated critical services when it caps the "substitutability" indicator applicable to such activities. *See* Meraj Allahrakha, Paul Glasserman & H. Peyton Young, *Systemic Importance Indicators for 33 U.S. Bank Holding Companies: An Overview of Recent Data* 4 (Off. of Fin. Rsch., Brief Series No. 15-01, Feb. 12, 2015), https://www.financialresearch.gov/briefs/files/2015-02-12-systemic-importance-indicators-for-us-bank-holding-companies.pdf [https://perma.cc/66G5-LS8U].

452. Such a systemic approach is particularly important in the wake of SVB's collapse, which led some to advocate further banking consolidation as either an inevitability or a potential solution to the underlying fragility in the banking system. *See* Justin Baer & Gina Heeb, *Bank Deals Are Back on the Table. Getting One Done Could Be Messy.*, WALL ST. J. (July 4, 2023, 5:30 AM EST), https://www.wsj.com/articles/bank-deals-are-back-on-the-table-getting-one-done-could-be-messy-3d77a2b2 [https://perma.cc/DC4Y-H4RS]; *see also* Chris Anstey, *Summers Warns Consequences 'Severe' If SVB Deposits Not Released*, BLOOMBERG (Mar. 10, 2023, 8:05 PM EST), https://www.bloomberg.com/news/articles/2023-03-11/summers-warns-consequences-severe-if-svb-deposits-not-released [https://perma.cc/Y4Z6-254P] (quoting former U.S. Treasury Secretary Larry Summers that "there may be a need for some consolidation" in the banking industry). While it is often argued that greater size and asset diversification make banks more stable, there is evidence that a bank's systemic size relative to a country's GDP can undermine stability, that diversified business models do not provide

The need for this attitudinal shift is especially acute with the digitization of finance, which both exacerbates unresolved structural problems and fosters new systemic challenges. Identifying and prioritizing these problems amidst an ongoing disruption requires a new way of thinking about what matters and why.

B. The Rise of Digital Finance

Post-2008, banking and finance have entered an era of digital disruption and transformation.[453] Today, algorithms allow cryptographically secured record-keeping and peer-to-peer trading of diverse digital assets on "distributed ledgers" or "blockchains."[454] With this promise of tech-enabled decentralization, digital finance is often touted as inherently more competitive and democratic than the traditional financial system. Yet, the digitization of financial services is not a value-neutral technological development; it is a political project that seeks to redefine core financial and economic relationships often in nontransparent ways.[455] New market actors use technology to unbundle and supercharge the existing banking model, thus exacerbating many of the political-economy concerns driving antimonopoly policy. From a public policy perspective, the greatest challenge is not simply accommodating transaction-level technological change but understanding and managing the shifts in the distribution and exercise of structural power in the rapidly self-reinventing financial markets.[456]

To date, the evolution of fintech and crypto-finance has largely followed the familiar trajectory of "shadow banking," whereby traditional banking functions—money creation and credit allocation—are unbundled and replicated

beneficial financial-stability effects, and that there are negative effects on economic growth once a country's financial sector reaches a certain threshold relative to GDP. *See* Bertay, Demirgüç-Kunt & Huizinga, *supra* note 451, at 533; *see also* Kevin J. Stiroh & Adrienne Rumble, *The Dark Side of Diversification: The Case of U.S. Financial Holding Companies*, 30 J. BANKING & FIN. 2131, 2131 (2006) (finding that any diversification benefits are offset by the costs of increased exposure to volatile activities); Jean Louis Arcand, Enrico Berkes & Ugo Panizza, *Too Much Finance?*, 20 J. ECON. GROWTH 105, 105 (2015) (showing that "financial depth starts having a negative effect on output growth when credit to the private sector reaches 100% of GDP").

453. *See* Steele, *supra* note 259, at 234-35.

454. Robleh Ali, John Barrdear, Roger Clews & James Southgate, *Innovations in Payment Technologies and the Emergence of Digital Currencies*, 54 BANK ENG. Q. BULL. 262, 266-67 (2014).

455. *See* Omarova, *supra* note 34, at 735 ("expos[ing] the normative and political significance of fintech as the catalyst for a potentially decisive shift in the underlying public-private balance of powers, competencies, and roles in the financial system.").

