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REVIVING BANK ANTITRUST

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ABSTRACT

After decades of disuse, antitrust is back. Renewing the United States' longstanding distrust of concentrated economic power, antimonopoly scholars have documented widespread harms of corporate "bigness" and inspired policy initiatives to de-concentrate the U.S. economy. To date, however, the new antitrust movement has largely overlooked a key cause of commercial concentration: the rapid consolidation of the U.S. banking sector. More than thirty thousand banks served local communities a century ago, but today just six financial conglomerates control half of the U.S. banking system. Bank consolidation, in turn, has spurred conglomeration throughout the economy. As the Supreme Court recognized in 1963, "[C]oncentration in banking accelerates concentration generally."

This Article contends that scholars and policymakers have neglected bank antitrust law for the past forty years and thereby encouraged excessive consolidation in the banking sector and the broader economy. It argues that policymakers' current approach to bank

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antitrust—premised on a narrow conception of consumer welfare—has failed in two critical respects. First, it has failed on its own terms, as bank mergers have increased the cost and reduced the availability of basic financial services. Second, because of its limited focus on consumer prices, the prevailing standard has ignored numerous nonprice harms stemming from bank consolidation, including diminished product quality, heightened entry barriers, and greater macroeconomic instability. To correct these shortcomings, this Article proposes a roadmap for reviving bank antitrust. It recommends strengthening the analytical tools used to identify anticompetitive bank mergers and rejecting a narrow focus on consumer prices in favor of a more comprehensive analysis of the costs that bank consolidation imposes on society. Reviving bank antitrust in this way is critical to enhancing competition in the financial sector and throughout the U.S. economy.

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> "[I]f the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ."[1]

INTRODUCTION

Antitrust is back. The Chicago School relegated antitrust policy to obscurity during the latter half of the twentieth century, but a new cohort of antimonopoly scholars—known as the New Brandeisians—has rekindled concerns about industrial consolidation and corporate "bigness."[2] This antitrust revival has spurred an unlikely coalition of ideologically diverse policymakers to pursue aggressive merger enforcement and de-concentration strategies in technology,

1. United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963).

2. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 16–19 (2018); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 1–3 (2020); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018) [hereinafter Khan, *The New Brandeis Movement*]; *see also* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 81–92 (2019) (discussing "the New Brandeis School").

pharmaceuticals, transportation, and healthcare.[3] Harnessing this momentum, President Joe Biden issued an executive order shortly after his inauguration directing his administration to "combat the excessive concentration of industry" and "promote competition" throughout the economy.[4]

To date, however, the new antitrust movement has largely overlooked a key cause of industrial concentration: the dramatic and sustained consolidation of the U.S. banking sector. More than thirty thousand banks operated in the United States during the 1920s.[5] Today, fewer than five thousand remain.[6] U.S. financial conglomerates are now bigger than ever, with the six largest bank holding companies (BHCs) controlling more assets than all other BHCs combined.[7] Widespread bank consolidation, in turn, has fueled conglomeration

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3. *See, e.g.*, Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 118 (2018) ("[T]he ascendant pressures for antitrust reforms are flowing from both wings of the political spectrum . . . ."); *see also* Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms That Could Reshape Amazon, Apple, Facebook and Google*, CNBC (Dec. 13, 2021, 1:35 PM), https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html [https://perma.cc/PX26-MCZD] ("While Democrats and Republicans diverged on some of the solutions [to the monopolies held by Amazon, Apple, Facebook, and Google], they mostly agreed on the alleged competitive harm and that reform was necessary to reinvigorate the markets."); Press Release, Amy Klobuchar, Chairwoman of the Sen. Judiciary Subcomm. on Competition Pol'y, Antitrust & Consumer Rts., U.S. Senate, Klobuchar, Grassley Introduce Bipartisan Bills To Reduce Drug Costs by Promoting Competition (Apr. 29, 2021), https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=1FB52216-C6C4-4F26-9443-48AB0A338E47 [https://perma.cc/7THR-CQQQ] (noting that "Senators Dick Durbin (R-IL), Joni Ernst (R-IA), Patrick Leahy (D-VT), Susan Collins (R-ME), Chris Van Hollen (D-MD), and Kevin Cramer (R-ND) are cosponsors of the [Preserving Access to Affordable Generics and Biosimilars Act]"); Press Release, Paul Gosar, Rep., U.S. House of Representatives, 416-7: House Passes Bipartisan Gosar Bill Restoring Competition in the Healthcare Market (Mar. 22, 2017), https://gosar.house.gov/news/documentsingle.aspx?DocumentID=1456 [https://perma.cc/K89T-4895] (noting that 416 members of Congress voted for the Gosar Bill).

4. Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,988–89 (July 14, 2021).

5. *See* Bernard Shull & Paul M. Horvitz, *The Bank Merger Act of 1960: A Decade After*, 16 ANTITRUST BULL. 859, 863 (1971).

6. *See Quarterly Banking Profile: Third Quarter 2021*, 15 FDIC Q. 4, 5 (2021).

7. JPMorgan Chase, Bank of America, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley collectively control $12.7 trillion in assets—more than 52 percent of all assets owned by U.S. BHCs. *See Large Holding Companies*, NAT'L INFO. CTR. (Dec. 31, 2020), https://www.ffiec.gov/npw/Institution/TopHoldings [https://perma.cc/HDW2-2RP4] (listing the asset sizes of the largest BHCs); *U.S. Top Tier Bank Holding Companies*, FED. RSRV. BANK OF CHI. (Dec. 31, 2020), https://www.chicagofed.org/banking/financial-institution-reports/top-banks-bhcs [https://perma.cc/PB9T-JF6T] (reporting that 3615 U.S. BHCs collectively control $24.1 trillion in total assets).

throughout the U.S. economy. Empirical studies consistently demonstrate that more concentrated banking markets favor incumbent firms and deter new entrants, as bigger banks lend to larger, more established businesses.[8] As the United States Supreme Court put it in 1963, "[C]oncentration in banking accelerates concentration generally."[9] To enhance competition in the U.S. economy, therefore, policymakers must prevent harmful consolidation in the banking sector.

This Article contends that scholars and policymakers have traditionally neglected bank antitrust law and thereby encouraged excessive concentration in the banking sector and the broader economy. This Article aims to correct this error by properly situating antitrust law within the broader U.S. bank regulatory framework. It argues that policymakers' current approach to bank antitrust law fails to adequately address numerous societal harms from bank consolidation and that a new enforcement paradigm is necessary to better protect consumers, businesses, and the wider financial system from anticompetitive banking practices.

Debates over bank competition have pervaded economic policymaking since the founding of the Republic. Early battles pitted Alexander Hamilton's vision for a single national bank against Thomas Jefferson's preference for smaller, decentralized banks rooted in local communities.[10] Later conflicts over the Second Bank of the United States, the establishment of the dual banking system, and the creation of the Federal Reserve System echoed themes from these debates, as

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8. *See* Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437, 437 (2006) ("The empirical evidence . . . strongly supports the idea that in markets with concentrated banking, potential entrants face greater difficulty gaining access to credit than in markets in which banking is more competitive."); *id.* at 438 ("[W]e find that more vigorous banking competition . . . is associated both with more firms in operation and with a smaller average firm size."); Nicola Cetorelli, *Does Bank Concentration Lead to Concentration in Industrial Sectors?* 18 (Fed. Rsrv. Bank of Chi., Working Paper No. 2001-01, 2001), https://fraser.stlouisfed.org/files/docs/historical/frbchi/workingpapers/frbchi_workingpaper_2001-01.pdf [https://perma.cc/KX45-GVXU] ("Bank concentration . . . seems to have a significant effect on the market structure of industrial sectors, by contributing to increase the average firm size in sectors especially dependent on external finance.").

9. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

10. *See* 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS (1492–1900), at 88–90 (2002) [hereinafter MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS].

policymakers weighed trade-offs between centralization and competition in the financial sector.[11]

U.S. policymakers embraced diffusion in the banking sector throughout much of the twentieth century. After a "massive merger movement" sparked populist backlash against bank consolidation following World War II,[12] Congress adopted the Bank Holding Company Act of 1956 ("BHC Act") and the Bank Merger Act of 1960 to limit further concentration.[13] This statutory framework created a two-tiered enforcement regime under which both the Department of Justice ("DOJ") and a banking organization's primary federal regulator review a merger proposal.[14] In the ensuing decades, the federal banking agencies rejected dozens of bank merger applications,[15] and the DOJ regularly sued to block bank mergers it viewed as anticompetitive.[16] Led by the United States Supreme Court, the judiciary almost always sided with the government in opposition to

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11. *See id.* at 141–47 (discussing President Andrew Jackson's veto of the reauthorization of the Second Bank of the United States); Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1383–88 (2021) (examining the origins of the dual banking system); PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 15–39 (2016) (describing the establishment of the Federal Reserve System).

12. BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT 85 (2001).

13. *See* Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(c), 70 Stat. 133, 135 [hereinafter Bank Holding Company Act] (codified as amended at 12 U.S.C. § 1842(c)); Act of May 13, 1960 (Bank Merger Act), Pub. L. No. 86-463, 74 Stat. 129 [hereinafter Bank Merger Act] (codified as amended at 12 U.S.C. § 1828(c)). This Article refers to the Bank Holding Company Act and Bank Merger Act collectively as the "bank merger statutes."

14. *See* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 446–47 (2020) [hereinafter Kress, *Modernizing Bank Merger Review*]. A bank's primary federal regulator is either the Federal Reserve, the Office of the Comptroller of the Currency ("OCC"), or the Federal Deposit Insurance Corporation ("FDIC"), depending on its charter type. *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW & POLICY 175 (3d ed. 2021). The Federal Reserve is the primary federal regulator for all BHCs. *See id.* at 717.

15. *See* SHULL & HANWECK, *supra* note 12, at 97 ("Between 1972 and 1982, the Federal Reserve Board denied sixty-three proposed acquisitions on [antitrust] grounds."); *Hearings on S. 1698 Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 89th Cong. 16 (1965) (statement of William Martin, Board of Governors of the Federal Reserve System) (reporting that the federal banking agencies rejected thirty-one merger applications between 1960 and 1965).

16. More than one-third of all the antitrust challenges the DOJ filed in the late 1960s involved bank mergers. *See* Eugene J. Metzger & Marsha K. Greenfield, *Agency Discretion To Deny Bank Mergers: What Are the Limits?*, 98 BANKING L.J. 838, 840 n.5 (1981).

further consolidation, favoring vigorous competition among small, local banks.[17]

However, the pro-competition trend came to an abrupt halt in the late 1970s with the emergence of the Chicago School. Rejecting expansive theories of antitrust, Robert Bork, Richard Posner, and other University of Chicago scholars popularized a new, technocratic approach based on economic efficiency and "consumer welfare."[18] Under this paradigm, Chicagoans believed that corporate conduct impairs competition only if it results in higher prices or lower output.[19] Chicagoans further assumed that "markets are inherently self-correcting" and thus, "government intervention in the form of antitrust enforcement is not needed to deliver competitive markets."[20] Paralleling developments in other industries, the Chicago School's narrow consumer welfare approach came to dominate bank merger oversight, and it has remained the governing framework for the past forty years.[21] Influenced by the Chicago School's *laissez faire* outlook, the DOJ and the federal banking agencies have effectively stopped challenging bank mergers, even as bank consolidation reaches a historic peak.[22]

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17. *See infra* Part I.A.4 (discussing judicial precedents).

18. *See* William E. Kovacic, *The Chicago Obsession in the Interpretation of U.S. Antitrust History*, 87 U. CHI. L. REV. 459, 471–78 (2020); Daniel A. Crane, *A Premature Postmortem on the Chicago School of Antitrust*, 93 BUS. HIST. REV. 759, 767–75 (2019).

19. *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1662 (2020) [hereinafter Khan, *The End of Antitrust*] (reviewing WU, *supra* note 2). As Professor Carl Bogus remarked, under the consumer welfare paradigm, "What causes consumer prices to rise is bad, and what causes them to fall is good. Everything else is largely ignored." Carl T. Bogus, *Books and Olive Oil: Why Antitrust Must Deal with Consolidated Corporate Power*, 52 U. MICH. J.L. REFORM 265, 269 (2019).

20. Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848 (2020).

21. *See* Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495, 509–10 (2019) (discussing the Chicago School's consumer welfare standard as applied to bank mergers). Antitrust enforcers have embraced a relatively broad conception of "consumer welfare" in certain industries by considering nonprice harms such as diminished innovation and product quality. *See, e.g.*, Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 U. KAN. L. REV. 1097, 1114 (2020) ("The consumer-welfare-focused Horizontal Merger Guidelines . . . explicitly direct the antitrust enforcement agencies to consider potential innovation harms when evaluating proposed mergers, and the agencies regularly pursue cases on the basis of harms to innovation." (footnote omitted)). In banking, however, antitrust enforcers continue to apply a narrow consumer welfare standard that overlooks nonprice harms. *See infra* Part II.B (discussing the omission of nonprice harms from bank antitrust analysis).

22. The DOJ last litigated a bank merger case in 1985. *See* Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets*, 13 FORDHAM

The Chicago School's circumscribed approach to bank antitrust has failed in two critical respects. First, it has failed on its own terms. Under the Chicago School's narrow consumer welfare framework, bank mergers have increased the cost and reduced the availability of credit, inflated the fees banks charge for basic financial services, and depressed the interest rates banks pay to their accountholders.[23] These negative outcomes have been especially severe for low- and moderate-income ("LMI") communities.[24] Moreover, large bank mergers generally have not delivered promised efficiency gains.[25] Thus, despite its promises to reduce prices and increase economic efficiency, the Chicago School's approach to bank antitrust has done neither.

J. CORP. & FIN. L. 581, 586 n.28 (2008). The banking agencies have not formally denied a bank merger application since 2003. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 439 n.17. As some commentators have pointed out, the decline in bank merger enforcement is likely related—at least in part—to the establishment of predictable merger guidelines. *See, e.g.*, Greg Baer, *It's a Myth That Regulators Rubber-Stamp Bank M&A*, AM. BANKER (Aug. 20, 2021, 11:21 AM), https://www.americanbanker.com/opinion/its-a-myth-that-regulators-rubber-stamp-bank-m-a [https://perma.cc/MLU2-X56N] ("Bank mergers are almost always approved because banks know what the approval standards are and generally do not apply if a potential merger does not meet them . . . .").

23. *See, e.g.*, Bernadette A. Minton, Alvaro G. Taboada & Rohan Williamson, *Bank Mergers, Acquirer Choice and Small Business Lending: Implications for Community Investment* 29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29284, 2021), https://www.nber.org/papers/w29284 [https://perma.cc/2BD8-QUW6] (finding that bank mergers involving acquirers with more than $10 billion in assets are associated with a decline in small business loans); Charles Kahn, George Pennacchi & Ben Sopranzetti, *Bank Consolidation and the Dynamics of Consumer Loan Interest Rates*, 78 J. BUS. 99, 109 (2005) (documenting that higher banking concentration is associated with increased personal loan interest rates); Greg Buchak & Adam Jørring, Do Mortgage Lenders Compete Locally? Implications for Credit Access 29 (July 13, 2021) (unpublished manuscript), https://ssrn.com/abstract=3762250 [https://perma.cc/BQ5Z-NW8M] (concluding that lenders charge higher fees in more concentrated markets); Valeriya Dinger, *Bank Mergers and Deposit Rate Rigidity*, 47 J. FIN. SERVS. RSCH. 27, 55 (2015) (finding that merging banks exploit their market power by paying lower interest rates on deposit accounts). For further analysis of how bank mergers affect the price and availability of financial services, see *infra* Part II.A.1.

24. *See, e.g.*, Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 22–25, 30–32 (Dec. 1, 2018) (unpublished manuscript), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf [https://perma.cc/L3P5-A8MG] (documenting adverse effects of bank consolidation on LMI communities). For further discussion of how bank mergers harm LMI areas, see *infra* Part II.A.2.

25. *See, e.g.*, Erik Devos, Srinivasan Krishnamurthy & Rajesh Narayanan, *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1029 (2016) (finding that mergers resulting in banks with more than $150 billion in assets do not produce efficiency gains). For further analysis of economic efficiencies in bank mergers, see *infra* Part II.A.4.

Second, because of their limited focus on prices and efficiency, antitrust enforcers have ignored numerous nonprice harms from bank consolidation. The U.S. antitrust laws were originally designed to promote not only a broad range of consumer interests—such as product quality and variety—but also far-reaching societal goals, including the preservation of open markets and system stability.[26] Over the past forty years, however, bank consolidation has undermined these objectives. For example, bank mergers have led to widespread branch closures, inconveniencing customers who previously benefited from proximity to bank offices.[27] Megamergers have created "too big to fail" banks that enjoy unfair funding advantages over smaller firms, thereby distorting competition and deterring new entrants.[28] Bank consolidation has also threatened macroeconomic stability, as larger banks exacerbate systemic risk and impair monetary policy transmission.[29] Under the Chicago School's influence, though, bank antitrust enforcers and courts have overlooked these harmful consequences.

Accordingly, policymakers should discard the Chicago School's narrow consumer welfare standard in favor of a more expansive approach to bank antitrust. President Biden has supported bank antitrust reform: his July 2021 executive order on competition encouraged the DOJ and the federal banking agencies to "adopt a plan

26. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737–46 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*]; WU, *supra* note 2, at 78–83.

27. *See* Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J.: APPLIED ECON. 1, 15–17 (2019) (finding evidence of significant branch closures by merging banks); Lydia DePillis, *The Internet Didn't Kill Bank Branches. Bank Mergers Did.*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did [https://perma.cc/8SSY-WCGA].

28. *See* Bhanu Balasubramnian & Ken B. Cyree, *Has Market Discipline Improved After the Dodd-Frank Act?*, 41 J. BANKING & FIN. 155, 165 (2014); Viral V. Acharya, Deniz Anginer & A. Joseph Warburton, *The End of Market Discipline? Investor Expectations of Implicit Government Guarantees* 30–33 (Munich Personal RePEc Archive, Working Paper No. 79700, 2016), https://core.ac.uk/download/pdf/213997156.pdf [https://perma.cc/A5QD-P2CA].

29. *See* Gregor N.F. Weiss, Sascha Neumann & Denefa Bostandzic, *Systemic Risk and Bank Consolidation: International Evidence*, 40 J. BANKING & FIN. 165, 174–77 (2014) (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors); David Scharfstein & Adi Sunderam, Market Power in Mortgage Lending and the Transmission of Monetary Policy 21–22 (Aug. 2016) (unpublished manuscript), https://www.hbs.edu/ris/Publication%20Files/Market%20Power%20in%20Mortgage%20Lending%20and%20the%20Transmission%20of%20Monetary%20Policy_8d6596e6-e073-4d11-83da-3ae1c6db6c28.pdf [https://perma.cc/5ZLZ-HK4Q] (concluding that high concentration in mortgage lending reduces the sensitivity of mortgage markets to monetary policy).