456. *See generally* Omarova, *supra* note 33 (offering a taxonomy of, and suggesting regulatory responses to, the macrostructural effects of fintech).

outside of the regulated banking system.[457] Shadow banking in general, and fintech and crypto specifically, are often motivated by a desire to arbitrage around the existing banking rules and regulations, thereby capturing the benefits of banks' "specialness" while evading the constraints of banking law.[458] As the pre-2008 experience shows, unchecked growth of such alternative markets impairs regulators' ability to prevent excessive accumulations of risk and leverage in the financial system. More fundamentally, permitting the rampant growth of private forms of money and money substitutes threatens the sovereign public's ability to control the supply and flow of money and credit in the economy.[459]

Cryptocurrencies, designed to function as substitutes for sovereign money, bring these public/private dynamics to the surface. The conception of Bitcoin, for example, was openly "celebrated as an informal declaration of independence from corrupt state-backed money."[460] Ironically, its failure to become a viable form of money underscores the fact that private digital currencies need access to the nation's full faith and credit. Stablecoins, which claim to maintain stable value pegged to the U.S. dollar or other safe assets, emerged in response to this demand. Stablecoins are typically collateralized by dollar bank deposits and government bonds from which they derive their value and capacity to function as a private substitute for public money.[461] Currently dominant stablecoins—including USD Coin, Tether, and Binance USD—are the "onramp" connecting crypto markets to the rest of the financial system.[462]

Stablecoins support an entire decentralized-finance ecosystem that utilizes software in place of traditional financial intermediaries to replicate lending, asset

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457. *See* Hockett & Omarova, *supra* note 29, at 1202-11.

458. *See Crypto-Assets: Implications for Consumers, Investors, and Businesses*, DEP'T OF THE TREASURY 40 (2022) [hereinafter *Treasury Crypto-Asset Report*], https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf [https://perma.cc/VKC2-7MV3].

459. Omarova, *supra* note 34, at 792.

460. Archie Chaudhury, *Reflecting on Satoshi Nakamoto's Manifesto*, *The Bitcoin White Paper*, BITCOIN MAG. (Oct. 31, 2022), https://bitcoinmagazine.com/culture/reflecting-on-satoshi-white-paper [https://perma.cc/3G3B-UMYJ].

461. Some stablecoins are backed by other crypto assets, and so-called algorithmic stablecoins employ software to stabilize their value. Most stablecoins, however, are backed by the U.S. dollar reserves. Mitsu Adachi et al., *Stablecoins' Role in Crypto and Beyond: Functions, Risks, and Policy*, EUR. CENT. BANK MACROPRUDENTIAL BULL. (July 11, 2022), https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/html/ecb.mpbu202207_2~836f682ed7.en.html [https://perma.cc/R5J8-JQ6G].

462. *See* Gordon Y. Liao & John Caramichael, *Stablecoins: Growth Potential and Impact on Banking* 6 (Bd. of Governors of the Fed. Rsrv. Sys., International Finance Discussion Papers 1334), https://www.federalreserve.gov/econres/ifdp/files/ifdp1334.pdf [https://perma.cc/2EF8-GDM8].

management, trade execution, and other financial services.[463] A structurally complex and interconnected web of exchanges, liquidity providers, investment vehicles, and other nodes perform critical functions in these markets.[464] Without regulatory oversight and disclosure mandates, potential conflicts of interest and overlaps in the ownership and control of various nodes are difficult to detect.[465]

This blurring of legal and regulatory lines is especially problematic given the private-market actors' desire to scale up digital-asset trading by integrating it into the traditional financial system. Currently, many crypto and fintech firms have some affiliation with regulated banks.[466] Banks perform depository and back-office services on behalf of tech platforms.[467] In "rent-a-charter" arrangements, fintech companies outsource loan origination to their partner banks, benefitting from federal preemption of certain state consumer protection laws.[468] Federally insured banks may also act as third-party custodians of crypto assets and provide related services.[469] These and other evolving relationships enable nonbanks to benefit from cheap deposit funding and other banking privileges, while operating outside of the bank regulatory regime and defying the legally

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463. *See Decentralized Finance: (DeFi) Policy-Maker Toolkit*, WORLD ECON. F. 5-11 (June 2021), https://www.weforum.org/whitepapers/decentralized-finance-defi-policy-maker-toolkit [https://perma.cc/2B72-KBES].

464. *See* Alexandra Born, Isabella Gschossmann, Alexander Hodbod, Claudia Lambert & Antonella Pellicani, *Decentralised Finance—A New Unregulated Non-Bank System?*, EUR. CENT. BANK MACROPRUDENTIAL BULL. (July 11, 2022), https://www.ecb.europa.eu/pub/financial-stability/macroprudential-bulletin/focus/2022/html/ecb.mpbu202207_focus1.en.html [https://perma.cc/J2LM-GQV2].

465. Concentrated holdings of many DeFi protocols' and platforms' governance tokens amplify concerns about market manipulation, self-dealing, and the overall fragility of crypto-finance. *See Treasury Crypto-Asset Report*, *supra* note 458, at 30, 36; *Report on Stablecoins*, PRESIDENT'S WORKING GRP. ON FIN. MKTS., FED. DEPOSIT INS. CORP., & OFF. COMPTROLLER CURRENCY 9 (Nov. 2021) [hereinafter *Report on Stablecoins*] https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf [https://perma.cc/5W2T-PGMD].

466. *See Report on Stablecoins*, *supra* note 465, at 12-13.

467. *See Assessing the Impact of New Entrant Non-Bank Firms on Competition in Consumer Finance Markets*, DEP'T OF THE TREASURY 25 (Nov. 2022) [hereinafter *Treasury Fintech Report*], https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf [https://perma.cc/J7XM-R4N9].

468. *See* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1745-46, 1795-98 (2021).

469. Jonathan V. Gould, Offi. of the Comptroller of the Currency Interpretive Letter No. 1170, Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers 1 (July 22, 2020); Benjamin W. McDonough, Off. of the Comptroller of the Currency Interpretive Letter No. 1179, Chief Counsel's Interpretation Clarifying: (1) Authority of a Bank to Engage in Certain Cryptocurrency Activities; and (2) Authority of the OCC to Charter a National Trust Bank 1 (Nov. 18, 2021).

mandated separation of banking and commerce.[470] Left unchecked, this can easily morph into a modern-day version of loosely organized "money trusts" controlling the flows of money, credit, and commercial goods and services through their platforms.

Banks are also developing their own digital-asset operations. Large Wall Street conglomerates are using blockchain technology,[471] running digital platforms for trading tokenized securities and derivatives,[472] issuing stablecoins,[473] and offering their clients digital-asset investment products.[474] If allowed, a massive entry of publicly subsidized banks will spur potentially unprecedented growth of digital-asset markets.[475] As with many past "innovations," tokenization offers regulated firms the opening to contest and relitigate the appropriate boundaries and applicability of existing rules to financial products offered in new packages or under new labels. It also creates new forms of structural

470. *Treasury Fintech Report*, *supra* note 467, at 24, 80-84. In addition to subsidized deposit funding, crypto companies are seeking access to Federal Reserve master accounts and the associated public payment system. *See* Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, No. 22-CV-125, 2022 WL 16901942, at *1-2 (D. Wyo. Nov. 11, 2022) (alleging an unlawful delay in the Fed's evaluation of Custodia's application for a master account under the Federal Reserve Act).

471. Eva Szalay & Philip Stafford, *HSBC and Wells Fargo to Settle Currency Trades with Blockchain*, FIN. TIMES (Dec. 13, 2021), https://www.ft.com/content/1a4dcaf5-2b4b-4f0b-8c58-a8fa173f24b3 [https://perma.cc/3WLM-WX6J]; Yueqi Yang, *JPMorgan Finds New Use for Blockchain in Trading and Lending*, BLOOMBERG (May 26, 2022, 8:30 AM EDT), https://www.bloomberg.com/news/articles/2022-05-26/jpmorgan-finds-new-use-for-blockchain-in-collateral-settlement [https://perma.cc/T2HK-8HHU].