. . . for the revitalization of merger oversight under the Bank Merger Act and Bank Holding Company Act."[30] Several months later, the DOJ and the Federal Deposit Insurance Corporation ("FDIC") requested public comment on potential revisions to the bank merger framework.[31] Answering these calls for reform, this Article proposes a roadmap for reviving bank antitrust. It recommends strengthening and expanding the analytical tools antitrust enforcers use to detect anticompetitive conduct in the banking sector. In addition, it urges authorities to reject a narrow focus on consumer prices in favor of a more comprehensive analysis of the numerous nonprice harms that bank consolidation threatens to impose on society.[32]

This issue is of urgent importance. The Trump administration encouraged bank consolidation by relaxing financial regulations and expediting merger approvals.[33] Economic pressures from the COVID-19 pandemic spurred bank mergers to their highest levels since the 2008 financial crisis,[34] and commentators expect the bank consolidation

30. Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (July 14, 2021).

31. *See* Press Release, Dep't of Just., Antitrust Division Seeks Additional Public Comment on Bank Merger Competitive Analysis (Dec. 17, 2021), https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis [https://perma.cc/4MJE-7CLB]; Rohit Chopra, *How Should Regulators Review Bank Mergers?*, CONSUMER FIN. PROT. BUREAU (Dec. 9, 2021), https://www.consumerfinance.gov/about-us/blog/how-should-regulators-review-bank-mergers [https://perma.cc/9D39-VZ7Y]. The three Democrats on the FDIC's board of directors voted to initiate a review of the agency's bank merger framework over the objection of the FDIC's Republican chair, sparking a controversy about the chair's legal authority to block proposals by the Democratic majority. *See* Emily Flitter, *How Bank Regulators Are Trying To Oust a Trump Holdover*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/business/jelena-mcwilliams-fdic-bank-regulation-trump.html [https://perma.cc/VR5F-FV4C].

32. In previous work, I have urged regulators to improve bank merger oversight by strengthening the financial stability, consumer protection, and financial and managerial standards enumerated in the bank merger statutes. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 468–96. This Article extends my prior work by seeking to rejuvenate antitrust law as a complementary tool to limit excessive bank consolidation.

33. *See* Richard X. Bove, *GOP Deregulation Fervor Will Spur Bank Merger Boom*, CNBC (Nov. 29, 2017), https://www.cnbc.com/2017/11/29/gop-deregulation-fervor-will-spur-bank-merger-boom-dick-bove-commentary.html [https://perma.cc/XR22-MT7R]; Ben Walsh, *Expect More Bank Mergers After Dodd-Frank Rollback*, BARRON'S (May 26, 2018), https://www.barrons.com/articles/expect-more-bank-mergers-after-dodd-frank-rollback-1527292801 [https://perma.cc/F87F-9LWZ]; Lalita Clozel, *Bank Mergers Get Faster Under Trump*, WALL ST. J. (Feb. 13, 2019), https://www.wsj.com/articles/bank-mergers-get-faster-under-trump-11550059200 [https://perma.cc/9ED2-H7ZX].

34. *See* Orla McCaffrey, *Bank Mergers Are on Track To Hit Their Highest Level Since the Financial Crisis*, WALL ST. J. (Sept. 28, 2021, 5:34 AM), https://www.wsj.com/articles/bank-merg

trend to continue.[35] If left unchecked, escalating bank concentration is likely to spur further industrial consolidation and counteract policymakers' efforts to enhance competition throughout the economy.[36] Reviving bank antitrust is therefore an essential cornerstone of a comprehensive de-concentration strategy for the financial sector and the broader U.S. economy.[37]

This Article proceeds as follows. Part I traces the rise and fall of bank antitrust, examining how aggressive antitrust enforcement yielded to the Chicago School's *laissez faire* approach during the late twentieth century. Part II then explains why the prevailing bank antitrust framework is inadequate. It shows that the narrow consumer welfare standard has failed to protect customers, businesses, and the broader financial system from a wide range of price and nonprice competitive harms. Part III debunks two popular myths about bank concentration: that the emergence of financial technology companies

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ers-are-on-track-to-hit-their-highest-level-since-the-financial-crisis-11632793461 [https://perma.cc/RRH8-A87L].

35. *See* Steve Gelsi, *Why the Recent Wave of Regional Bank Mergers Is Far from Over—And You Could Profit from It*, MARKETWATCH (Sept. 21, 2021), https://www.marketwatch.com/story/m-a-lawyers-knuckle-down-for-an-expected-wave-of-regional-bank-mergers-11630684330 [https://perma.cc/4CHG-63PW]; Carleton English, *Bank Stocks Have Made a Comeback. Expect More Mergers and Consumer Loans, Says Citizens Financial's CEO.*, BARRON'S (Mar. 11, 2021), https://www.barrons.com/articles/bank-stocks-have-made-a-comeback-expect-more-mergers-and-consumer-loans-says-citizens-financials-ceo-51615421804 [https://perma.cc/76QJ-83AU].

36. *See supra* note 8 and accompanying text (noting that higher bank concentration is associated with less industrial competition).

37. A comprehensive de-concentration agenda for the financial sector might include creating public banking options, *see* Morgan Ricks, John Crawford & Lev Menand, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 122–25 (2021) (proposing Federal Reserve bank accounts for all individuals and businesses); Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166–69 (2014) (recommending that the U.S. Post Office offer banking services); GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION 169–80 (2019) (discussing public banking options), breaking up large banks, *see* ARTHUR E. WILMARTH, TAMING THE MEGABANKS 335–56 (2021) (urging the reinstatement of the Glass-Steagall Act); Jeremy C. Kress, *Solving Banking's "Too Big To Manage" Problem*, 104 MINN. L. REV. 171, 212–30 (2019) [hereinafter Kress, *Solving Banking's "Too Big To Manage" Problem*] (proposing to break up "too big to manage" banks), encouraging de novo entry by new banks, *see* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1441–47 (2020) (discussing reforms to the de novo chartering process), and facilitating consumer data portability, *see* Adam J. Levitin, *Consumers—Not Banks—Should Control Access to Personal Financial Data*, HILL (July 6, 2021), https://thehill.com/opinion/finance/561645-consumers-not-banks-should-control-access-to-personal-financial-data [https://perma.cc/53NW-D43L] (observing that customers' access to their financial data would help them switch banks); Amias Gerety & Chris Odinet, *The CFPB Must Act To Give Consumers Ownership and Control of Their Data*, PROTOCOL (Apr. 23, 2021), https://www.protocol.com/cfpb-rule-consumer-financial-data [https://perma.cc/KFC4-BYPP] (discussing strategies for enhancing customer access to financial data).

alleviates concerns about anticompetitive banking practices and that competitive banking markets are inherently unstable. As Part III shows, both of these claims lack support. Finally, Part IV proposes a framework for reviving bank antitrust. It urges policymakers to move beyond the narrow consumer welfare approach in favor of a thorough analysis of the numerous ways in which continued bank consolidation could harm society. The Article concludes that resurrecting bank antitrust enforcement is essential to preserve competition not only in banking but also throughout the U.S. economy.

I. THE RISE AND FALL OF BANK ANTITRUST

Bank antitrust has not always been as moribund as it is today. In fact, policymakers prioritized decentralization in the banking sector for much of the first two hundred years of the Republic. It was not until the Chicago School emerged in the 1970s that bank antitrust lost its way. This Part traces the rise and fall of bank antitrust. It explains how the United States' Jeffersonian and Jacksonian traditions originally inspired vigorous bank antitrust enforcement. It then demonstrates how the Chicago School enfeebled bank antitrust and facilitated three waves of consolidation that weakened competition throughout the financial sector.

A. *The Bank Antitrust Movement*

The United States' once-powerful bank antitrust movement emanated from the country's longstanding distrust of concentrated economic and political power. This Section tracks the evolution of bank antitrust from its roots in the Founding Era through the development of powerful statutory, regulatory, and judicial enforcement frameworks in the mid-twentieth century.

1. *From the Founding Era to Free Banking*. Banking policy famously divided the Founding Fathers as soon as the colonies declared their independence. Seeking to bolster the new country's finances, Treasury Secretary Alexander Hamilton proposed the establishment of a national bank to serve both the nascent government and the public.[38] Hamilton envisioned a single federally chartered bank, with "no other bank, public or private, to be permitted."[39]

38. *See* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 47–48 (1957).

39. *Id.* at 47.

Thomas Jefferson, by contrast, vigorously opposed a government-sanctioned banking monopoly. Innately skeptical of finance, Jefferson believed that if banks were to exist, they should be small, decentralized, and locally rooted.[40] As Jefferson wrote, "The monopoly of a single bank is certainly an evil."[41]

Although Hamilton initially succeeded in establishing a national bank, his opponents' vision for diffuse, local institutions ultimately prevailed. Hamilton convinced Congress to charter the First Bank of the United States in 1791 and, after a brief lapse, Congress authorized the Second Bank of the United States in 1816.[42] By the time the Second Bank's charter expired, however, Andrew Jackson—a fierce national bank critic—had become president.[43] Channeling Jefferson, Jackson decried the Second Bank as a "monopoly," and Treasury Secretary Roger B. Taney proclaimed that banking "should be open . . . to the most free competition."[44] Jackson thus vetoed the renewal of the Second Bank's charter in 1836, ending the national bank.[45]

The demise of the Second Bank gave way to a "free banking" system featuring intense competition among small, local banks. States that had previously issued bank charters only through special legislative acts adopted general incorporation statutes that allowed

40. *See id.* at 221–22. In addition to their concerns about monopolization, Jefferson and many other national bank critics opposed a national bank on legal grounds, asserting that the Constitution did not authorize the federal government to establish a bank. *See generally* ERIC LOMAZOFF, RECONSTRUCTING THE NATIONAL BANK CONTROVERSY (2018) (discussing debates over the national bank's constitutionality).

41. Letter from Thomas Jefferson, President, to Albert Gallatin, Sec'y of the Treasury (June 19, 1802), https://www.loc.gov/resource/mtj1.026_0603_0603/?st=text [https://perma.cc/T5XB-VUUT]; *see also* Letter from Thomas Jefferson, President, to Albert Gallatin, Sec'y of the Treasury (Oct. 7, 1802), https://www.loc.gov/resource/mtj1.027_0169_0169/?st=text [https://perma.cc/39A8-UZ42] ("It is certainly for the public good to keep all the banks competitors for our favors by a judicious distribution of them . . . .").

42. *See* MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS, *supra* note 10, at 89–90, 134–36.

43. *See id.* at 142–44.

44. Andrew Jackson, *Veto Message (July 10, 1832)*, *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576, 577 (James D. Richardson ed., 1897); Report by Mr. Taney on Deposite Banks, *in* ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES 451, 457 (1834), https://fraser.stlouisfed.org/title/annual-report-secretary-treasury-state-finances-194/deposite-banks-april-1834-report-finances-december-1834-public-money-december-1834-5479 [https://perma.cc/3R6F-8ZSM].

45. *See* MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS, *supra* note 10, at 144.

administrative agencies to grant bank charters liberally.[46] Similarly, the National Bank Act of 1863 authorized the comptroller of the currency to issue a federal charter to any bank that satisfied minimum financial criteria.[47] These free banking laws sparked a "bank mania," as the states and the comptroller raced to charter new entrants.[48] Banks proliferated across the country, exploding in number from 550 in 1828 to 10,000 in 1890, and ultimately 30,000 by World War I.[49] As Comptroller of the Currency John Jay Knox wrote, these were "the halcyon days when there was a bank at every cross roads."[50]

In addition to permissive chartering policies, the free banking era featured branching restrictions that preserved decentralization in the banking system. States generally prohibited banks from establishing branches beyond their home office, as policymakers feared that branching "would result in building up a money power which would crush the small banks out of existence."[51] Although these branching restrictions shielded local banks from competition with out-of-market banks, they also "precluded the growth of large banks and encouraged small local institutions."[52] Indeed, as legal historian Jerry Markham concluded, the combination of easy entry and branch restrictions during the 1800s fostered competition among small, locally rooted banks that "was often fierce and sometimes ruthless."[53] Thus, by the close of the nineteenth century, U.S. policymakers had embraced a philosophy of decentralization in the banking sector.[54]

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46. *See id.* at 171. Free banking laws were generally understood to be "'antimonopoly' statutes." *Id.*

47. National Bank Act, ch. 106, §§ 17–18, 13 Stat. 99, 104–05 (1864) (codified as amended at 12 U.S.C. §§ 26–27).

48. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS, *supra* note 10, at 168; *see also id.* at 365 (describing chartering competition between the states and the comptroller of the currency). As historian Bray Hammond commented, "Free banking meant, in effect, an indefinite and unlimited number of banks." HAMMOND, *supra* note 38, at 573.

49. *See id.* at 168, 365; 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900-1970), at 56 (2002).

50. JOHN JAY KNOX, A HISTORY OF BANKING IN THE UNITED STATES 532 (1903).

51. BENJAMIN J. KLEBANER, COMMERCIAL BANKING IN THE UNITED STATES 133 (1974).

52. *Id.* at 111.

53. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS, *supra* note 10, at 127.

54. *See* HAMMOND, *supra* note 38, at 598 (describing free banking as "a belated triumph of Thomas Jefferson over Alexander Hamilton"). For a detailed discussion of bank decentralization

2. *The Bank Merger Statutes*. After the banking sector's rapid expansion during the free banking era, the Great Depression and World War II sparked industry-wide consolidation. More than fifteen thousand banks failed between 1921 and 1933, cutting the number of U.S. banks almost in half.[55] Soon afterward, the surviving banks began combining with one another in a "massive merger movement."[56] More than 10 percent of all banks were merged out of existence during the 1950s.[57] In 1959 alone, twenty-five of the one hundred largest U.S. banks bought smaller rivals.[58] This merger spree pushed concentration to unprecedented levels, prompting widespread concerns about excessive consolidation in the banking sector.[59]

Despite this unease, however, regulators lacked tools to combat the bank consolidation trend. At the time, the federal banking agencies conducted only cursory oversight of bank mergers, as the applicable laws did not specify standards the agencies were to use when evaluating a merger proposal.[60] Moreover, banks often structured merger agreements to avoid review by the banking agencies entirely.[61] The DOJ likewise did not closely scrutinize bank consolidation, as it was widely assumed that banks were exempt from the Clayton and Sherman Antitrust Acts.[62] As Professors Bernard Shull and Gerald Hanweck noted, "[B]anking's effective immunity from the antitrust laws was unquestioned."[63] Thus, although regulators grew increasingly

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as a fundamental principle of the American monetary system, see LEV MENAND, THE FED UNBOUND 81–82 (2022).

55. *See* Shull & Horvitz, *supra* note 5, at 863.

56. *See* SHULL & HANWECK, *supra* note 12, at 85.

57. H.R. REP. NO. 86-1416, at 4–5 (1960).

58. *See Regulation of Bank Mergers: Hearing on S. 1062 Before the H. Comm. on Banking & Currency*, 86th Cong. 2–3 (1960) (statement of Rep. Paul Brown).

59. *See* Joseph E. Casson & Bernie R. Burrus, *Federal Regulation of Bank Mergers*, 18 AM. U. L. REV. 677, 683 (1969).

60. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 444 (discussing the National Bank Consolidation Act of 1918 and the Federal Deposit Insurance Act of 1950).

61. *See id.* (noting that a bank merger was exempt from federal preapproval if the transaction did not deplete the capital of the combining banks).

62. *See* Adolf A. Berle, Jr., *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589, 590 (1949). Sections 1 and 2 of the Sherman Act, which prohibit the monopolization or restraint of "commerce," were understood not to apply to banking, as policymakers traditionally treated banking and commerce as separate fields. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 444 n.45. In addition, section 7 of the Clayton Act, which governs a company's acquisition of stock that substantially lessens competition, was perceived to be inapplicable to bank mergers, which were usually structured as asset sales instead of stock acquisitions. *See id.*

63. SHULL & HANWECK, *supra* note 12, at 80.

concerned about harmful bank consolidation following World War II, they lacked authority to address it.

In response, Congress adopted the BHC Act of 1956 and the Bank Merger Act of 1960 to enhance the federal banking agencies' oversight of mergers.[64] The bank merger statutes mandated that, before acquiring another depository institution, a banking organization must obtain approval from its primary federal regulator—the OCC for national banks, the FDIC for state nonmember banks, and the Federal Reserve for state member banks and BHCs.[65] The statutes also established a comprehensive analytical framework to guide the agencies' evaluations. For example, the statutes directed the agencies to consider the organizations' financial and managerial condition and the transaction's likely impact on the public interest.[66] In addition, the Bank Merger Act instructed the agencies to assess "the effect of the transaction on competition (including any tendency toward monopoly)."[67] The bank merger statutes thus expressly tasked the banking agencies with preserving competition in the financial sector.

As initially drafted, the bank merger statutes did not expressly subject bank mergers to antitrust review by the DOJ in addition to regulatory preapproval by the banking agencies. However, the statutes did not specifically foreclose the DOJ from applying the Clayton or Sherman Acts to bank mergers, either. Thus, disagreements erupted between the DOJ and bank regulators soon after the bank merger statutes went into effect.[68] The DOJ frequently advised a banking agency that a proposed merger would be anticompetitive, only for the agency to approve the transaction over the DOJ's objection.[69] Eventually, the DOJ sued to block several mergers that the banking

64. Bank Holding Company Act, *supra* note 13; Bank Merger Act, *supra* note 13.

65. Bank Holding Company Act, *supra* note 13; Bank Merger Act, *supra* note 13.

66. *See* Bank Merger Act, *supra* note 13; Bank Holding Company Act, *supra* note 13, § 3(c).

67. Bank Merger Act, *supra* note 13. For mergers or acquisitions involving holding companies, the Bank Holding Company Act required the Federal Reserve to evaluate whether the transaction would "expand the size or extent of the bank holding company system involved beyond the limits consistent with adequate and sound banking . . . and the preservation of competition in the field of banking." Bank Holding Company Act, *supra* note 13, § 3(c)(5).

68. *See* William T. Lifland, *The Supreme Court, Congress, and Bank Mergers*, 32 LAW & CONTEMP. PROBS. 15, 20 (1967).