472. *Goldman Sachs Unveils Digital Asset Platform with EIB €100m Blockchain Bond*, LEDGER INSIGHTS (Nov. 30, 2022), https://www.ledgerinsights.com/goldman-sachs-unveils-digital-asset-platform-with-eib-e100m-blockchain-bond [https://perma.cc/MC78-7VFB]; Penny Crosman, *How JPMorgan Is Developing an Internet of Money*, AM. BANKER (July 25, 2022, 1:46 PM EDT), https://www.americanbanker.com/news/how-jpmorgan-is-developing-an-internet-of-money [https://perma.cc/DH6Z-EYD7].

473. Penny Crosman, *Banks Form Consortium to Mint USDF Stablecoins*, AM. BANKER (Jan. 12, 2022, 12:27 PM EST), https://www.americanbanker.com/news/banks-form-consortium-to-mint-usdf-stablecoins [https://perma.cc/P5YG-4D2A]; *Onyx Coin Systems Product Team*, J.P. MORGAN, https://www.jpmorgan.com/onyx/coin-system.htm [https://perma.cc/2VPP-888B].

474. Hugh Son, *Morgan Stanley Becomes the First Big U.S. Bank to Offer its Wealthy Clients Access to Bitcoin Funds*, CNBC (Mar. 17, 2021, 8:52 PM EDT), https://www.cnbc.com/2021/03/17/bitcoin-morgan-stanley-is-the-first-big-us-bank-to-offer-wealthy-clients-access-to-bitcoin-funds.html [https://perma.cc/8Q6R-WVAP].

475. Historically, the entry of U.S. banks into derivatives trading spurred the exponential growth of global derivatives markets. *See* Omarova, *supra* note 323, at 1044-45 ("This Article tells a story of one U.S. regulatory agency, the Office of the Comptroller of the Currency (OCC), gradually and deliberately expanding the ability of large U.S. commercial banks to engage in trading and dealing in complex over-the-counter derivatives and emerge as the leading players in global derivative markets." (footnotes omitted)).

interconnectedness between crypto firms and regulated financial institutions.[476] This raises significant concerns not only about financial stability but also about excessive concentrations of power in digital platform-based finance.

The latter concern is particularly urgent due to the heightened risks related to the collection, use, and misuse of customer data by crypto, fintech, and Big Tech firms. Because consumer information is vital to their businesses, these entities collect vast amounts of personal and financial data.[477] Large-scale combinations of tech platforms, data, and finance enable potentially systematic anticonsumer and anticompetitive practices. For example, tying has become a common business practice for digital platforms.[478] Integrated and powerful tech-finance platforms can engage in unfair pricing and manipulation of consumer behavior;[479] illicitly collect and weaponize competitor information;[480] and use their data and market power to trap consumers inside their "walled gardens."[481]

476. For example, Silvergate Bank, a leading provider of banking services to the crypto-industry, experienced a massive deposit run after the collapse of FTX, a major crypto-exchange, in late 2022. Yueqi Yang & Hannah Levitt, *Crypto Panic at Silvergate Spawns a New Breed of Bank Run*, BLOOMBERG (Jan. 6, 2023, 12:44 PM EST), https://www.bloomberg.com/news/articles/2023-01-06/crypto-panic-at-silvergate-spawns-a-new-breed-of-bank-run [https://perma.cc/93VR-QPZY]. Silvergate borrowed $4.3 billion from the Federal Home Loan Bank System. Kate Berry, *Silvergate Bank Loaded Up on $4.3 Billion in Home Loan Bank Advances*, AM. BANKER (Jan. 10, 2023, 1:56 PM EST), https://www.americanbanker.com/news/silvergate-bank-loaded-up-on-4-3-billion-in-fhlb-advances [https://perma.cc/JTV3-JH89]. This illustrates the extraordinary private benefits—and potential public costs—of expanding direct or indirect access to the federal safety net. Silvergate was eventually forced to self-liquidate, creating additional reputational risks for Signature Bank, which offered deposit services to crypto businesses. Signature's highly concentrated deposit base and large amounts of uninsured deposits ultimately led to its failure. *See FDIC's Supervision of Signature Bank*, FED. DEPOSIT INS. CORP. 13-16 (Apr. 28, 2023), https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf [https://perma.cc/CA87-X3SH].

477. *Treasury Fintech Report*, *supra* note 467, at 86; *see also Treasury Crypto-Asset Report*, *supra* note 458, at 49 (describing privacy and surveillance risks associated with crypto-assets and crypto platforms).

478. *See* Qian Wu & Niels J. Philipsen, *The Law and Economics of Tying in Digital Platforms: Comparing* Tencent *and* Android, 19 J. COMPETITION L. & ECON. 103, 103 (2023).

479. *Treasury Fintech Report*, *supra* note 467, at 88.

480. Khan, *supra* note 64, at 1025-33.

481. *Id.* at 1096-98; *see also* CFPB Off. of Competition & Innovation & Off. of Mkts., *Big Tech's Role in Contactless Payments: Analysis of Mobile Device Operating Systems and Tap-to-Pay Practices*, CONS. FIN. PROT. BUREAU (Sept. 7, 2023), https://www.consumerfinance.gov/data-research/research-reports/big-techs-role-in-contactless-payments-analysis-of-mobile-device-operating-systems-and-tap-to-pay-practices/full-report [https://perma.cc/2MZZ-Q9AV] (discussing the ability for the Apple Pay digital wallet to restrict its tap-to-pay functions for disfavored products, raising potential implications for the applicability of open banking regulations).

Diem Association, a corporate consortium led by Big Tech giant Meta, brought these risks into sharp relief when it announced its plan to issue a global stablecoin called Diem.[482] The project drew backlash from policymakers, alarmed by its potential to facilitate illegal transactions and threaten financial stability.[483] What made this project a truly systemic concern, however, was its potential to create a globally dominant, private monetary system and a captive marketplace, controlled by Meta and built on top of its social-media platform.[484] Although the Diem project was eventually scrapped, the emergence of such a superplatform remains an ongoing threat. In early August 2023, for example, the dominant electronic-payment company PayPal announced the launch of its own U.S. dollar-denominated stablecoin for use by PayPal customers.[485] Issued on the Ethereum blockchain in partnership with a state-chartered stablecoin issuer, PayPal USD may well be able to succeed where Diem has failed.[486]

These structural dynamics expose the key motivations behind much of today's digital innovation: the relentless push to both "unbundle" and supercharge the *private* benefits and privileges of the banking franchise, while also decoupling them from the accompanying *public* accountability and legal constraints on the misuse of that franchise. In doing so, the digital disruption is pushing against the traditional public-policy principles embedded in the U.S. banking law. Rather than democratizing the financial system and making it more competitive, current developments in digital-asset markets implicate many concerns historically associated with corporate "bigness" and the rise of "money trusts."[487] The growing specter of Big Tech becoming an integral part of the new-generation

482. Ryan Browne, *Facebook-backed Diem Aims to Launch Digital Currency Pilot Later This Year*, CNBC (Apr. 21, 2021, 8:17 AM EDT), https://www.cnbc.com/2021/04/20/facebook-backed-diem-aims-to-launch-digital-currency-pilot-in-2021.html [https://perma.cc/VR3Y-RYHM].

483. Paul Kiernan, *Fed's Powell Says Facebook's Libra Raises 'Serious Concerns,'* WALL ST. J. (July 11, 2019, 8:52 PM ET), https://www.wsj.com/articles/feds-jerome-powell-faces-senators-after-rate-cut-signal-11562837403 [https://perma.cc/2JTL-A2XG].

484. Saule Omarova & Graham Steele, Opinion, *There's a Lot We Still Don't Know About Libra*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/opinion/facebook-libra-cryptocurrency.html [https://perma.cc/TCG4-48RA].

485. *See* Press Release, PayPal, PayPal Launches U.S. Dollar Stablecoin (Aug. 7, 2023), https://newsroom.paypal-corp.com/2023-08-07-PayPal-Launches-U-S-Dollar-Stablecoin [https://perma.cc/2G9B-QWA9].

486. *See* Michael J. Casey, Opinion, *PayPal's Stablecoin Is No Libra. Why the Timing Feels Right*, CONSENSUS MAG. (Aug. 11, 2023, 2:58 PM EDT), https://www.coindesk.com/consensus-magazine/2023/08/11/paypals-stablecoin-is-no-libra-why-the-timing-feels-right [https://perma.cc/ALR8-C5RE].