69. For example, of the 153 mergers the banking agencies approved in 1963, the DOJ cautioned that more than two-thirds would have anticompetitive effects. *See* Stanley D. Waxberg & Stanley D. Robinson, *Chaos in Federal Regulation of Bank Mergers: A Need for Legislative Revision*, 82 BANKING L.J. 377, 384 (1965).

agencies had approved, and in a pair of surprising rulings, the Supreme Court held that both the Clayton and Sherman Acts applied to bank mergers.[70] This conclusion introduced uncertainties into the bank competition analysis. Even if the relevant banking agency approved a merger under the bank merger statutes, the DOJ could later challenge the transaction under the federal antitrust laws.[71]

To resolve this uncertainty, Congress amended the bank merger statutes in two ways in 1966. First, Congress harmonized the substantive standards between the bank merger statutes and the antitrust laws. Echoing section 2 of the Sherman Act, Congress prohibited the banking agencies from approving a transaction "which would result in a monopoly . . . in any part of the United States."[72] In addition, consistent with section 7 of the Clayton Act, Congress foreclosed the agencies from approving a merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly."[73] In contrast to the antitrust laws, however, Congress included a public interest exception in the bank merger statutes. Specifically, Congress authorized an agency to approve a merger that substantially lessens competition or tends to create a monopoly if it finds that the anticompetitive effects "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."[74] This carve-out was generally understood to apply to transactions involving failing banks.[75]

The second way in which Congress refined the bank merger statutes was by prescribing procedures to promote coordination between the banking agencies and the DOJ. Congress codified the

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70. United States v. Phila. Nat'l Bank, 374 U.S. 334, 335–49 (1963) (concluding that bank mergers are subject to section 7 of the Clayton Act); United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 655, 672–73 (1964) (holding that the challenged bank merger created an unreasonable restraint of trade under section 1 of the Sherman Act). These rulings contradicted the conventional wisdom that banking was exempt from the Clayton and Sherman Acts. *See supra* notes 62–63 and accompanying text.

71. *See* Casson & Burrus, *supra* note 59, at 690.

72. 12 U.S.C. §§ 1828(c)(5)(A), 1842(c)(1)(A).

73. 12 U.S.C. §§ 1828(c)(5)(B), 1842(c)(1)(B). Congress also prohibited the banking agencies from approving a merger that "would be in restraint of trade," similar to section 1 of the Sherman Act. *See* 12 U.S.C. §§ 1828(c)(5)(B), 1842(c)(1)(B).

74. 12 U.S.C. §§ 1828(c)(5)(B), 1842(c)(1)(B).

75. *See* John S. Watson, *Bank Mergers: A New Standard of Evaluation?*, 46 TEX. L. REV. 81, 101 (1967).

Supreme Court's holding that bank mergers are subject to both regulatory review by the banking agencies and antitrust enforcement by the DOJ.[76] To enhance consistency, however, Congress instructed the DOJ to send the relevant banking agency a "competitive factors" report within thirty days after the agency notifies the DOJ of a new merger filing.[77] In addition, Congress limited the timeframe in which the DOJ may challenge a bank merger. After a banking agency approves a merger, the applicant must wait thirty days before consummating the transaction.[78] During that time, the DOJ may sue to block the proposal. After the expiration of the thirty-day waiting period, however, the merger becomes immune from antitrust challenge.[79] In this way, Congress resolved the jurisdictional turf battle and preserved active roles for both the banking agencies and the DOJ in bank antitrust enforcement.

In sum, Congress responded to the banking sector's rapid consolidation in the mid-twentieth century by enacting a powerful legislative framework to preserve competition. Shortly thereafter, the DOJ adopted stringent enforcement guidelines to complement the new statutory framework, as the next Section explains.

3. *The Original Merger Guidelines*. Just a few years after Congress enacted the bank merger statutes, the DOJ unveiled merger guidelines that set the stage for vigorous bank antitrust enforcement. Previously, regulated entities alleged that the DOJ's enforcement policies were opaque and inconsistent.[80] Thus, in 1968, the DOJ released guidelines (the "1968 Guidelines") "to acquaint the business community . . . with the standards currently being applied by the [DOJ] in determining whether to challenge corporate acquisitions and mergers."[81] The 1968

76. *See* Federal Deposit Insurance Act, Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c)(7)); 12 U.S.C. § 1849(b)(1).

77. 12 U.S.C. §§ 1828(c)(4), 1849(b)(1).

78. The waiting period may be shortened to fifteen days if the DOJ does not object to the transaction. *See* 12 U.S.C. §§ 1828(c)(6), 1849(b)(1).

79. *See* 12 U.S.C. §§ 1828(c)(7)(C), 1849(b)(1). This process prevents the DOJ from seeking to reverse a bank merger after it has been consummated. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 446–47.

80. *See, e.g.*, John Bodner, Jr., *Merger Rules and Guidelines*, 36 ANTITRUST L.J. 1, 2 (1967) (noting the absence of "a rational set of standards or rules for judging the legality of mergers").

81. U.S. DEP'T OF JUST., 1968 MERGER GUIDELINES 1 (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf [https://perma.cc/7CAU-96BR].

Guidelines governed the DOJ's enforcement strategies in all industries, including banking.[82]

The 1968 Guidelines established a presumption that the DOJ would challenge relatively small increases in market concentration as anticompetitive. The guidelines stated that in a highly concentrated market in which the four largest firms collectively controlled at least 75 percent of the market, the DOJ would "ordinarily" challenge a merger between two firms that each had a premerger market share of 4 percent or more.[83] For less concentrated markets, the DOJ said that it would "ordinarily" challenge a merger involving two firms with premerger market shares of 5 percent or more.[84] The 1968 Guidelines thus reflected a "structure-conduct-performance" paradigm—the prevailing assumption that "concentrated market structures evince a lack of competition and facilitate anticompetitive conduct."[85] The guidelines underscored that the DOJ viewed even small increases in market concentration as potentially harmful to competition and would aggressively use its authority under the bank merger statutes to police excessive concentration in the banking sector.[86]

4. *The Judicial Framework*. As the DOJ and the banking agencies began exercising their bank merger enforcement authority, the judiciary supplemented the bank merger statutes with a pro-competitive judicial framework. The DOJ quickly embraced its bank merger enforcement authority, filing more than one-third of all its antitrust challenges in the late 1960s against the banking sector.[87]

82. *See id.* at 4–5.

83. *Id.* at 6. In a highly concentrated market, the DOJ would also challenge a merger if (1) the acquiring firm's market share was 10 percent or more and the target's market share was at least 2 percent, or (2) the acquiring firm's market share was 15 percent or more and the target's market share was at least 1 percent. *See id.*

84. *Id.* The DOJ established a more detailed sliding scale for when it would challenge a merger in a less concentrated market. For example, the guidelines stated that the DOJ would object to a merger if (1) the acquiring firm's market share was 10 percent or more and the target's market share was at least 4 percent, or (2) the acquiring firm's market share was 25 percent or more and the target's market share was at least 1 percent. *See id.*

85. Khan, *The End of Antitrust*, *supra* note 19, at 1666.

86. By way of comparison, the DOJ generally does not challenge much larger increases in market concentration today. *See, e.g.*, Huntington Bancshares Inc., 107 FED. RSRV. BULL. 27, 32, 35 (2021) (noting that the DOJ did not object to a merger between two banks that had premerger market shares of 17.4 percent and 16.0 percent, respectively).

87. *See* Metzger & Greenfield, *supra* note 16, at 840 n.5. By contrast, the banking sector accounted for less than 2 percent of the DOJ's antitrust enforcement cases between 1914 and

Meanwhile, the Federal Reserve denied sixty-three merger applications as anticompetitive within a decade.[88] The affected banks frequently pressed their claims in court, with many cases presenting thorny issues of first impression. The Supreme Court decided seven bank merger cases between 1963 and 1974, siding emphatically in favor of antitrust enforcement.[89] In the process, the Court created a pro-competitive judicial framework featuring three key principles supporting the government's efforts to limit excessive bank consolidation: (1) narrow geographic markets, (2) broad product markets, and (3) a high burden of proof on merging banks.

First, the Supreme Court boosted bank antitrust enforcement by narrowly defining the relevant geographic market for analyzing a merger's competitive effects. Recall that the bank merger statutes and the Clayton Act prohibit transactions that substantially lessen competition or tend to create a monopoly "in any section of the country."[90] When applying this standard to bank mergers, the Court rejected an expansive geographic market definition encompassing all areas in which the merging banks conduct business.[91] Instead, the Court interpreted the relevant geographic market narrowly, limiting its assessment to "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[92] The Court reasoned that "[i]ndividuals and corporations typically confer the bulk of their patronage on banks in their local community" and

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1960. *See* AM. BAR ASSOC. SECTION OF ANTITRUST LAW, MERGER CASE DIGEST 15–16, 599 (1967) (reporting that only one of the fifty-four antitrust cases the DOJ filed between 1914 and 1960 involved a bank).

88. *See* SHULL & HANWECK, *supra* note 12, at 97.

89. Of the seven bank merger cases the Court decided in this timeframe, it blocked the contested merger six times. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963) (enjoining proposed merger of two Philadelphia banks); United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 665, 672–73 (1964) (holding that proposed merger of Kentucky banks violated section 1 of the Sherman Act); United States v. First City Nat'l Bank of Hous., 386 U.S. 361, 362, 371 (1967) (reversing lower courts' dismissals of DOJ lawsuits challenging bank mergers in Texas and Pennsylvania); United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 192 (1968) (reversing lower court decision that upheld merger of Tennessee banks); United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350, 372–73 (1970) (reversing lower court decision that upheld merger of New Jersey banks); United States v. Conn. Nat'l Bank, 418 U.S. 656, 660 (1974) (vacating lower court judgment that upheld merger of Connecticut banks). *But see* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 641–42 (1974) (affirming lower court's dismissal of DOJ lawsuit challenging market extension merger by Washington bank).

90. *See supra* note 73 and accompanying text.

91. *See Phila. Nat'l Bank*, 374 U.S. at 357.

92. *Id.*

"find it impractical to conduct their banking business at a distance."[93] Thus, for example, in *United States v. Phillipsburg National Bank & Trust Co.*,[94] the Court rejected a proposed market definition encompassing a four-thousand-square-mile region in favor of a substantially smaller market covering two contiguous towns.[95] The Court's narrow geographic market definition supported aggressive antitrust enforcement because smaller markets include fewer competitors and are therefore more likely to indicate that a horizontal merger would be anticompetitive.[96]

Second, the Supreme Court bolstered bank antitrust enforcement by defining the relevant product market broadly. In *United States v. Philadelphia National Bank*,[97] the Court held that the "cluster" of commercial bank products and services, taken together, comprises a distinct line of commerce.[98] The Court explained in *Phillipsburg National Bank* that "banks are the only financial institutions in which a wide variety of financial products and services"—such as checking accounts, trust accounts, and various types of personal and commercial credit—"are gathered together in one place."[99] As a result, the Court reasoned, "only firms offering the full array of bank products should be included in the market definition of banking."[100] Defining the

93. *Id.* at 358; *see also Phillipsburg Nat'l Bank*, 399 U.S. at 362–63 ("Commercial realities in the banking industry make clear that banks generally have a very localized business."). The Court observed that small customers, in particular, are unlikely to shop for financial services outside of their local area. *See Phila. Nat'l Bank*, 374 U.S. at 359 n.36 ("[T]he smaller the customer, the smaller is his banking market geographically."); *Phillipsburg Nat'l Bank*, 399 U.S. at 364 ("[T]he small borrower frequently cannot 'practicably turn for supplies' outside his immediate community; and the small depositor—because of habit, custom, personal relationships, and, above all, convenience—is usually unwilling to do so." (quoting *Phila. Nat'l Bank*, 374 U.S. at 357 n.34)).

94. United States v. Phillipsburg Nat'l Bank & Tr. Co., 399 U.S. 350 (1970).

95. *Id.* at 357–58, 362–65; *see also Conn. Nat'l Bank*, 418 U.S. at 666–71 (rejecting proposed market definition encompassing the entire state of Connecticut).

96. *Cf.* Yvonne S. Quinn, *Practical Aspects of Defending Bank Mergers Before the Federal Reserve Board and the Department of Justice*, 62 ANTITRUST L.J. 91, 96 n.18 (1993) ("[A]s a general matter proponents of mergers involving two in-market banks will often benefit from the broadest possible market definition . . . .").

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

98. *Id.* at 356.

99. *Phillipsburg Nat'l Bank*, 399 U.S. at 360. The Court further noted that the "clustering of financial products and services in banks facilitates convenient access to them for all banking customers." *Id.*

100. BD. OF GOVERNORS OF THE FED. RSRV. SYS., OMB NO. 7100-0232, SUPPORTING STATEMENT FOR THE SURVEY TO OBTAIN INFORMATION ON THE RELEVANT MARKET IN

relevant product market in this way favored vigorous antitrust enforcement because it limited the types of firms that courts recognized as competitors to commercial banks.[101] For example, the Court held in 1974 that thrifts did not compete directly with commercial banks since they did not offer the full "cluster" of bank products and services, and therefore the presence of thrifts in a market did not offset the anticompetitive effects of a commercial bank merger.[102]

Finally, the Supreme Court clarified that banks bear a heavy burden of proof in antitrust cases. Recall that the bank merger statutes authorize a banking agency to approve an anticompetitive merger if it determines that the merger's anticompetitive effects "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."[103] The bank merger statutes instruct courts to apply this public-interest standard in any bank merger case the DOJ files under the antitrust laws.[104] In *United States v. First City National Bank of Houston*,[105] the Supreme Court held that the merging banks bear the burden of establishing that a transaction's public benefits "clearly outweigh[]" its anticompetitive effects.[106] The Court later emphasized that this burden is substantial. For example, the Court required banks to demonstrate specific public benefits with precision to overcome a finding of anticompetitiveness.[107] In addition, the Court stipulated that the merging banks must demonstrate that the proffered public benefits

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INDIVIDUAL MERGER CASES 2, https://www.federalreserve.gov/reportforms/formsreview/FR2060_20070530_omb.pdf [https://perma.cc/6MP4-PANN] (discussing *Connecticut National Bank*).

101. *Cf.* Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few To Serve: The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1029 (1992) ("The incorporation of thrifts and other nonbank competitors into the product market makes it more likely that a merger between large banks in the same market will be approved, because incorporation dilutes the market shares of the merging banks and reduces the overall concentration ratio for the market.").

102. *See Conn. Nat'l Bank*, 418 U.S. at 660–66. Thrifts—also referred to as "savings banks" or "savings associations"—are depository institutions that have historically focused on home mortgage lending. *See* BARR ET AL., *supra* note 14, at 177.

103. *See supra* note 74 and accompanying text.

104. *See* 12 U.S.C. §§ 1828(c)(7)(B), 1849(b)(1).

105. United States v. First City Nat'l Bank of Hous., 386 U.S. 361 (1967).

106. *Id.* at 366 (holding that "the burden of proof is on the defendant banks to establish that an anticompetitive merger is within the [public interest] exception").

107. *See* United States v. Third Nat'l Bank in Nashville, 390 U.S. 170, 186 (1968) (declining to recognize a merged bank's increased lending capacity as a public benefit because the banks did not demonstrate the beneficial consequences of the increased limit).

could not be achieved through means other than the proposed merger.[108] Thus, the Court will not approve an anticompetitive merger unless the banks demonstrate that they are unable to achieve the promised public benefits by hiring new management, merging with a noncompeting bank, pursuing organic growth, or adopting alternative strategies.[109] In sum, the Supreme Court's bank merger framework favored antitrust enforcers because it saddled banks with a heavy burden of proof.

Collectively, the bank merger statutes, the DOJ's 1968 Guidelines, and the Supreme Court's judicial framework succeeded in reining in bank consolidation. By the 1970s, "concentration had declined or leveled off from the concentration ratios of the 1950's."[110] Moreover, once-prevalent mergers among the largest banks all but disappeared.[111] This era, however, proved to be the pinnacle of bank antitrust law. In the ensuing decades, the Chicago School effectively neutered bank antitrust enforcement, as the next Section explains.

B. The Decline of Bank Antitrust

The United States' pro-competitive movement came to an abrupt halt in the late 1970s with the emergence of the Chicago School of antitrust. Popularized by University of Chicago lawyers and economists, this new libertarian ideology reoriented antitrust away from expansive theories of economic, social, and political harms to a narrower, technocratic approach based on efficiency and consumer welfare.[112] In practice, the Chicago School significantly curtailed antitrust enforcement throughout the U.S. economy.[113]

108. *See id.* at 190 ("[B]efore a merger injurious to the public interest is approved, a showing [must] be made that the gain expected from the merger cannot reasonably be expected through other means.").

109. *See id.* at 189 ("If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger . . . we seriously doubt that Congress intended a merger to be authorized by either the banking agencies or the courts.").

110. Earl W. Kintner & Hugh C. Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COM. L. REV. 213, 248 (1972).

111. *See* Horvitz & Shull, *supra* note 5, at 874–75.

112. *See* Khan, *The End of Antitrust*, *supra* note 19, at 1660–62.

113. *See* Robert Pitofsky, *Reinvigorating Merger Enforcement That Has Declined as a Result of Conservative Economic Analysis*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 233, 233 (Robert Pitofsky ed., 2008) ("In many respects, the decline of antitrust enforcement against mergers between direct rivals . . . is the most pronounced and unfortunate effect of the influence of Chicago School economics.").

The Chicago School had a particularly crippling effect on bank antitrust. Inspired by the Chicago School, policymakers not only weakened the regulatory framework governing bank mergers, they also adopted new legislation that encouraged widespread bank consolidation in the late 1990s and 2000s. This Section first examines how the Chicago School enfeebled bank antitrust by softening the merger guidelines and curtailing enforcement. It then analyzes the ensuing trend of bank consolidation, the high levels of concentration in the modern banking system, and the Trump administration's efforts to weaken bank antitrust even further.

1. *Emergence of the Chicago School.* The Chicago School revolutionized antitrust beginning in the late 1970s. University of Chicago scholars Robert Bork, Richard Posner, and Frank Easterbrook formulated a libertarian antitrust framework to counter the interventionist approach that had long dominated U.S. policymaking.[114] Reagan-era judges and policymakers readily embraced this new philosophy, and the Chicago School soon "achieved an almost complete triumph" in antitrust circles.[115]

The Chicago School rejected the view—popularized by Louis Brandeis in the early twentieth century—that antitrust law should protect economic, social, and political liberties by combating excessive concentrations of private power.[116] Instead, Chicagoans contended that antitrust should focus solely on economic efficiency and consumer welfare, to the exclusion of other policy objectives.[117] Under this view, Chicagoans believed that industrial consolidation impairs competition only if it results in higher prices or lower output.[118] Moreover, the Chicago School assumed that "markets are self-correcting" because new competitors freely enter concentrated markets and "erode[]

114. *See* Khan, *The End of Antitrust*, *supra* note 19, at 1661–62.

115. Crane, *supra* note 3, at 123.

116. *See* Khan, *The New Brandeis Movement*, *supra* note 2, at 131–32.

117. *See* Kovacic, *supra* note 18, at 471–78; Crane, *supra* note 18, at 767–75. As Robert Bork originally described "consumer welfare," the term referred to allocative efficiency, or the maximization of economic surplus enjoyed by both consumers and producers. *See* Hovenkamp, *supra* note 2, at 65. Other scholars have used "consumer welfare" to refer strictly to consumer surplus. *See id.* at 68. Regardless of precise terminology, however, the Chicago School's conception of "consumer welfare" emphasized efficiency and rejected Brandeis's expansive theories of antitrust grounded in social and political objectives. *See id.*

118. *See* Khan, *The End of Antitrust*, *supra* note 19, at 1662; Bogus, *supra* note 19, at 269.

incumbent market power."[119] Chicagoans thus saw "no need for robust antitrust enforcement to create or maintain the conditions necessary to make competition effective."[120] As Professor Marc Allen Eisner wrote, to Chicagoans, "[w]hat exists is ultimately the best guide to what should exist."[121]

The Chicago School's emergence coincided with a weakening of antitrust enforcement in two ways that are particularly relevant to banking. First, the DOJ substantially softened its merger guidelines. Second, bank antitrust authorities further eroded enforcement by crafting a variety of exceptions for otherwise anticompetitive bank mergers.

a. Weakening the Merger Guidelines. Soon after the emergence of the Chicago School, the DOJ overhauled its merger guidelines, signaling a sweeping retrenchment in antitrust enforcement. The revised guidelines were a "radical departure" from the 1968 Guidelines and reflected a "newfound focus" on consumer welfare.[122] In practice, the updated guidelines proved to be much more permissive of horizontal mergers than either the 1968 Guidelines or the prevailing judicial precedent.[123] In addition, the DOJ and the banking agencies adopted special guidelines for bank mergers that were even more lenient than the general standards for mergers in other industries.[124]

Beginning in 1982, the DOJ revamped its merger guidelines to reflect the Chicago School's narrower, technocratic approach to antitrust. Rejecting the 1968 Guidelines' focus on the four-firm concentration ratio,[125] the revised guidelines (the "1982 Guidelines")

119. Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 86 U. CHI. L. REV. 595, 598 (2019).

120. *Id.*

121. MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS 104 (1991).

122. Khan, *Amazon's Antitrust Paradox*, *supra* note 26, at 721. As Professor Herbert Hovenkamp explained, "The 1982 Merger Guidelines are a product of the new economic orientation in antitrust law, if not an outright product of Chicago School economic theories." Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937, 947 n.43 (1984).

123. *See* Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453, 456 (1983); *see also* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2003 (2018) (characterizing the 1982 Guidelines as "dramatically less strict" than the 1968 Guidelines).

124. *See infra* notes 132–137 and accompanying text.

125. *See supra* note 83 and accompanying text.

instead relied on the more complex Herfindahl-Hirschman Index ("HHI") to flag potentially anticompetitive mergers.[126] Emerging from the industrial organizations literature, the HHI measures market concentration by summing the squared market shares of every competitor in a market, with a higher HHI indicating a more concentrated market.[127] The 1982 Guidelines stated that the DOJ would be unlikely to challenge a merger if the post-merger HHI in a given market was less than 1800 and the merger caused the HHI to increase by fewer than 100 points.[128] This standard was considerably more lenient than the 1968 Guidelines.[129] The DOJ further relaxed its merger guidelines in 1992, 1997, and 2010 (the "2010 Guidelines"), each time narrowing the circumstances under which it would attempt to block a merger.[130] Despite this significant shift in enforcement philosophy, courts readily adopted the DOJ's new approach, embedding the weakened guidelines in antitrust jurisprudence.[131]

126. U.S. DEP'T OF JUST., 1982 MERGER GUIDELINES 12 (1982) [hereinafter 1982 MERGER GUIDELINES], https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf [https://perma.cc/6UDM-LD75]. As the DOJ explained, "Unlike the traditional four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms." *Id.*

127. *See* Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402, 404 (1983). *See generally* 1982 MERGER GUIDELINES, *supra* note 126. For example, in a market consisting of five competitors with shares of 30, 25, 20, 15, and 10 percent, the HHI is $(30^2 + 25^2 + 20^2 + 15^2 + 10^2) = 2250$. In a monopolistic market with only one competitor that has a 100 percent share, the HHI is $(100^2) = 10{,}000$.

128. *See* 1982 MERGER GUIDELINES, *supra* note 126, at 14–15. In addition, the new guidelines stated that the DOJ was "more likely than not" to challenge a merger if the post-merger HHI was between 1000 and 1800 and the merger caused the HHI to increase by more than 100 points. *Id.*

129. For example, as Professors Herbert Hovenkamp and Carl Shapiro calculated, a merger between two firms with 10 percent and 4 percent market shares, respectively, would have triggered an antitrust challenge under the 1968 Guidelines but would not under the guidelines released in 1982. *See* Hovenkamp & Shapiro, *supra* note 123, at 2003.

130. For example, the 1982 Guidelines originally provided that the DOJ would "likely" challenge a merger that increased a market's HHI by more than 100 points to a level above 1800. 1982 MERGER GUIDELINES, *supra* note 126, at 14–15. Under the 2010 Guidelines, however, the DOJ presumes a merger to be anticompetitive only if it increases the HHI by more than 200 points to a level above 2500. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/5XPM-6FCB]. For further discussion of the 1992 and 1997 guideline revisions, see Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 52–55 (2010).

131. *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 367 (2020) ("While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts

In addition to relaxing the general merger guidelines, the DOJ partnered with the banking agencies to create special merger rules for banks (the "Bank Merger Guidelines") that are weaker, in certain respects, than the standards for other industries.[132] Issued in 1995, the Bank Merger Guidelines establish screening thresholds for bank mergers to "reduce regulatory burden on the banking industry."[133] Specifically, the Bank Merger Guidelines state that the agencies "are likely to examine a [bank merger] in more detail" if the merger increases a market's HHI by more than 200 points to a level above 1800 (the 1800/Δ200 screening threshold).[134] By contrast, the 2010 Guidelines provide that mergers in other sectors "warrant scrutiny" and "potentially raise significant competitive concerns" if they increase a market's HHI by more than 100 points to a level above 1500.[135] The DOJ explained that it uses a looser test for banking because depository institutions face competition from nonbanks that is not reflected in

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adopted them."); Andrew Chin, Note, *Antitrust by Chance: A Unified Theory of Horizontal Merger Doctrine*, 106 YALE L.J. 1165, 1173 (1997) (concluding that courts have been "heavily influenced by the HHI thresholds for presumptive illegality" in the merger guidelines). Professor Hillary Greene found that judges referenced the DOJ's merger guidelines in approximately 12.5 percent of cases between 1970 and 1975. By the late 1980s, however, more than 60 percent of antitrust cases referenced the merger guidelines. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 802–04 (2006).

132. The DOJ, the Federal Reserve, and the OCC officially adopted the Bank Merger Guidelines, while the FDIC implemented a statement of policy that is substantially similar. *See* Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended* Philadelphia National Bank *Holiday*, 13 FORDHAM J. CORP. & FIN. L. 595, 638 (2008); *see also* FED. DEPOSIT INS. CORP., FDIC STATEMENT OF POLICY ON BANK MERGER TRANSACTIONS (2008) [hereinafter FDIC STATEMENT OF POLICY ON BANK MERGER TRANSACTIONS], https://www.fdic.gov/regulations/laws/rules/5000-1200.html [https://perma.cc/Y74Z-EEY6].

133. U.S. DEP'T OF JUST., BANK MERGER COMPETITIVE REVIEW—INTRODUCTION AND OVERVIEW 1 (1995) [hereinafter BANK MERGER GUIDELINES], https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf [https://perma.cc/YPW9-YJGV].

134. *Id.* at 3. To calculate HHIs, the banking agencies use deposit data as a proxy for the "cluster" of bank products and services identified in *Philadelphia National Bank*. By contrast, the DOJ assesses the competitive effects of a proposed bank merger in individual submarkets, including deposits and various types of loans. *See* Pekarek & Huth, *supra* note 132, at 639 & n.228 (quoting Robert E. Litan, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address Before the Antitrust Section of the ABA: Antitrust Assessment of Bank Mergers (Apr. 6, 1994), https://www.justice.gov/atr/speech/antitrust-assessment-bank-mergers [https://perma.cc/8PG6-KEPP]); FDIC STATEMENT OF POLICY ON BANK MERGER TRANSACTIONS, *supra* note 132, § III(3) (noting that the FDIC focuses on deposit data).

135. HORIZONTAL MERGER GUIDELINES, *supra* note 130, at 19. The 2010 Guidelines establish a presumption of anticompetitiveness for a nonbanking merger that increases a market's HHI by more than 200 points to a level above 2500. *Id.*

bank HHI data.[136] Thus, the merger guidelines are generally more permissive of consolidation in banking than in other industries.[137]

In sum, the Chicago School inspired the DOJ to adopt more technocratic—and lenient—merger review guidelines.[138] In doing so, the DOJ and the banking agencies granted special treatment to the banking sector, establishing customized standards for bank mergers that are uniquely tolerant of consolidation.

b. Eroding Enforcement. In addition to weakening the merger guidelines, policymakers further curtailed bank antitrust enforcement by crafting a variety of exceptions for otherwise anticompetitive mergers. The DOJ and the banking agencies granted three specific concessions to the banking sector, each consistent with the Chicago School's non-interventionist philosophy.

First, policymakers began recognizing nonbank financial institutions as competitors to banks. Recall that the Supreme Court held in 1974 that thrifts did not compete directly with banks because thrifts were legally barred from offering certain financial products and services.[139] In the ensuing years, however, lawmakers authorized thrifts to engage in some bank-like activities.[140] Thus, the DOJ and the

136. *See* Litan, *supra* note 134 (observing that "banks face competition in virtually all of their services from non-banks . . . that often cannot be captured by computing HHI's based solely on deposits" and noting that the DOJ has "recognized the strength of that competition generally by screening out mergers causing changes in the HHI up to 200 even where the post-merger HHI in the market is 1800 or higher").

137. The Bank Merger Guidelines are weaker than the 2010 Guidelines in another respect: they do not establish an upper limit on concentration beyond which the agencies presumptively challenge a merger. The 2010 Guidelines state that, in nonbanking industries, the DOJ will ordinarily seek to block a merger that increases a market's HHI by more than 200 points to a level above 2500. *See supra* note 130. The Bank Merger Guidelines, however, create no such presumption.

138. *See, e.g.*, Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 147 (2002) (stating that the 1982 Guidelines "harmoniz[ed] the existing horizontal merger precedent with the economic approach of the Chicago School"); Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard*, 83 ANTITRUST L.J. 393, 397 (2020) (noting that the 1982 Guidelines "in effect embrac[e] the Chicago approach").

139. *See supra* note 102 and accompanying text. At the time, thrifts were generally limited to offering savings accounts and home mortgage loans. *See* Lissa Lamkin Broome, *The Influence of Enhanced Thrift Institution Powers on Commercial Bank Market Expansion*, 67 N.C. L. REV. 795, 795 (1989).

140. *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.) (authorizing federally chartered thrifts to offer transaction accounts, short-term consumer loans, and trust and fiduciary

banking agencies started including thrifts in their HHI calculations for bank mergers.[141] At first, the Bank Merger Guidelines weighted thrift deposits at only 50 percent, reasoning that "[a]lthough th[e] legal restrictions have been relaxed to some extent, many thrifts remain less active competitors" for certain products, such as commercial loans.[142] Over time, however, the DOJ, OCC, and FDIC increased their weighting of thrift deposits to 100 percent.[143] In addition, the DOJ and the banking agencies now regularly include credit union deposits in their HHI calculations.[144] In this way, policymakers relaxed bank antitrust enforcement by conceding that nonbanks may offset the anticompetitive effects of a bank merger.

Second, antitrust enforcers started authorizing divestitures as a remedy in lieu of denying anticompetitive mergers. In 1970, amendments to the BHC Act eliminated special regulatory treatment for one-bank BHCs, spurring numerous acquisitions by BHCs that had previously controlled only a single bank.[145] In some cases, these transactions threatened to increase concentration in local banking markets.[146] Instead of rejecting these proposals, however, the DOJ and the banking agencies generally allowed them to proceed, provided the

services); Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.) (permitting a federal thrift to maintain up to 40 percent of its assets in nonresidential real estate, 30 percent of its assets in consumer loans, and 10 percent of its assets in commercial loans).

141. *See* Broome, *supra* note 139, at 820, 826–27.

142. *How Do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, Analyze the Competitive Effects of Mergers and Acquisitions Under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Oct. 9, 2014) [hereinafter *Bank Merger FAQs*], https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm [https://perma.cc/QXE5-52LA]; *see also* BANK MERGER GUIDELINES, *supra* note 133, at 7 (instructing that only "50% of the total deposits that each [thrift] (including all affiliates) has in the market area" should be listed on the HHI calculation worksheet).

143. *See* Symposium, *The Antitrust Aspects of Bank Mergers*, 13 FORDHAM J. CORP. & FIN. L. 511, 530 (2008); *Bank Merger FAQs*, *supra* note 142.

144. *See Bank Merger FAQs*, *supra* note 142.

145. *See* Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101(a), 84 Stat. 1760, 1760 (codified as amended at 12 U.S.C. § 1841(a)(1)) (eliminating the one-bank holding company exception); Jim Burke, *Divestiture as an Antitrust Remedy in Bank Mergers* 2 (Bd. of Governors of the Fed. Rsrv. Sys. Fin. & Econ. Discussion Series, Working Paper No. 1998-14, 1998), https://www.federalreserve.gov/pubs/feds/1998/199814/199814pap.pdf [https://perma.cc/982L-5Q36] (discussing post-1970 acquisitions).

146. *See* Burke, *supra* note 145, at 2–3.

acquirer sold certain branches to another bank.[147] In practice, divestitures significantly curtailed bank antitrust enforcement. In the decade before recognizing divestitures as a remedy, the Federal Reserve denied sixty-five bank mergers on competitive grounds.[148] By contrast, the Federal Reserve denied only five mergers on competitive grounds in the ten years after adopting divestitures as a remedy.[149]

Finally, the antitrust authorities began to tolerate elevated concentration levels in markets they deemed attractive for entry. The Bank Merger Guidelines provide that the agencies may allow a merger that would increase a market's HHI by more than 200 points to a level above 1800 based on "expectations about potential entry by institutions not now in the market."[150] To evaluate a market's attractiveness for entry, the agencies consider recent de novo entry by out-of-market banks, population growth rate, and per capita income, among other factors.[151] Taking these considerations into account, the agencies frequently approved bank mergers that exceeded the 1800/Δ200 screening threshold based on their predictions about how market dynamics might evolve in the future.[152]

A representative example demonstrates how these policies, in combination, resulted in more lenient bank antitrust enforcement. In 1990, the Federal Reserve considered First Union Corporation's

147. *See id.* at 6–10 (discussing the Federal Reserve's and DOJ's divestiture policies).

148. *See id.* at 2–3 (citing data from 1972 to 1982).

149. *See id.* at 5 (citing data from 1987 to 1997). For a discussion of why branch divestitures may not be an effective remedy for an otherwise anticompetitive merger, see *infra* Part IV.A.2.

150. *See* BANK MERGER GUIDELINES, *supra* note 133, at 3.

151. *See, e.g.*, Centura Banks, Inc., 76 FED. RSRV. BULL. 869, 872 (1990).

152. *See* Robert M. Adams & Dean F. Amel, *The Effects of Past Entry, Market Consolidation, and Expansion by Incumbents on the Probability of Entry in Banking*, 48 REV. INDUS. ORG. 95, 96 (2016) ("In antitrust enforcement in the U.S. banking industry . . . the attractiveness of a market for future entry is the most prominent mitigating factor cited when potentially anticompetitive consolidations are allowed."); *see also* SunTrust Banks, Inc., 76 FED. RSRV. BULL. 685, 686–87 (1990) (approving a merger that would increase the Albany, Georgia, banking market HHI by 575 points to 2375); Iowa Nat'l Bankshares Corp., 80 FED. RSRV. BULL. 342, 342–44 (1994) (approving a merger that would increase the Waterloo, Iowa, banking market HHI by 388 points to 2744 post-divestiture); First Com. Corp., 81 FED. RSRV. BULL. 793, 794 (1995) (approving a merger that would increase the Lake Charles, Louisiana, banking market HHI by 288 points to 2455 post-divestiture); KeyCorp, 81 FED. RSRV. BULL. 286, 288–89 (1995) (approving a merger that would increase the Portland, Maine, banking market HHI by 368 points to 2167 post-divestiture); Aspen Bancshares, Inc., 82 FED. RSRV. BULL. 665, 666–67, 666 n.5 (1996) (approving a merger that would increase the Cortez, Colorado, banking market HHI by 657 points to 2367).

proposed acquisition of Florida National Banks of Florida, Inc.[153] At the time, Florida National and First Union were the first- and third-largest banks, respectively, in the Jacksonville, Florida, market.[154] The proposed merger would have increased the Jacksonville banking market's HHI by 1236 points to a level of 3191—well above the Bank Merger Guidelines' 1800/Δ200 threshold.[155] The Federal Reserve, however, determined that thrifts "exert[ed] a considerable competitive influence on the market."[156] Weighting thrift deposits at 50 percent, the Federal Reserve calculated that the proposed merger would increase the HHI by 768 points to a level of 2283.[157] In addition, the Federal Reserve considered that First Union had committed to divest thirteen branches that controlled 4 percent of the market's deposits.[158] Factoring in these divestitures, the proposed merger's effect on the Jacksonville market's HHI—an increase of 564 points to 2079—still exceeded the Bank Merger Guidelines' 1800/Δ200 threshold.[159] Nonetheless, the Federal Reserve noted that "the Jacksonville market is a major urban area in a rapidly growing state and is attractive for entry."[160] Accordingly, despite the initial, extreme HHI calculation, the Federal Reserve concluded that the merger was "not likely to have a significantly adverse effect on competition."[161] In this way, policymakers rationalized otherwise anticompetitive mergers based on purported mitigating factors.[162]

2. *Renewed Bank Consolidation.* The Chicago School approach sparked renewed consolidation in the financial sector during the 1990s and 2000s. A merger spree was made possible by deregulatory legislation and relaxed antitrust enforcement, consistent with the

153. First Union Corp., 76 FED. RSRV. BULL. 83, 83 (1990).
154. *See id.* at 84.
155. *See id.*
156. *Id.* at 85.
157. *See id.* at 85 n.11.
158. *See id.* at 85.
159. *See id.* at 85 n.13.
160. *Id.* at 85.
161. *Id.*
162. For a discussion of why purported mitigants may not actually alleviate the anticompetitive effects of a bank merger, see *infra* Part IV.A.2.