487. *See supra* Section I.B.1.

TBTF finance—bigger, faster, and relentlessly expansive—heightens and concretizes these concerns.[488]

Yet, the U.S. policy discourse focuses primarily on making digital assets "safer" for consumers and investors in order to facilitate "responsible innovation" in financial markets.[489] The efforts to establish "regulatory sandboxes"[490] and create special fintech charters[491] reflect this fundamentally accommodative approach to digitization.[492] An even clearer example is the current debate on stablecoin regulation, forcefully converging around the central goal of making private stablecoins "stable" and "safe" for use in payments—typically, by limiting their issuance to FDIC-insured banks or mandating the composition of the reserves backing their value.[493]

488. Omarova, *supra* note 33, at 106.

489. Katie Kummer, Christopher Woolard, Fatima Hassan-Szlamka & Danielle Grennan, *What Actions Can Drive Responsible Innovation in Digital Assets?*, ERNST & YOUNG (Sept. 30, 2022), https://www.ey.com/en_gl/public-policy/what-actions-can-drive-responsible-innovation-in-digital-assets [https://perma.cc/DRC7-M3DZ].

490. Alessandra Carolina Rossi Martins, *A Sandbox for the U.S. Financial System*, REGUL. REV. (Aug. 19, 2021), https://www.theregreview.org/2021/08/19/rossi-martins-sandbox-for-us-financial-system [https://perma.cc/7TR2-Y48E].

491. Wyoming offers a charter for Special Purpose Depository Institutions that are authorized to take uninsured deposits and conduct other financial activities (except for lending). WYO. STAT. ANN. § 13-12-103 (West 2020); 021-20 WYO CODE R. (LexisNexis 2023). New York's BitLicense regime requires virtual currency companies to receive approval of new products and services, submit affiliates to examination, and comply with consumer-protection and anti-fraud requirements. N.Y. COMP. CODES R. & REGS. 23, §§ 200.10, 200.13(d) & 200.19 (2015). The OCC has created a Special Purpose National Bank (SPNB) charter for fintech companies that are not required to obtain FDIC insurance. 12 C.F.R. § 5.20(e)(1)(i) (2022); *Comptroller's Licensing Manual Supplement: Considering Charter Applications from Financial Technology Companies*, OFF. OF THE COMPTROLLER OF THE CURRENCY 2-3 (2018), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/pub-considering-charter-apps-from-fin-tech-co.pdf [https://perma.cc/GZS8-6E46].

492. Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 25, 37-52 (2020) (discussing "regulatory sandboxes" and special fintech charters).

493. *See, e.g.*, *Chairman McHenry's Clarity for Payment Stablecoins Act Approved by the House Financial Services Committee*, DAVIS POLK (Aug. 9, 2023), https://www.davispolk.com/insights/client-update/chairman-mchenrys-clarity-payment-stablecoins-act-approved-house-financial [https://perma.cc/G7HE-6HH8]; Press Release, Sen. Comm. on Banking, Hous., & Urban Affs., Toomey Introduces Legislation to Guide Future Stablecoin Regulation (Dec. 21, 2022), https://www.banking.senate.gov/newsroom/minority/toomey-introduces-legislation-to-guide-future-stablecoin-regulation [https://perma.cc/KQ9V-SPKP]; Howell E. Jackson, Timothy G. Massad & Dan Awrey, *How We Can Regulate Stablecoins Now—Without Congressional Action*, 1-2 (Brookings Inst., Hutchins Ctr. Working Paper No. 76, 2022), https://www.brookings.edu/wp-content/uploads/2022/08/WP76-Massad-et-al_v4.pdf [https://perma.cc/JLE6-UCSY].