Chicago School's emphasis on economic efficiency. This era of consolidation proceeded in three distinct phases.[163]

First, the repeal of longstanding geographic restrictions spurred a large wave of interstate bank mergers. Traditionally, federal and state laws had prevented banking organizations from expanding outside of their home states.[164] In the 1970s, however, states gradually began to permit some interstate acquisitions.[165] It was not until 1994, though, that Congress effectively eliminated barriers to interstate banking, prompting the "highest-ever five-year run of bank mergers in U.S. history, in terms of both the number and the value of the banks acquired."[166] Policymakers' embrace of interstate bank consolidation was motivated by the Chicago School's emphasis on economic efficiency.[167] Indeed, the law in which Congress removed the final barriers to interstate mergers was named the Riegle-Neal Interstate Banking and Branching *Efficiency* Act.[168]

In the second phase of modern-day consolidation, the relaxation of decades-old activity restrictions triggered mergers throughout the financial system. Historically, the Depression-era Glass-Steagall Act and related laws barred BHCs from engaging in investment banking, insurance, and other nonbanking activities.[169] In 1999, however, the Gramm-Leach-Bliley ("GLB") Act reversed these prohibitions.[170] In the ensuing years, many of the largest U.S. BHCs expanded by acquiring investment banks and insurance companies.[171] Policymakers specifically invoked economic efficiency and consumer welfare when authorizing these cross-sectoral mergers. For example, the House

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163. *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW & POLICY 54–58, 726–29 (2d ed. 2018).

164. *See id.* at 714–15.

165. *See id.* at 726.

166. Pekarek & Huth, *supra* note 132, at 629 (quoting Robert DeYoung, William C. Hunter & Gregory F. Udell, *The Past, Present, and Probable Future for Community Banks* 13 (Fed. Rsrv. Bank of Chi., Working Paper No. 2003-14, 2003), http://www.chicagofed.org/digital_assets/publications/working_papers/2003/wp2003-14.pdf [https://perma.cc/4HN8-KTPN]).

167. *See* Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183, 213–18 (1996) (discussing proponents' assertions that interstate banking would enhance economic efficiency).

168. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (emphasis added).

169. *See* Kress, *Solving Banking's "Too Big To Manage" Problem*, *supra* note 37, at 183–84.

170. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342–51 (1999).

171. *See* Kress, *Solving Banking's "Too Big To Manage" Problem*, *supra* note 37, at 184–85.

Report on the GLB Act argued that the bill would benefit consumers by "increasing the efficiency of institutions" and "reducing costs to consumers as a result of this . . . efficiency."[172]

Finally, the 2008 financial crisis prompted emergency acquisitions by the United States' largest banks to rescue failing competitors. As the financial system teetered on the brink of collapse, the federal government encouraged a handful of comparatively strong banks to absorb weaker institutions flirting with insolvency.[173] As a result, JPMorgan acquired Bear Stearns and Washington Mutual, Bank of America added Merrill Lynch and Countrywide Financial, and Wells Fargo merged with Wachovia.[174] Some of these mergers exploited loopholes in the BHC Act's prohibition against acquisitions by a bank that would control more than 10 percent of nationwide deposits.[175] Yet policymakers authorized these megamergers, reasoning that the transactions would benefit consumers.[176]

3. *Evidence of High Concentration in Banking*. The resurgence of bank consolidation has produced historically high concentration throughout the U.S. financial sector. Nationwide banking market concentration has increased dramatically in the past forty years. In the 1980s, the five largest U.S. banks collectively controlled less than 10 percent of the assets in the U.S. banking system.[177] By the 2010s, however, the five biggest commercial banks accounted for almost half

172. H.R. REP. NO. 106-74, pt. 3, at 107 (1999).

173. *See* Kress, *Solving Banking's "Too Big To Manage" Problem*, *supra* note 37, at 186.

174. *See id.*

175. *See* Arthur E. Wilmarth, Jr., *Reforming Financial Regulation To Address the Too-Big-To-Fail Problem*, 35 BROOK. J. INT'L L. 707, 750–51 (2010) (discussing exceptions to the 10 percent nationwide deposit cap). For example, the Federal Reserve allowed Bank of America to acquire Countrywide and Merrill Lynch on the ground that the target institutions controlled thrifts, while the BHC Act's deposit cap applied only to acquisitions of banks. *See id.*

176. *See, e.g.*, Bank of Am. Corp., 95 FED. RSRV. BULL. B13, B16 (2009) ("The record indicates that consummation of the proposal would result in benefits to customers currently served by [Merrill Lynch] by providing them access to additional banking and nonbanking products and services from Bank of America.").

177. In 1989, the five largest U.S. banks—Citibank, Bank of America, Chase Manhattan Bank, Morgan Guaranty Trust, and Manufacturers Hanover—collectively controlled $442 billion in assets, or 9 percent of the total assets in the U.S. banking system. *See* MOODY'S BANK & FINANCE MANUAL a2 (1991) (listing the assets of the largest banks); *BankFind Suite: Find Annual Historical Bank Data*, FED. DEPOSIT INS. CORP. [hereinafter *FDIC BankFind Suite*], https://banks.data.fdic.gov/bankfind-suite/historical (reporting that U.S. commercial and savings banks controlled a total of $4.74 trillion in assets in 1989).

of U.S. banking system assets.[178] Meanwhile, the total number of U.S. banks plummeted by more than two-thirds over the same time span, in large part due to mergers and acquisitions.[179] Figure 1 depicts the surge in U.S. banking sector concentration since the 1980s.[180]

Concentration is particularly acute among the very largest financial conglomerates. Today, six companies—JPMorgan, Bank of America, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley—collectively control more assets than the remaining 3600 U.S. BHCs combined.[181] While this level of nationwide bank concentration is lower than in most other developed countries,[182] it is remarkable considering the United States' historic misgivings about large concentrations of economic power.[183]

Nationwide banking statistics mask even higher concentration levels in local markets. Consumers and businesses in most geographic areas face a dearth of local banking options. Indeed, more than three-quarters of the United States' local banking markets are considered

178. The five largest commercial banks controlled 45 percent of U.S. banking system assets in 2014. *See* FED. RSRV. STAT. RELEASE, LARGE COMMERCIAL BANKS (Dec. 31, 2014), https://www.federalreserve.gov/releases/lbr/20141231/default.htm [https://perma.cc/53NK-YU7Q] (reporting that the five largest U.S. commercial banks collectively controlled $6.93 trillion in assets as of year-end 2014); *see also FDIC BankFind Suite*, *supra* note 177 (reporting that U.S. commercial and savings banks controlled a total of $15.55 trillion in assets in 2014).

179. *See FDIC BankFind Suite*, *supra* note 177 (reporting that the number of U.S. commercial and savings banks declined from 17,811 in 1984 to 5004 in 2020); *see also* Stephen A. Rhoades, *Bank Mergers and Industrywide Structure, 1980–94*, at 4 (Bd. of Governors of the Fed. Rsrv. Sys., Staff Stud. No. 169, 1996), https://www.federalreserve.gov/pubs/staffstudies/1990-99/ss169.pdf [https://perma.cc/9UYZ-FMJF] (identifying 6347 bank mergers between 1980 and 1994); Steven J. Pilloff, *Bank Merger Activity in the United States, 1994–2003*, at 3 (Bd. of Governors of the Fed. Rsrv. Sys., Staff Stud. No. 176, 2004), https://www.federalreserve.gov/pubs/staffstudies/2000-present/ss176.pdf [https://perma.cc/4VZ7-SHDT] (identifying 3517 bank mergers between 1994 and 2003).

180. Data on the total number and total assets of U.S. banks is sourced from the FDIC's BankFind Suite. *See FDIC BankFind Suite*, *supra* note 177 (reporting the total number and total assets of U.S. commercial and savings banks from 1984 to 2020). For the period from 1989 to 2000, the author manually calculated the five-bank asset concentration ratio using bank Call Report data from the FDIC. *See Details and Financials – Institution Directory*, FED. DEPOSIT INS. CORP., https://www7.fdic.gov/idasp/advSearchLanding.asp [https://perma.cc/XRD9-VTKH]. For the period from 2001 to 2020, the author manually calculated the five-bank asset concentration ratio using data from the Federal Reserve's Large Commercial Banks statistical release. *See Large Commercial Banks*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/releases/lbr [https://perma.cc/UV5X-3PDA].

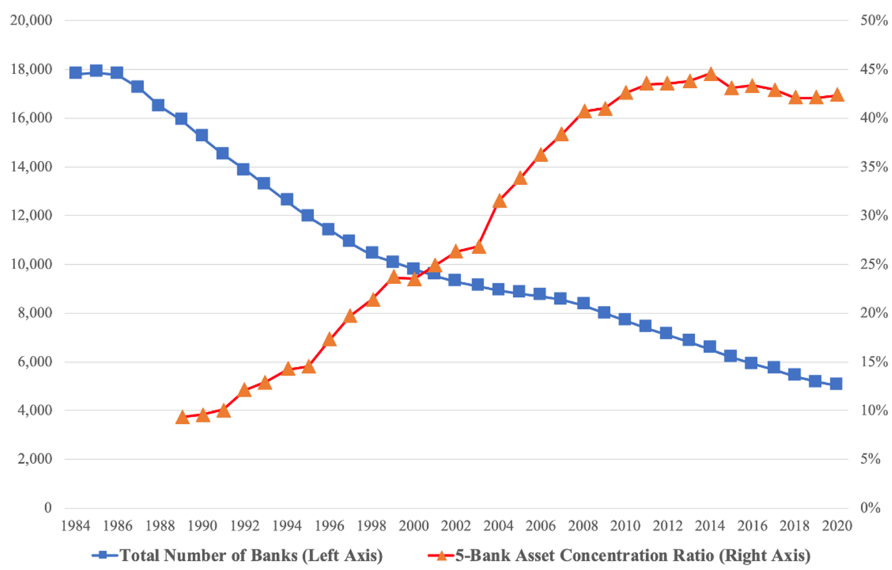
181. *See supra* note 7.

182. *See, e.g.*, BARR ET AL., *supra* note 14, at 767 (comparing five-bank asset concentration levels across developed countries).

183. *See supra* Part I.A.

uncompetitive, with HHIs exceeding the DOJ's 1800 threshold for high concentration in banking.[184] In fact, the mean HHI for all U.S. banking markets is almost 3500.[185] In an average local market, therefore, a consumer might have only three banking options.[186] Concentration is even more pronounced in rural areas, where nearly 90 percent of local markets are considered highly concentrated.[187] Moreover, local banking market concentration continues to increase, albeit less rapidly than nationwide concentration.[188] In sum, therefore, the emergence of the Chicago School and the ensuing deluge of bank mergers have pushed both national and local concentration levels to extremes.

Figure 1:
Concentration in the U.S. Banking Sector



184. *See* Andrew P. Meyer, *Market Concentration and Its Impact on Community Banks*, FED. RSRV. BANK OF ST. LOUIS (Apr. 12, 2018), https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks [https://perma.cc/3XAD-EBDY]; *see also* BB&T Corp., 106 FED. RSRV. BULL. 1, 5 n.26 (2020) ("Under the DOJ Bank Merger Guidelines, a market is considered . . . highly concentrated if the post-merger HHI exceeds 1800.").

185. *See* Meyer, *supra* note 184.

186. In a market with three banks that each control 33.3 percent market share, the HHI is $(33.3^2 + 33.3^2 + 33.3^2) = 3333$.

187. *See* Meyer, *supra* note 184.

188. *See id.* (noting that the mean HHI for U.S. banking markets increased from 3316 in 2006 to 3468 by 2017).

4. *Attempts to Further Weaken Bank Antitrust*. Despite escalating bank concentration, Trump administration policymakers sought to relax bank antitrust standards even further. Most notably, the DOJ solicited public comment on potential revisions to the Bank Merger Guidelines in 2020.[189] The DOJ specifically requested input on whether it should increase the 1800/Δ200 HHI screening threshold in the Bank Merger Guidelines.[190] The DOJ also suggested that it might include fintech companies for the first time in its bank antitrust analyses.[191] As some commenters cautioned, the DOJ's proposal to apply "greater weight to nontraditional financial service providers in bank merger reviews . . . would permit further consolidation in the banking sector."[192] Like the DOJ, the Federal Reserve also considered relaxing its bank merger framework by taking into account fintech companies. As Federal Reserve Governor Michelle Bowman explained, the Federal Reserve evaluated reforms "that would better reflect the competition that smaller banks face in an industry quickly being transformed by technology and non-bank financial companies."[193] Although the Trump administration ultimately did not adopt revisions to the Bank Merger Guidelines, policymakers' efforts to further weaken bank antitrust reflect the Chicago School's enduring legacy.

In sum, the Chicago School stifled antitrust enforcement in the banking sector. While U.S. policymakers had historically prioritized

189. Press Release, Dep't of Just., Antitrust Division Seeks Public Comment on Updating Bank Merger Review Analysis (Sept. 1, 2020) [hereinafter Press Release, Dep't of Just., Antitrust Division Seeks Public Comment], https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis [https://perma.cc/9B7A-TXU8].

190. *See Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide*, DEP'T OF JUST. (Oct. 28, 2020), https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide [https://perma.cc/E8DV-9DHQ] (asking whether the screening thresholds in the Bank Merger Guidelines should be updated to reflect the thresholds in the 2010 Guidelines). As discussed above, the 2010 Guidelines establish a presumption of anticompetitiveness for a nonbanking merger that increases a market's HHI by more than 200 points to a level above 2500. *See supra* note 135.

191. *See Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide*, *supra* note 190.

192. *See* Letter from Rohit Chopra, Comm'r, Fed. Trade Comm'n, and Jeremy C. Kress, Assistant Professor, Univ. of Mich., to William Barr, Att'y Gen., Dep't of Just. 6 (Oct. 16, 2020), https://www.justice.gov/atr/page/file/1330326/download [https://perma.cc/A3X7-F4BN]. For a discussion of why fintech is not likely to offset the anticompetitive consequences of bank consolidation, see *infra* Part III.A.

193. Michelle W. Bowman, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Conference for Community Bankers: My Perspective on Bank Regulation and Supervision 6 (Feb. 16, 2021), https://www.federalreserve.gov/newsevents/speech/files/bowman20210216a.pdf [https://perma.cc/2U9C-6VYM].

bank competition and disfavored large agglomerations of financial power, the emergence of the Chicago School in the 1970s inspired statutory, regulatory, and judicial rollbacks that encouraged rapid bank consolidation. As the next Part demonstrates, the anti-interventionist Chicago School ideology that now dominates bank antitrust has harmed consumers, businesses, and the broader economy.

II. THE EXISTING BANK ANTITRUST FRAMEWORK IS INADEQUATE

The Chicago School's narrow consumer welfare approach to bank antitrust has proven deficient in two critical respects. First, it has failed on its own terms. Under the Chicago School framework, escalating concentration has increased the cost of financial products and has not delivered promised efficiency gains. Second, because of its narrow focus on prices and efficiency, the current approach has overlooked numerous nonprice harms from bank consolidation. These nonprice harms include branch closures that inconvenience customers, big-bank funding subsidies that distort competition and deter new entrants, and excessive concentration that impairs monetary policy transmission and increases systemic risk. This Part makes the case that the existing bank antitrust framework is ill-suited to combat the negative consequences of bank consolidation.

A. The Chicago School's Approach Has Failed on Its Own Terms

Despite its promises to reduce prices and increase economic efficiency, the Chicago School approach to bank antitrust has done neither. To the contrary, bank mergers have hurt consumers and small businesses, with particularly severe consequences for LMI and minority communities. In addition, large bank mergers have generally failed to produce promised efficiency gains.

1. *Consumers*. The Chicago School's narrow consumer-welfare-oriented approach to bank antitrust has, perversely, harmed consumers. Under the current bank merger framework, consolidation has increased the cost and reduced the availability of consumer loans, inflated the fees banks charge for basic financial services, and depressed the interest rates banks pay to their accountholders.

The prevailing approach to bank mergers has made it harder and more expensive for consumers to obtain credit. Indeed, empirical evidence has demonstrated that bank consolidation is associated with higher interest rates on both mortgages and personal loans.[194] For example, one study found that a one-hundred-point increase in a local market's HHI is associated with a twelve-to-fourteen-basis-point increase in personal loan rates.[195] In addition, bank mergers lead to lower approval rates and higher rejection rates for mortgage applications.[196] Further, bank mergers are associated with a decline in the total amount of lending in a local market.[197] Thus, under the consumer welfare approach, bank consolidation has impaired consumers' access to credit.

Consolidation has also increased the fees banks charge their customers. Common transaction fees—including charges for overdrafts, stopped payments, and ATM withdrawals—tend to rise after banks consolidate.[198] In addition, banks in more concentrated areas tack on extra fees for mortgage loans.[199] One study found that non-interest charges on mortgages are, on average, thirty-five basis points—or $1200—higher in the most concentrated markets compared

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194. *See, e.g.*, Dimuthu Ratnadiwakara & Vijay Yerramilli, Effect of Bank Mergers on the Price and Availability of Mortgage Credit 4 (June 2021) (unpublished manuscript), https://www.bauer.uh.edu/yerramilli/RY-MergersMortgages.pdf [https://perma.cc/TRK6-45DC] (finding that a 5 percent gain in local market share by an acquiring bank is associated with a thirty-one-basis-point increase in interest rates on its nonagency mortgage loans); Kahn et al., *supra* note 23, at 109 (concluding that bank concentration is positively associated with interest rates for personal loans).

195. Kahn et al., *supra* note 23, at 109.

196. *See* Buchak & Jørring, *supra* note 23, at 6 ("[R]ejection rates for mortgage applications rise significantly when lender concentration is higher."); Ratnadiwakara & Yerramilli, *supra* note 194, at 23 (concluding that acquiring banks decrease approval rates for Federal Housing Administration–insured mortgage applications).

197. *See* John H. Boyd, Gianni De Nicolo & Abu M. Jalal, *Bank Risk-Taking and Competition Revisited: New Theory and New Evidence* 29 (Int'l Monetary Fund, Working Paper No. 06/297, 2006), https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Bank-Risk-Taking-and-Competition-Revisited-New-Theory-and-New-Evidence-20126 [https://perma.cc/954W-H5C2] ("[B]oth the theory and the data suggest a positive *ceteris paribus* relationship between bank competition and willingness to lend (as opposed to hold government bonds)."); Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 514 (2006) (finding that the total amount of bank and nonbank credit provision significantly decreases when competition declines).

198. *See* Timothy H. Hannan, *Retail Deposit Fees and Multimarket Banking*, 30 J. BANKING & FIN. 2561, 2577 (2006) ("For the most common retail fees that every bank charges, banks in more concentrated markets tend to charge higher fees, all else equal . . . ."); Bord, *supra* note 24, at 21, 54 (documenting significant increases in retail account fees when a bank with more than $10 billion in assets acquires a bank with less than $10 billion in assets). For additional discussion of banks' fee arrangements, see generally Kathryn Judge, *Fee Effects*, 98 IOWA L. REV. 1517 (2013) (examining how financial institutions maximize fees).

199. *See* Buchak & Jørring, *supra* note 23, at 3.

to the least concentrated markets.[200] The same study concluded that if concentration levels in all counties were at most equal to the current twenty-fifth percentile, the net decrease in fees would save mortgage borrowers $2.2 billion per year.[201]

Finally, consolidation has harmed consumers by reducing the interest banks pay to their depositors. When banks merge, they exploit their market power by decreasing the rates they pay on their checking and savings accounts.[202] Indeed, empirical studies have consistently documented a "significant negative impact of bank mergers on checking account rates, both in the short and in the long run."[203] One study, for example, found that bank mergers between 1998 and 2005 were associated with deposit interest rate declines of 8.6 percent and 5.5 percent, respectively, six months and four years post-merger.[204]

In sum, when banks merge, they exploit their market power by increasing the cost of loans, raising transaction fees, and paying less interest to depositors. The Chicago School framework, however, has not protected consumers from these harmful consequences.

2. *Low- and Moderate-Income and Minority Communities*. The negative effects of bank consolidation are especially acute for consumers in LMI and minority communities. As Professors Greg Buchak and Adam Jørring document, "[W]hile greater concentration reduces credit access for all borrowers, the reduction is particularly large for low-income borrowers . . . and borrowers belonging to racial

200. *See id.* (comparing markets in the top and bottom decile of concentration).

201. *See id.* at 5.

202. *See* Dinger, *supra* note 23, at 55 (finding that merging banks are more likely than non-merging banks to change their deposit rates in the first year following a merger).

203. Ben R. Craig & Valeriya Dinger, *Bank Mergers and the Dynamics of Deposit Interest Rates*, 36 J. FIN. SERVS. RSCH. 111, 113 (2009); *see also* Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry*, 46 J. INDUS. ECON. 433, 442–49 (1998) (concluding that the deposit rates offered by banks that merged between 1991 and 1994 declined relative to those offered by non-merging banks); Erik Heitfield & Robin A. Prager, *The Geographic Scope of Retail Deposit Markets*, 25 J. FIN. SERVS. RSCH. 37, 52–54 (2004) (finding that the inverse relationship between state-level concentration and deposit interest rates strengthened during the 1990s); *see also* Itamar Drechsler, Alexi Savov & Philipp Schnabl, *The Deposits Channel of Monetary Policy*, 132 Q.J. ECON. 1819, 1849 (2017) (finding that banks increase deposit spreads by fourteen basis points more at their branches in high-concentration counties relative to branches in low-concentration counties when the Fed funds rate rises by one hundred basis points).

204. Craig & Dinger, *supra* note 203, at 128.

minorities."[205] Indeed, increases in banking market concentration are associated with bigger spikes in rejection rates for low-income and nonwhite loan applicants compared to other borrowers.[206] In addition, banks in more concentrated markets disproportionately increase the fees they charge LMI and minority consumers relative to other customers.[207] As a result, bank consolidation exacerbates disparities in access to affordable financial services.[208]

Credit disparities associated with bank consolidation have produced devastating knock-on effects for LMI and minority communities. For example, high-fee check-cashing companies and other predatory financial service providers have proliferated in LMI areas affected by bank consolidation.[209] In addition, households in LMI neighborhoods are more likely to experience evictions and have debts sent to collection agencies following bank mergers.[210] Due to the ensuing economic hardships, bank consolidation has even been associated with increases in burglary and other property crimes, with the largest effects in LMI areas.[211] Collectively, the negative effects of bank consolidation inhibit LMI and minority populations' economic opportunities. Indeed, intergenerational economic mobility is lower in

205. Buchak & Jørring, *supra* note 23, at 6; *see also* Erik J. Mayer, *Big Banks, Household Credit Access, and Economic Mobility* 22 (SMU Cox Sch. of Bus., Rsch. Paper No. 21-04, 2021), https://ssrn.com/abstract=3816308 [https://perma.cc/U3JX-NN86] ("[L]ow income borrowers experience reduced credit access when local banks are large."); Yong Kyu Gam & Yunqi Zhang, Dismembered Giants: Bank Divestitures and Local Lending 6 (Nov. 2019) (unpublished manuscript), https://www.aeaweb.org/conference/2020/preliminary/paper/EitrD7zf [https://perma.cc/JH6M-A4Q3] (finding that Black applicants are less likely to obtain mortgages following bank mergers).

206. *See* Buchak & Jørring, *supra* note 23, at 27 ("[T]he differential rejection probability for a black . . . or low-income borrower is greater when local markets are more concentrated."); Ratnadiwakara & Yerramilli, *supra* note 194, at 4–5 (reporting that the spike in rejection rates for FHA mortgages following a bank merger is higher for low-income and nonwhite applicants).

207. *Cf.* Buchak & Jørring, *supra* note 23, at 27 ("[W]hile . . . low-income borrowers pay higher fees on average, the fee differential shrinks in more competitive local markets.").

208. *See* Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1302 (2022) (summarizing the disparate impact of bank consolidation on LMI communities). For a thorough analysis of disparities in access to affordable financial services, see generally MEHRSA BARADARAN, HOW THE OTHER HALF BANKS (2015).

209. *See* Bord, *supra* note 24, at 23–25.

210. *See id.* at 30–32 (concluding that bank mergers caused 9000 evictions in LMI areas between 2009 and 2012).

211. *See* Garmaise & Moskowitz, *supra* note 197, at 518–23.

areas with larger local banks.[212] Bank consolidation, therefore, has been uniquely detrimental for LMI and minority communities.

3. *Small Businesses*. The prevailing Chicago School approach has likewise harmed small businesses. Community banks have traditionally specialized in lending to local entrepreneurs and farmers.[213] When banks consolidate, therefore, small business lending declines, as bigger banks tend to serve larger commercial customers.[214] Numerous empirical studies have documented a reduction in small business lending associated with bank mergers.[215] For small businesses that have been able to obtain loans following a bank merger, credit has become more expensive, average loan size has declined, and nonprice loan terms—such as collateral requirements—have become more onerous.[216] Even mergers that comply with the Bank Merger Guidelines' HHI thresholds impair small business lending. Indeed, Professor Robert Mann found that bank mergers below the 1800/Δ200 HHI screening threshold were associated with an 8 percent decline in small business lending between 1996 and 2015.[217] To be sure, there is

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212. *See* Mayer, *supra* note 205, at 34.

213. *See* Jeremy C. Kress & Matthew C. Turk, *Too Many To Fail: Against Community Bank Deregulation*, 115 NW. U. L. REV. 647, 654 (2020) (discussing "relational" lending by small banks).

214. *Cf.* FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY 4–7 (2020), https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf [https://perma.cc/YK4T-32CH] (noting that community banks' share of small business loans is more than double their share of the banking industry's total assets).

215. *See* Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237, 1248–58 (2007); Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 J. FIN. 329, 354 (2002); Allen N. Berger, Anthony Saunders, Joseph M. Scalise & Gregory F. Udell, *The Effects of Bank Mergers and Acquisitions on Small Business Lending*, 50 J. FIN. ECON. 187, 217, 218 tbl.5 (1998) (finding a reduction in small business lending following mergers between acquirers with more than $1 billion in assets and targets with more than $100 million in assets); Drechsler et al., *supra* note 203, at 1859; Katherine Samolyk & Christopher A. Richardson, *Bank Consolidation and Small Business Lending Within Local Markets* 4 (Fed. Deposit Ins. Corp., Working Paper No. 2003-02, 2003), https://www.fdic.gov/bank/analytical/working/wp03-02.pdf [https://perma.cc/NQ5V-HH7Y].

216. *See* Garmaise & Moskowitz, *supra* note 197, at 515 (concluding that bank mergers between 1995 and 1997 significantly increased the cost of commercial credit and decreased loan size); Sapienza, *supra* note 215, at 354 (finding that acquisitions by large banks increase the cost of credit for small businesses); Jonathan A. Scott & William C. Dunkelberg, *Bank Mergers and Small Firm Financing*, 35 J. MONEY, CREDIT & BANKING 999, 1012 (2003) (documenting more onerous nonprice terms in small business loan contracts following bank mergers).

217. *See* Robert Mann, Bank Competition, Local Labor Markets, and the Racial Employment Gap 23–24 (Jan. 27, 2022) (unpublished manuscript), https://ssrn.com/abstract=401

some evidence that consolidation among the very smallest community banks may boost local small business lending.[218] Larger mergers, however, generally impair small businesses' access to affordable financial services.[219]

More broadly, bank consolidation's adverse effects on small businesses impede economic development and reduce social welfare. Facing scarcer credit availability, fewer entrepreneurs have started small businesses following bank mergers.[220] The biggest post-merger

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3042 [https://perma.cc/SH9Q-T4GW]. Mann's study excluded mergers occurring during the 2007 and 2008 financial crisis. *See id.* at 11–12.

218. *See, e.g.*, Shradha Bindal, Christa H.S. Bouwman, Shuting (Sophia) Hu & Shane A. Johnson, *Bank Regulatory Size Thresholds, Merger and Acquisition Behavior, and Small Business Lending*, 62 J. CORP. FIN., no. 101519, 2020, at 28 (finding that mergers resulting in banks with less than $10 billion in assets between 2010 and 2015 were associated with increases in small business lending); Robert B. Avery & Katherine A. Samolyk, *Bank Consolidation and Small Business Lending: The Role of Community Banks*, 25 J. FIN. SERVS. RSCH. 291, 294 (2004) (finding that mergers involving community banks with less than $1 billion in assets were associated with higher small business loan growth between 1994 and 1997); Bernadette A. Minton, Alvaro G. Taboada & Rohan Williamson, *Are Bank Merger Characteristics Important for Local Community Investment?* 3 (Fisher Coll. of Bus., Working Paper No. 2020-03-012, 2020) (concluding that mergers involving acquirers with less than $10 billion in assets between 1999 and 2016 were associated with increases in small business loan originations).

219. *See* Bindal et al., *supra* note 218, at 28 (concluding that mergers producing banks with more than $10 billion in assets between 2010 and 2015 were associated with lower small business lending, relative to mergers producing banks with less than $7 billion in assets); Avery & Samolyk, *supra* note 218, at 294 (finding that mergers involving banks with more than $1 billion in assets were associated with lower small business loan growth between 1994 and 1997); Minton et al., *supra* note 218, at 3 (concluding that mergers involving acquirers with more than $10 billion in assets between 1999 and 2016 were associated with fewer small business loan originations). In an anomalous finding, Federal Reserve Bank of Philadelphia economists documented that bank mergers involving acquirers with more than $6 billion in assets between 2000 and 2012 were associated with increased small business lending. *See* Julapa Jagtiani, Ian Kotliar & Raman Quinn Maingi, *Community Bank Mergers and Their Impact on Small Business Lending*, 27 J. FIN. STABILITY 106, 116–19 (2016). However, subsequent work by the same researchers showed that large acquirers diverted small business lending from their targets' local communities to the acquirers' local communities, leaving the targets' communities worse off. *See* Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* 18–20 (Fed. Rsrv. Bank of Phila., Working Paper No. 18-18, 2018), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-18.pdf [https://perma.cc/PE5W-GZ6X].

220. *See* Bill Francis, Iftekhar Hasan & Haizhi Wang, *Bank Consolidation and New Business Formation*, 32 J. BANKING & FIN. 1598, 1603–09 (2008); Nicola Cetorelli, *Life-Cycle Dynamics in Industrial Sectors: The Role of Banking Market Structure*, 85 FED. RSRV. BANK ST. LOUIS ECON. REV. 135, 140–42 (2003); *see also* Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437, 437 (2006) ("[I]n markets with concentrated banking, potential entrants face greater difficulty gaining access to credit than in markets in which banking is more competitive.").

declines in startup activity have been concentrated in Black communities.[221] With fewer small businesses forming and expanding, bank consolidation has been associated with declines in commercial real estate development, construction activity, and local property prices.[222] Meanwhile, fewer small businesses has led to fewer good jobs. Indeed, in areas affected by bank mergers, unemployment has increased, median income has declined, and income inequality has become even more severe.[223] One study showed that a 142-point increase in county-level HHI is associated with a 0.5 percent drop in employment and a 2 percent drop in average wages, with even sharper declines in Black communities.[224]

4. *Absence of Economic Efficiencies*. Under the Chicago School framework, bank consolidation has not only harmed bank customers, it has also failed to produce efficiency gains. Empirical analyses of larger bank mergers generally "fail to find any significant cost savings" from consolidation.[225] For example, one study of mergers between 1983 and 2014 concluded that cost savings typically do not materialize when a merged bank exceeds $150 billion in assets.[226] This conclusion is consistent with numerous studies finding no economies of scale in larger banks.[227] In fact, rather than reducing costs, some evidence

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221. *See* Mann, *supra* note 217, at 27–29.

222. *See* Garmaise & Moskowitz, *supra* note 197, at 516–17.

223. *See id.* at 518; Mann, *supra* note 217, at 24–25.

224. Mann, *supra* note 217, at 24–25, 29–30.

225. Joel F. Houston & Michael D. Ryngaert, *The Overall Gains from Large Bank Mergers*, 18 J. BANKING & FIN. 1155, 1155 (1994) (concluding that the efficiency gains from a sample of bank mergers between 1985 and 1991 were "statistically indistinguishable from zero"); *see also* Allen N. Berger, Rebecca S. Demsetz & Philip E. Strahan, *The Consolidation of the Financial Services Industry: Causes, Consequences, and Implications for the Future*, 23 J. BANKING & FIN. 135, 162 (1999) ("The studies of US banking generally show very little or no cost X-efficiency improvement on average from . . . M&As."); Stephen A. Rhoades, *Efficiency Effects of Horizontal (In-Market) Bank Mergers*, 17 J. BANKING & FIN. 411, 419–22 (1993) (concluding that bank mergers in the 1980s generally did not result in efficiency gains).

226. *See* Devos et al., *supra* note 25, at 1029.

227. *See* Hulusi Inanoglu, Michael Jacobs, Jr., Junrong Liu & Robin Sickles, *Analyzing Bank Efficiency: Are "Too-Big-to-Fail" Banks Efficient?*, *in* THE HANDBOOK OF POST CRISIS FINANCIAL MODELING 110, 113 (Emmanuel Haven, Philip Molyneux, John O.S. Wilson, Sergei Fedotov & Meryem Duygun eds., 2016) (finding negative returns to scale among the fifty largest U.S. commercial banks); Richard Davies & Belinda Tracey, *Too Big To Be Efficient? The Impact of Implicit Subsidies on Estimates of Scale Economies for Banks*, 46 J. MONEY, CREDIT & BANKING 219, 243–44 (2014) (finding no evidence of economies of scale in BHCs with more than $50 billion in assets after controlling for implicit government subsidies); Guohua Feng & Xiaohui

suggests megamergers may result in cost *inefficiencies*.[228] Indeed, any potential cost savings arising from branch consolidation or overhead reduction may be "offset by managerial difficulties in monitoring the larger organizations, conflicts in corporate culture, or problems in integrating systems."[229] To be sure, mergers among very small community banks may enhance economic efficiencies.[230] However, even in cases where banks have reported efficiency gains following a merger, economists generally agree that "[m]ost significant cost savings could be accomplished without [a] merger."[231] Nonetheless, empire-building bank executives may continue to pursue mergers to enhance market share and increase their own compensation.[232]

Zhang, *Returns to Scale at Large Banks in the US: A Random Coefficient Stochastic Frontier Approach*, 39 J. BANKING & FIN. 135, 144 (2014) (concluding that 90 percent of U.S. commercial banks with more than $1 billion in assets do not experience economies of scale).

228. *See* Allen N. Berger & David B. Humphrey, *Megamergers in Banking and the Use of Cost Efficiency as an Antitrust Defense*, 37 ANTITRUST BULL. 589, 598 (1992) (concluding that a sample of bank mergers in the 1980s resulted in cost inefficiencies); *see also* Telis Demos, *So Your Bank Is Buying Another: Don't Panic*, WALL ST. J. (Oct. 6, 2021, 7:30 AM), https://www.wsj.com/articles/so-your-bank-is-buying-another-dont-panic-11633519800 [https://perma.cc/8U85-7B9C] ("A recent McKinsey & Co. study found that among 58 midcap bank mergers from 2010 to 2021, only 17 merged institutions' returns outperformed peers over the two years postdeal.").

229. Berger et al., *supra* note 225, at 162; *see also* Filippo Curti, W. Scott Frame & Atanas Mihov, *Are the Largest Banking Organizations Operationally More Risky?*, 54 J. MONEY, CREDIT & BANKING 1223, 1225 (2022) ("Assets from recent M&A are especially important for operational losses, highlighting elevated operational risks from M&A activity.").

230. *See* John H. Boyd & Stanley L. Graham, *Consolidation in U.S. Banking: Implications for Efficiency and Risk*, *in* BANK MERGERS AND ACQUISITIONS 113, 125–33 (Yakov Amihud & Geoffrey Miller eds., 1998) (documenting that mergers resulting in banks with less than $400 million in assets produced efficiency gains); Adel A. Al-Sharkas, M. Kabir Hassan & Shari Lawrence, *The Impact of Mergers and Acquisitions on the Efficiency of the US Banking Industry: Further Evidence*, 35 J. BUS. FIN. & ACCT. 50, 62–64 (2008) (documenting that mergers involving small banks result in larger cost efficiency improvements compared to mergers involving larger banks).

231. Stephen A. Rhoades, *The Efficiency Effects of Bank Mergers: An Overview of Case Studies of Nine Mergers*, 22 J. BANKING & FIN. 273, 277 (1998).

232. *See, e.g.*, Zhian Chen, Wing-Yee Hung, Donghui Li & Lu Xing, *The Impact of Bank Merger Growth on CEO Compensation*, 44 J. BUS. FIN. & ACCT. 1398, 1400 (2017) (finding that merger-related growth increases bank CEO compensation by fourteen times more than an equivalent amount of non-merger-related internal growth); *see also* Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1013–15 (1992) (discussing bank executives' empire-building motives for mergers).