The principal flaw of this approach is its limited focus on the *microlevel*, *transactional* benefits of stablecoins and related technologies. Framing the key policy choices in terms of "fast and safe payments" obscures potentially far-reaching *macrolevel*, *structural* implications of opening the banking franchise to private cryptocurrency issuers or, conversely, opening private cryptocurrency markets to banks. Institutionalized access to direct or indirect public subsidies can turbocharge speculative trading in digital assets and spawn the next-generation crypto system—infinitely scalable and highly concentrated, yet also structurally connected to the core of traditional finance. This digitized version of finance would further blur the already problematic line between ostensibly private markets and the ever-expanding public safety net. It would grow increasingly complex and opaque, difficult to govern or regulate, and prone to much faster and more violent crisis dynamics than the current system has ever been.[494] To guard against these dangers, policymakers must expand their view beyond transactional efficiencies and "safety" of individual technologies and focus on the structural dynamics and tech-driven power shifts in financial markets. At every point, their probing gaze should be fixed not on any single "innovation" but on the *ecosystem* around it.

This is where the project of rediscovering the antimonopoly spirit and function of banking law is especially relevant and important. It provides both a comprehensive normative foundation and time-tested doctrinal apparatus for more effective policymaking in digitized financial markets. Legal constraints on banking institutions' activities and affiliations are particularly potent—and currently underutilized—tools in this respect. Regulators should use these provisions more assertively and flexibly, both (1) to prevent banks from engaging in, or channeling credit into, crypto speculation; and (2) to keep fintech and crypto firms from illicitly exploiting the bank subsidy. Legislative and regulatory actions that enable fintech and crypto firms to operate inside the banking system, or to replicate such access through contractual arrangements with banking institutions, should, at the very least, explicitly subject such nonbank entities to the BHCA's prohibitions on combining banking and commerce.[495] In doing so, it is critical to give regulators greater flexibility in identifying and limiting new patterns of direct control or indirect controlling influence, which may lead to excessive concentrations of both financial risk and market power. Furthermore, depending on the business models or structural footprints of the relevant entities, it may be necessary to subject them to a more stringent "Super-BHCA" regime, along with stricter "Super-23A" limitations on their transactions with

494. *See* Omarova, *supra* note 33 (discussing technology-driven structural changes in the financial system and the regulatory challenges they pose).

495. *See supra* Part V.

affiliates.[496] Instituting special restrictions against tying, insider transactions, and ownership and management interlocks are similarly important—especially, given the existing evidence of how prevalent such practices are in the fintech, crypto, and digital-platform markets. These measures would create structural barriers to abuses of concentrated market power in digital finance, reducing its potential to harm consumers and destabilize the financial system.

Again, our goal is not to offer specific solutions to specific problems raised by the ongoing digitization of finance. We use these examples to illustrate how the new narrative of U.S. banking law advanced in this Essay can help to reset regulatory priorities in this area. Combining traditional prudential aims of banking law with broader antimonopoly concerns creates an opening for more effective and comprehensive responses to contemporary technological disruptions. Only by targeting structural power shifts in the rapidly evolving financial markets can the stability, vitality, and democratic foundations of our economy be preserved.

CONCLUSION

In this Essay, we seek to recover and rearticulate the long-forgotten antimonopoly goals and principles of U.S. banking law and regulation. We argue that the existing system of bank regulation constitutes, and should be recognized as, a sector-specific antitrust regime designed to prevent excessive concentration and misuse of private power in the publicly subsidized banking sector. Continuing the long-standing American tradition, banking law exemplifies a *structural* approach to restraining banks' abuses of their government-granted privileges and their power to direct economy-wide flows of money and credit.

This structural regime of bank antitrust operates through multiple channels, only some of which are formally categorized as antitrust tools. Examining a broader set of provisions constraining private banks' use of their "special" government-granted powers, however, reveals the deep interconnection between the traditional prudential aims of banking law and its underlying antimonopoly ends. Much more than a set of technical rules for keeping banks safe and sound, bank regulation is fundamentally a democratic commitment to safeguarding America's economy and its people from domination by concentrated financial interests.

It is particularly important to reaffirm that fundamental commitment in the face of the continuing growth of TBTF conglomerates, the ongoing digitization of finance, and the rise of tech-driven financial superplatforms. These systemic challenges require systemic responses. Rethinking the synergies between

496. *See, e.g.*, 12 U.S.C. § 1851(f)(1) (2018).

antitrust law and financial regulation, which share the fundamental normative focus on curbing the excesses of concentrated private power in U.S. markets, can help policymakers meet these challenges.