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In sum, despite its promises, the Chicago School approach has neither reduced prices nor increased efficiency in the banking sector. To the contrary, the prevailing antitrust framework has enabled merging banks to acquire and exploit market power. In turn, it has increased prices and reduced the availability of basic financial services, with the worst effects in LMI and minority areas. Paradoxically, therefore, the Chicago School's consumer welfare standard has hurt the very people it purports to protect.

B. *The Chicago School's Approach Ignores Nonprice Competitive Harms*

By inappropriately limiting antitrust's scope, the Chicago School's consumer welfare standard has failed in a second way: it has ignored numerous *nonprice* harms from bank consolidation. Banks compete with one another not only on pricing but also on many other dimensions.[233] As the Supreme Court asserted in *Philadelphia National Bank*, "Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous special and extra services . . . ."[234] Excessive consolidation in the banking sector therefore could impair competition in many ways besides simply increasing prices for financial services.

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233. *See* Hsiu-Kwang Wu & Lawrence Connell, Jr., *Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers*, 59 VA. L. REV. 860, 875 n.78 (1973) ("Competition between banks is often non-price in nature. . . . [F]or example, the speed of approval of a loan may be more important to the borrower than a slight difference in the interest rate."); John T. Scott, *Nonprice Competition in Banking Markets*, 44 S. ECON. J. 594, 596 (1978) ("Nonprice competition takes many forms in banking."); Carl Felsenfeld, Douglas Broder, Bert Foer & Anne Gron, *Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 516 (2008) (statement of Bert Foer, President, Am. Antitrust Inst.) ("[N]on-price competition . . . focuses on location, customer service, alternative delivery channels, the set of products being offered, brand recognition, and relationship competition."); *see also* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Remarks for the Antitrust New Frontiers Conference: ". . .And Justice for All": Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers [https://perma/cc/X6C9-XGYF] ("[C]ompetition has price and non-price dimensions. Price effects alone do not provide a complete picture of market dynamics . . . .").

234. United States v. Phila. Nat'l Bank, 374 U.S. 321, 368 (1963).

Under the Chicago School's narrow consumer welfare standard, however, bank antitrust enforcers have overlooked a litany of nonprice competitive harms.[235] Bank consolidation (1) diminishes product quality by accelerating branch closures, eroding customer service, and weakening consumer privacy; (2) exacerbates "too-big-to-fail" subsidies that distort competition and deter new entrants; and (3) threatens the macroeconomy by impairing monetary policy transmission and intensifying systemic risks. Despite the prevalence of these harmful consequences, however, the Chicago School approach to bank antitrust—with its narrow focus on prices and efficiency—unwisely ignores them all.

1. *Diminished Product Quality*. As Assistant Attorney General Makan Delrahim acknowledged in 2019, "[D]iminished quality is . . . a type of harm to competition."[236] To date, however, antitrust enforcers have disregarded impairments in product quality when evaluating bank mergers. In particular, the DOJ and the banking agencies have overlooked the ways in which bank consolidation limits branch access, decreases customer service, and threatens consumer privacy.

a. Branches. Access to local branches is a critical aspect of product quality in banking. Consumers benefit from the convenience of in-person service and familiarity with their bankers.[237] Indeed, the overwhelming majority of consumers still use brick-and-mortar

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235. In other industries, antitrust enforcement has taken into account nonprice harms within a broader conception of the consumer welfare standard. *See, e.g.*, Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1347–48 (2020) (discussing courts' recognition of nonprice harms in nonbank antitrust cases). In fact, the 2010 Guidelines for nonbank mergers expressly recognize nonprice effects, such as potential reductions in innovation and product quality, as competitive harms. HORIZONTAL MERGER GUIDELINES, *supra* note 130, at 23–24. Neither the Bank Merger Guidelines nor the DOJ's and Federal Reserve's frequently asked questions on the competitive effects of bank mergers contemplate nonprice harms. *See* BANK MERGER GUIDELINES, *supra* note 133 (focusing on increases in HHI as the primary indicator of competitive harm); *Bank Merger FAQs*, *supra* note 142. Further, the bank antitrust enforcers do not appear to consider nonprice harms in practice. *See infra* Part II.B.1–3 (discussing omission of nonprice harms from bank antitrust analysis).

236. Delrahim, *supra* note 233.

237. For many consumers, convenience is so critical that they choose to bank with institutions with nearby branches, even if those institutions offer less favorable product terms. *See* Mary Wisniewski, *Survey: While Checking Fees Vary Wildly by Race and Age, Americans Stay Loyal to Their Banks*, BANKRATE (Jan. 15, 2020), https://www.bankrate.com/banking/best-banks-consumer-survey-2020 [https://perma.cc/QA2Q-44PB].

branches despite the proliferation of online banking.[238] As Federal Reserve researchers concluded in 2018, "[B]oth depositors and small businesses continue to value local bank branches."[239] Branch closures, therefore, hurt customers who rely on proximity to bank offices.

The post–Chicago School resurgence of bank consolidation has triggered merger-related branch closures throughout the country. As merging banks consolidate operations and cut overhead costs, they typically shutter branches in neighboring locations.[240] In fact, Professor Hoai-Luu Nguyen found a 27 percent increase in the likelihood of a branch closure when merging banks operate in the same census tract.[241] In one notable example, BB&T and SunTrust Bank announced plans to close 800 of their 2887 branches, or nearly 28 percent of their offices, when the banks merged in 2019.[242] Troublingly, branch closures following bank mergers are typically concentrated in LMI areas, further disadvantaging vulnerable populations.[243]

Merger-related branch closures not only inconvenience consumers, they also deprive communities of financial services. Several studies have documented that a loan applicant's geographic proximity to a bank branch is a key determinant in whether the borrower obtains

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238. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2016, at 9 (2016) (noting that 84 percent of survey respondents use bank branches), https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf [https://perma.cc/8XTM-HXMW]. For further discussion of the extent to which consumers rely on local branches, see *infra* Part III.A.1.

239. Elliot Anenberg, Andrew C. Chang, Serafin Grundl, Kevin B. Moore & Richard Windle, *The Branch Puzzle: Why Are There Still Bank Branches?*, FEDS NOTES (Aug. 20, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/why-are-there-still-bank-branches-20180820.htm [https://perma.cc/V5Y9-DAMY]. As Professor Arthur Wilmarth has noted, bank branches often serve as hubs of civic life in smaller cities and rural communities. *See* Arthur E. Wilmarth, Jr., *A Two-Tiered System of Regulation Is Needed To Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 290, 297 (discussing the role of community banks in supporting local economies and civic groups).

240. *See* DePillis, *supra* note 27.

241. Nguyen, *supra* note 27, at 15–17 (analyzing mergers between 1999 and 2012); *see also* Gam & Zhang, *supra* note 205, at 19–20, 51 (evaluating bank mergers between 1999 and 2014 and concluding that merging banks closed significantly more branches than competing banks).

242. Lauren Seay & Ali Shayan Sikander, *Majority of BB&T, SunTrust Branch Closures Still To Come*, S&P GLOBAL MKT. INTEL. (Oct. 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261 [https://perma.cc/T9P4-5PMC]. Of the closed branches, more than half did not have an active BB&T or SunTrust branch within two miles. *See id.*

243. *See* GARY A. DYMSKI, THE BANK MERGER WAVE: THE SOCIAL AND ECONOMIC CONSEQUENCES OF FINANCIAL CONSOLIDATION 95 (1999).

credit.[244] For example, Professor Erik Mayer analyzed millions of residential mortgage applications from 2010 through 2015 and concluded that "as the distance from the . . . property to the lender's nearest branch increases, the mortgage approval rate decreases, especially when the borrower has a low income."[245] Similarly, Professors Sumit Agarwal and Robert Hauswald surveyed commercial loan applications and concluded that the farther a business is located from the bank's branch office, the less likely the bank is to offer credit.[246] Geographic proximity to a local branch is thus a critical factor in a borrower's ability to obtain credit.

Under the Chicago School's narrow consumer welfare standard, however, antitrust enforcers have failed to consider reductions in branch access as part of their bank merger evaluations. In response to public commenters' concerns over merger-related branch closures, the Federal Reserve frequently asserts that "federal banking law provides a specific mechanism for addressing branch closings."[247] That mechanism, however, simply requires a bank to provide ninety days' notice prior to an upcoming closure.[248] The law expressly prohibits the relevant agency from blocking a proposed branch closure by an interstate bank.[249] By failing to address local branch access as part of the bank merger review framework, therefore, the DOJ and the banking agencies effectively allow a crucial aspect of product quality to escape regulatory review.

b. Customer Service. The current antitrust framework also ignores deterioration in customer service following bank mergers. When a bank obtains market power through consolidation, it may not maintain the same quality of customer service that it previously provided in a

244. *See* Sumit Agarwal & Robert Hauswald, *Distance and Private Information in Lending*, 23 REV. FIN. STUD. 2757, 2768–72 (2010); Mayer, *supra* note 205, at 4.

245. Mayer, *supra* note 205, at 3.

246. Agarwal & Hauswald, *supra* note 244, at 2768–72; *see also* Yichen Xu, The Importance of Brick-and-Mortar Bank Offices: Evidence from Small Business and Home Mortgage Lending, 1998-2016, at 4 (2018) (Ph.D. dissertation, University of Delaware), https://udspace.udel.edu/handle/19716/23925#files-area [https://perma.cc/6N79-Q25H] (concluding that merger-induced branch closures reduce small business lending by 22 percent even in areas with alternative local branches).

247. *See, e.g.*, BB&T Corp., *supra* note 184, at 28.

248. *See* 12 U.S.C. § 1831r-1.

249. *See id.* § 1831r-1(d)(3).

more competitive environment.[250] In fact, several studies have documented that banks cut back on customer service after a merger. For example, one analysis of small business survey data concluded that bank mergers "had an adverse effect on an index of service delivery that included a rating of the accessibility of the account manager, services offered, capability of staff, continuity of account manager, and lending criteria."[251] Another study by Federal Reserve economists found that greater concentration reduced the probability that a bank would offer a particular service, such as extended banking hours, automated teller machines, and safety deposit boxes.[252] These analyses undermine banks' frequent claims that consolidation expands their product offerings and enhances customer service.[253] To date, however, antitrust enforcers have failed to consider how bank consolidation might impair customers' banking experiences.

c. Consumer Privacy. Finally, the existing bank merger framework ignores harms to consumer privacy. As the DOJ has noted, "[P]rivacy can be an important dimension of quality."[254] The prevailing bank merger standards, however, overlook the ways in which financial institutions exploit consumers—and gain competitive advantages—by harvesting and monetizing customer data. Mergers allow banks to collect and combine more customer data in new ways, making it easier for them to price discriminate and take advantage of customers' biases.[255] In addition, some banks sell transaction-level data to retailers, which target specific promotions to consumers based on their unique

250. *Cf.* Felsenfeld et al., *supra* note 233, at 516 (statement of Bert Foer, President, Am. Antitrust Inst.) (observing that banks compete with one another via the quality of their customer service).

251. Scott & Dunkelberg, *supra* note 216, at 1000.

252. *See* Arnold A. Heggestad & John J. Mingo, *Prices, Nonprices, and Concentration in Commercial Banking*, 8 J. MONEY, CREDIT & BANKING 107, 111 (1976).

253. *See, e.g.*, BB&T Corp., *supra* note 184, at 29 ("BB&T represents that the combined organization would be better able to leverage increased scale . . . for the benefit of its customers. In addition, BB&T represents that existing customers . . . would have access to . . . a broader offering of products and services.").

254. Delrahim, *supra* note 233.

255. *Cf.* Frederic Boissay, Torsten Ehlers, Leonardo Gambacorta & Hyun Song Shin, *Big Techs in Finance: On the New Nexus Between Data Privacy and Competition* 10–13 (Bank for Int'l Settlements, Working Paper No. 970, 2021) (discussing anticompetitive uses of customer data in finance).

purchasing habits.[256] Consolidation of customer data not only undermines consumers' privacy, it may also expose them to increased risks that their personal information could be compromised via data breaches.[257] Despite threats to consumer privacy, though, the current bank merger framework neglects this important dimension of product quality.[258]

2. *Too-Big-To-Fail Subsidy*. In addition to diminishing product quality, bank consolidation exacerbates the "too-big-to-fail" subsidy that gives large banks an unfair competitive advantage over smaller firms. Market participants generally expect that if a large U.S. bank were to experience economic distress, the government would bail out the bank rather than let it collapse.[259] As a result, big banks have traditionally been able to borrow at favorable rates relative to smaller competitors.[260] By one estimate, this implicit subsidy reached more than six hundred basis points in the lead-up to the 2008 financial crisis.[261] While the size of the "too-big-to-fail" subsidy has shrunk since the crisis, it still persists.[262] When larger banks merge, they obtain the benefit of this funding advantage.[263] The expansion of the "too-big-to-fail" subsidy via bank consolidation distorts the competitive dynamics

256. *See* Anick Jesdanun, *For Banks, Data on Your Spending Habits Could Be a Gold Mine*, L.A. TIMES (Dec. 3, 2019, 5:00 AM), https://www.latimes.com/business/story/2019-12-03/banks-mining-data-on-your-spending-habits [https://perma.cc/LG5D-TUFW]; Blake Ellis, *The Banks' Billion-Dollar Idea*, CNN: MONEY (July 8, 2011, 5:15 PM), https://money.cnn.com/2011/07/06/pf/banks_sell_shopping_data/index.htm [https://perma.cc/K3FL-W2WK].

257. *Cf.* Curti et al., *supra* note 229, at 1225, 1228 (concluding that bank size is positively correlated with operational risk events, including technological systems failures).

258. Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 61 (2019) ("[B]ecause antitrust's framework typically uses consumer prices to measure welfare . . . privacy injuries have largely avoided antitrust scrutiny.").

259. *See* Saule T. Omarova, *The "Too Big To Fail" Problem*, 103 MINN. L. REV. 2495, 2500 (2019).

260. *See* Balasubramnian & Cyree, *supra* note 28; Acharya et al., *supra* note 28.

261. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-621, LARGE BANK HOLDING COMPANIES: EXPECTATIONS OF GOVERNMENT SUPPORT 51 (2014).

262. Following the 2008 crisis and ensuing regulatory reforms, typical estimates of the "too-big-to-fail" subsidy have ranged from roughly twenty-two to one hundred basis points. *See* Nicola Cetorelli & James Traina, *Resolving "Too Big to Fail"* 1–2, 1 n.3 (Fed. Rsrv. Bank of N.Y., Staff Rep. No. 859, 2018), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr859.pdf [https://perma.cc/87TF-39S7] (summarizing various estimates).

263. A study by Federal Reserve Bank of Philadelphia economists found that banks paid an extra premium for mergers that would qualify them for "too-big-to-fail" status. *See* Elijah Brewer III & Julapa Jagtiani, *How Much Did Banks Pay To Become Too-Big-To-Fail and To Become Systemically Important?*, 43 J. FIN. SERVS. RSCH. 1, 4 (2013).

of the financial sector. Indeed, smaller banks cite the "too-big-to-fail" subsidy as an impediment to fair competition.[264] In addition, megabanks' artificial funding advantages likely deter new banks from forming.[265] Because of their circumscribed framework, however, antitrust enforcers do not take into account how bank consolidation impairs competition by perpetuating the "too-big-to-fail" subsidy.

3. *Macroeconomic Threats*. Finally, the Chicago School's narrow consumer welfare approach overlooks the ways in which bank consolidation threatens the macroeconomy. A strong economy promotes competition by encouraging new startups, fostering foreign investment, and boosting consumer demand.[266] Bank consolidation, however, imperils the macroeconomy—and thereby lessens competition—by impeding monetary policy transmission and intensifying systemic risks, as this Section explains.

a. Impaired Monetary Policy Transmission. In order to achieve sustainable economic growth, the Federal Reserve sets monetary policy to stimulate economic activity during downturns and prevent overheating during expansions.[267] The Federal Reserve, however, does not control the money supply directly; instead, it relies on private banks to transmit its desired monetary conditions to the broader economy.[268] For example, when the economy contracts, the Federal Reserve may reduce the interest rate that it pays on banks' reserve balances, thereby

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264. *See* INDEPENDENT CMTY. BANKERS OF AM., TOO-BIG-TO-FAIL SUBSIDIES THREATEN ECONOMY, COMMUNITY BANKS, AND TAXPAYERS 1–2 (2014), https://www.icba.org/docs/default-source/icba/advocacy-documents/testimony/113th-congress/test073114.pdf?sfvrsn=2 [https://perma.cc/XB5H-DXD2].

265. *Cf.* Zaring, *supra* note 37, at 1441–46 (documenting a decline in de novo bank charters following the 2008 financial crisis).

266. *See generally* LIDA R. WEINSTOCK, CONG. RSCH. SERV., IF11020, INTRODUCTION TO U.S. ECONOMY: BUSINESS INVESTMENT (2021), https://crsreports.congress.gov/product/pdf/IF/IF11020 [https://perma.cc/2TWA-T4UA] (analyzing how a strong macroeconomy promotes business investment).

267. *See Monetary Policy: What Are Its Goals? How Does It Work?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy/monetary-policy-what-are-its-goals-how-does-it-work.htm [https://perma.cc/V9MC-DJGZ].

268. The Federal Reserve attempts to influence banks' behavior by adjusting the interest rate it pays on banks' reserve balances and by purchasing and selling securities in the open market. *See id.*

decreasing market interest rates, encouraging consumers and businesses to borrow, and stimulating economic activity.[269]

Escalating concentration in the banking sector, however, disrupts the transmission of monetary policy. In uncompetitive markets, banks do not reliably alter their behavior in response to Federal Reserve policy changes and, as a result, monetary policy does not have its desired effect.[270] For example, when the Federal Reserve loosens monetary policy to encourage economic activity, lenders in concentrated areas exploit their market power by maintaining high interest rates instead of passing on cheaper rates to borrowers.[271] Thus, banks capture bigger profits but, in the process, they thwart the Federal Reserve's goal of spurring borrowing and economic activity. In one estimate, Professors David Scharfstein and Adi Sunderam calculate that a one-standard-deviation increase in county-level lender concentration reduces total monetary policy transmission by almost 30 percent.[272] By blunting the effect of monetary policy, therefore, bank concentration weakens the United States' resilience to macroeconomic shocks like the 2008 financial crisis and the COVID-19 pandemic. To date, however, bank antitrust enforcers have not considered how escalating financial sector concentration undermines competition by disrupting monetary policy transmission.

b. Increased Systemic Risks. In addition to impeding monetary policy, bank consolidation also threatens competition by intensifying risks to

269. *See id.*

270. *See, e.g.*, Nimrod Segev & Matthew Schaffer, *Monetary Policy, Bank Competition, and Regional Credit Cycles: Evidence from a Quasi-Natural Experiment*, 64 J. CORP. FIN., no. 101494, 2020, at 3; Yifei Wang, Toni M. Whited, Yufeng Wu & Kairong Xiao, *Bank Market Power and Monetary Policy Transmission: Evidence from a Structural Estimation*, 77 J. FIN. 2093, 2113–22 (2022); Dean Corbae & Ross Levine, Competition, Stability, and Efficiency in Financial Markets 27–28 (Sept. 14, 2018) (unpublished manuscript), https://faculty.haas.berkeley.edu/ross_levine/Papers/JH091418.pdf [https://perma.cc/BY5U-E6V5]; Adonis Antoniades, *Monetary Easing and the Lending Concentration Channel of Monetary Policy Transmission*, 133 J. BANKING & FIN. 1, 11–15 (2021); *see also* Youngju Kim, Hyunjoon Lim & Wook Sohn, *Bank Competition and Transmission of Monetary Policy*, 28 APPLIED ECON. LETTERS 421, 421 (2020) ("GDP and credit respond less strongly to monetary policy shocks in economies where the bank market is more concentrated.").

271. *See generally* Scharfstein & Sunderam, *supra* note 29. When the Federal Reserve tightens monetary policy to prevent overheating, a similar effect occurs: banks in concentrated areas exploit their market power by maintaining their deposit rates instead of passing on higher interest rates to depositors. *See* Dinger, *supra* note 23.

272. Scharfstein & Sunderam, *supra* note 29, at 2.

financial stability. In the lead-up to the 2008 financial crisis, antitrust enforcers authorized a series of megamergers that created "too big to fail" conglomerates.[273] When some of these firms collapsed, they inflicted severe economic damage that diminished competition throughout the economy.[274] Indeed, the ensuing financial crisis wiped out nearly one in four insured depository institutions, substantially reducing competition in the banking sector.[275] The crisis also triggered a torrent of corporate bankruptcies, eliminating competitors in numerous industries.[276] This economic meltdown was a predictable consequence of excessive consolidation in the banking sector. In fact, numerous empirical studies have demonstrated that large bank mergers increase financial instability.[277] Although the Dodd-Frank Act directed the banking agencies to consider financial stability in

273. *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, 359–62 (2015) (discussing mergers by Wells Fargo, JPMorgan, Bank of America, and Citigroup).

274. *See* CORNERSTONE RSCH., TRENDS IN LARGE CORPORATE BANKRUPTCY AND FINANCIAL DISTRESS: MIDYEAR 2021 UPDATE 2 (2021), https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-Midyear-2021-Update [https://perma.cc/8ESM-BVGU] (documenting a spike in business bankruptcy filings after the 2008 financial crisis).

275. *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008-2013, at 119 tbl.4.1 (2017) (reporting that the number of insured depository institutions in the United States declined from 8534 in 2007 to 6509 in 2014). Policymakers further exacerbated financial sector concentration by encouraging the largest surviving financial institutions to acquire failing firms, including JPMorgan's takeover of Bear Stearns and Washington Mutual, Bank of America's acquisition of Merrill Lynch, and Wells Fargo's merger with Wachovia. *See* PATRICIA A. MCCOY & KATHLEEN C. ENGEL, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 178, 180 (2011).

276. *See supra* note 274, at 2.

277. *See, e.g.*, Weiss et al., *supra* note 29, at 179 (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors); *see also* Simone Varotto & Lei Zhao, *Systemic Risk and Bank Size*, 82 J. INT'L MONEY & FIN. 45, 53–54 (2018) (concluding that a bank's size, while not determinative, is the primary driver of its systemic riskiness); Amy G. Lorenc & Jeffery Y. Zhang, *How Bank Size Relates to the Impact of Bank Stress on the Real Economy*, 62 J. CORP. FIN., no. 101592, 2020, at 14 (concluding that financial stress at large banks has a significantly stronger, negative impact on the real economy compared to smaller banks); Luc Laeven, Lev Ratnovski & Hui Tong, *Bank Size and Systemic Risk* 14–18 (Int'l Monetary Fund, Staff Discussion Note No. 14/04, 2014), https://www.imf.org/external/pubs/ft/sdn/2014/sdn1404.pdf [https://perma.cc/9T7T-VNHW] (documenting that systemic-risk contribution increases with a bank's size and is significantly higher for banks with more than $50 billion in assets); Nils Moch, *The Contribution of Large Banking Institutions to Systemic Risk: What Do We Know? A Literature Review*, 69 REV. ECON. 231, 231 (2018) (reviewing studies and concluding that "bank size is a key predictor for systemic risk and . . . the largest banks disproportionately contribute to overall risk").

connection with merger applications, the agencies' assessments to date have been rudimentary.[278] The DOJ's bank merger framework, meanwhile, ignores financial instability despite the threat that financial crises pose to competition.

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In sum, the Chicago School's narrow consumer welfare approach to bank antitrust has overlooked—and thereby perpetuated—numerous nonprice harms from bank consolidation. Diminished product quality, the "too-big-to-fail" subsidy, and macroeconomic fragility all impair competition in the financial sector and throughout the U.S. economy. Because of the Chicago School's limited focus on prices and efficiency, however, the current bank merger framework is blind to these harms.

III. DEBUNKING ANTITRUST MYTHS

Despite the prevailing merger framework's well-documented weaknesses, proponents of bank consolidation nonetheless resist stricter antitrust enforcement. In fact, some commentators have even urged the banking agencies and DOJ to further dilute already-inadequate bank merger standards.[279] Advocates for looser bank antitrust enforcement typically advance two arguments. First, they insist that online banks and emerging financial technology, or "fintech," companies enhance competition for financial services. Second, they contend that increasing competition in the banking sector could undermine financial stability. As this Part demonstrates, however, neither of these rationales for weaker antitrust enforcement withstands scrutiny.

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278. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 468–71 (discussing deficiencies in the agencies' financial stability analyses).

279. *See, e.g.*, Letter from Gregg Rozansky, Senior Vice President, Bank Pol'y Inst., to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. 2, 11 (Oct. 15, 2020) [hereinafter BPI Comment Letter], https://www.justice.gov/atr/page/file/1330306/download [https://perma.cc/3EXJ-KLLZ] (urging the DOJ to increase the 1800/Δ200 HHI threshold for bank mergers to 2500/Δ200); Comments of Wachtell, Lipton, Rosen & Katz to U.S. Dep't of Just., Antitrust Div. 9 (Oct. 15, 2020) [hereinafter Wachtell Comment Letter], https://www.justice.gov/atr/page/file/1330316/download [https://perma.cc/9S8Q-JAJT] (urging the DOJ to increase the 1800/Δ200 HHI threshold for bank mergers to 2200/Δ250 or 2500/Δ250).

A. *Fintech Will Not Save Us*

Since the adoption of the Bank Merger Guidelines in 1995, online-only financial companies have emerged as challengers to traditional banks. Today, digital banks, like Ally and Goldman Sachs's Marcus, accept deposits nationwide without operating a single local branch.[280] Meanwhile, fintech lenders, such as Rocket Mortgage, Affirm, and Kabbage, underwrite mortgages, small business loans, and personal loans nearly instantaneously through simple smartphone-based apps.[281]

The growth of these new financial companies has, in turn, inspired efforts to relax the bank antitrust framework. When traditional banks merge, antitrust enforcers have typically excluded online banks and fintech companies from the competitive analysis because such firms either are not licensed as depository institutions or do not operate local branches.[282] Traditional antitrust review may therefore underestimate the true level of competition in a banking market and result in overly stringent enforcement.[283] The DOJ cited the emergence of nontraditional financial service providers as its primary justification for requesting public comment on potential revisions to the Bank Merger Guidelines in 2020.[284] In response, bank trade groups and law firms urged antitrust enforcers to relax the guidelines' HHI thresholds to reflect this new form of competition.[285]

To be sure, innovative financial technologies have changed the competitive dynamics of the banking sector.[286] Digital financial service providers purport to offer greater convenience, quicker loan approvals,

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280. *See* Kevin Wack, *Branchless Banks Defy the Naysayers*, AM. BANKER (Jan. 22, 2020, 9:30 PM), https://www.americanbanker.com/news/branchless-banks-defy-the-naysayers [https://perma.cc/75EF-SWG3].

281. *See generally* Erin Griffith, *The Start-Up Enemies of Wall Street Are Booming*, N.Y. TIMES (Mar. 29, 2021), https://www.nytimes.com/2021/03/29/technology/fintech-startups-wall-street.html [https://perma.cc/3DHL-FRWR] (discussing fintech companies' attempts to "upend the financial establishment"); *see also* Christopher K. Odinet, *Consumer BitCredit and Fintech Lending*, 69 ALA. L. REV. 781, 798–99, 828 n.347 (2018) (listing major fintech lenders).

282. *See* Wachtell Comment Letter, *supra* note 279, at 18–20.

283. *See* Mark Botti, Nicholas Hill, Sheridan Rogers & Mathis Wagner, *Updating Retail Bank Merger Review for the Internet Age*, 34 ANTITRUST 44, 46 (2020).

284. *See* Press Release, Dep't of Just., Antitrust Division Seeks Public Comment, *supra* note 189.

285. *See* BPI Comment Letter, *supra* note 279, at 7–11; Wachtell Comment Letter, *supra* note 279, at 18–20.

286. *See* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234 (2018) (asserting that "fintech alters the competition policy analysis").

and more innovative underwriting standards compared to brick-and-mortar banks.[287] By one estimate, fintech companies now command more than one-third of the personal loan market, surpassing traditional banks.[288] In addition, online-only banks controlled 10 percent of the deposits in the United States as of 2019.[289] Since then, the COVID-19 pandemic has further accelerated the expansion of digital financial service providers.[290]

Despite the growth of fintech and online banks, however, policymakers should remain skeptical about the extent to which these new technologies neutralize the anticompetitive effects of bank consolidation. This Section contends that the emergence of digital financial service providers does not justify lax bank antitrust enforcement because consumers and businesses still strongly prefer to patronize a local bank. Further, financial technology does not penetrate many LMI and minority communities, where the adverse effects of bank consolidation are felt most acutely. Notwithstanding developments in fintech and online banking, therefore, strengthening bank antitrust enforcement remains essential to promoting competition in financial services.

1. *Fintech Is Not a Substitute for Traditional Banks*. Fintech is unlikely to combat the anticompetitive effects of bank consolidation because digital financial services do not substitute for locally rooted banks. Consumers and small businesses have long had the option to obtain financial services from distant depository institutions and other nonlocal providers.[291] However, when the Supreme Court implemented the judicial framework governing bank mergers in the 1960s, it defined the relevant competitive market as local in scope because "[i]ndividuals and corporations typically confer the bulk of

287. *See* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1753–58 (2021).

288. *See* Andy Peters, *Banks Fall Further Behind Fintechs in Personal Lending*, AM. BANKER (Feb. 21, 2019), https://www.americanbanker.com/news/banks-fall-further-behind-fintechs-in-personal-lending [https://perma.cc/EN8C-DCXG].

289. *Online Banks To Take Bigger Share of U.S. Deposit Market*, REUTERS (Sept. 23, 2019), https://www.reuters.com/article/us-onlinesavings-evercore/online-banks-to-take-bigger-share-of-u-s-deposit-market-evercore-idUSKBN1W81F5 [https://perma.cc/VG3S-BX5Z].

290. *See* Julie Andersen Hill, *Covid-19, Banks, and Fintechs*, 74 Q. REP. 346, 350 (2021).

291. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 360 (1963) (acknowledging that some borrowers and depositors "may find it practical to do a large part of their banking business outside their home community").

their patronage on banks in their local community."[292] Sixty years later, customers' preference for nearby banks remains strong, even with the advent of digital financial services.[293] Because borrowers and depositors still favor local banks, fintech is unlikely to eliminate competitive harms when banks disappear through consolidation.

Despite the emergence of fintech, consumers and businesses still prefer to bank locally. Indeed, customers consistently rate "convenience of location" as their top reason for choosing a financial institution.[294] Thus, most customers still maintain checking or savings accounts at a nearby bank, even though fintech companies generally offer higher interest rates to savers than traditional depository institutions.[295] Even customers who do some of their banking online continue to patronize a nearby bank branch.[296] For instance, in the Federal Reserve's 2019 Survey of Consumer Finances, families who used online banking were only six percentage points less likely to report visiting a local bank branch in the preceding year compared to families that did not use online banking.[297] The proportion of consumers who regularly patronize a local branch has actually increased as fintech and online banking have expanded over the past

292. *Id.* at 358.

293. *See* Anenberg et al., *supra* note 239 ("[D]epositors and small businesses still rely on bank branches . . . .").

294. *See Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (2019), https://www.federalreserve.gov/econres/scfindex.htm [https://perma.cc/X7WQ-PQUA] (download the "Estimates in nominal dollars" Excel file based on internal data under "Historic Tables" and select the "Checking Box" spreadsheet).

295. *See* David Herpers, *Why Digital Banks Offer Higher Interest Rates on Savings Accounts*, FORBES (June 4, 2021), https://www.forbes.com/sites/forbesfinancecouncil/2021/06/04/why-digital-banks-offer-higher-interest-rates-on-savings-accounts/?sh=2cf43d086ccc [https://perma.cc/Z24J-VJYM].

296. *See* Anenberg et al., *supra* note 239.

297. Neil Bhutta, Jesse Bricker, Andrew C. Chang, Lisa J. Dettling, Sarena Goodman, Joanne W. Hsu, Kevin B. Moore, Sarah Reber, Alice Henriques Volz, Richard A. Windle, Kathy Bi, Jacqueline Blair, Julia Hewitt & Dalton Ruh, *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RSRV. BULL. 1, 17 tbl. B (2020) (reporting that 79 percent of families that used online banking had visited a local bank branch in the preceding twelve months, compared to 85 percent of families that did not use online banking). Almost all households that patronize a local bank branch do so to access services other than just using the ATM. *See* Anenberg et al., *supra* note 239.

decade.[298] Thus, as the Federal Reserve concluded, "[o]nline banking appears to be an imperfect substitute for . . . visiting a local branch."[299]

Because of customers' preference for traditional, local banks, fintech does not negate the harmful effects of bank consolidation. When a bank merges with a competitor, its customers generally do not switch to a fintech company; rather, customers continue to patronize the bank despite its newfound market power.[300] Consider a study by Professor Jack Liebersohn that analyzed the competitive consequences of bank mergers between 1994 and 2017.[301] Liebersohn found "little evidence that new entry by non-bank lenders ameliorates the anticompetitive effects of bank mergers."[302] Fintech is especially unlikely to offset the decline in small business lending when community banks merge.[303] These conclusions are consistent with the well-documented evidence that bank consolidation increases the cost and reduces the availability of financial services, despite the presence of alternative financial service providers.[304]

Customers' strong preference for traditional, local banks is unlikely to diminish despite the COVID-19 pandemic and looming demographic changes. Although the pandemic increased usage of online and mobile banking, it also led to more in-person visits to local

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298. *Compare* FED. DEPOSIT INS. CORP., HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES 23 (2019) (reporting that 83 percent of banked households visited a branch at least once in the previous year), *with* FED. DEPOSIT INS. CORP., 2013 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 10 (2014) (reporting that 79 percent of banked households visited a branch at least once in the previous year).

299. Bhutta et al., *supra* note 297. While certain fintechs purport to offer better customer experiences than traditional banks, Professor Chris Odinet has shown that consumers lodge similar complaints against fintech companies as they do against banks. *See* Odinet, *supra* note 281, at 829–42.

300. *Cf.* Isil Erel & Jack Liebersohn, *Does Fintech Substitute for Banks? Evidence from the Paycheck Protection Program* 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27659, 2020), https://www.nber.org/papers/w27659 [https://perma.cc/8MKK-7LYC] (concluding that "the degree of substitution between FinTechs and traditional banks is economically small").

301. Jack Liebersohn, How Effective Is Antitrust Intervention? Evidence from Bank Mergers 16 (June 4, 2021) (unpublished manuscript), https://www.dropbox.com/s/plvsp4eqz2lmphn/liebersohn_banks_submissionaer.pdf?dl=0 [https://perma.cc/YC2K-RT7T].

302. *Id.* at 6.

303. *See* Tetyana Balyuk, Allen N. Berger & John Hackney, What Is Fueling FinTech Lending? The Role of Banking Market Structure 30 (June 2020) (unpublished manuscript), https://ssrn.com/abstract=3633907 [https://perma.cc/XB9S-LCKP] ("FinTech lending platforms may not be able to effectively fill the void left by the ongoing disappearance of small and in-market banks that focus on soft information technologies.").

304. *See supra* Part II.A.1–3.

branches.[305] Indeed, customers' patronage of branches "increased during the COVID-19 pandemic by almost as much as their use of banks' mobile apps."[306] Moreover, consumers' reliance on branches will likely persist even as "digital natives" comprise a larger proportion of the U.S. population.[307] Today, young people are only marginally less likely than senior citizens to patronize a local bank branch.[308] Further, Federal Reserve researchers predict that "when currently young depositors transition into old age they will have a stronger preference for visiting their local branch," notwithstanding their technological fluency.[309] For many customers, therefore, locally rooted banks remain an irreplaceable source of financial services despite the emergence of fintech. The COVID-19 pandemic did not reduce reliance on in-person bank branches, and consumers' preference for local banks is unlikely to abate in the future.

2. *Fintech Does Not Penetrate Many Communities*. Fintech does not neutralize the anticompetitive effects of bank consolidation for a second reason: digital financial services do not penetrate many LMI and minority communities where the adverse consequences of consolidation are most severe. LMI communities often lack reliable internet access necessary for consumers to use fintech. Moreover, even in LMI areas that have adequate technological infrastructure, consumers frequently resist fintech, in part due to the fintech sector's

305. *See* Allissa Kline, Laura Alix, Jon Prior & Polo Rocha, *The Demise of Branches Is Overstated, Big-Bank Executives Say*, AM. BANKER (Nov. 8, 2021), https://www.americanbanker.com/news/the-demise-of-branches-is-overstated-big-bank-executives-say [https://perma.cc/GX9A-9R26]; David Heun, *Branch, Call Center Use Is Growing Alongside Digital Banking*, AM. BANKER (Nov. 5, 2021), https://www.americanbanker.com/news/branch-call-center-use-is-growing-alongside-digital-banking-study [https://perma.cc/J4A5-ECGF] ("[R]ecent research is telling bank executives that their customers not only find human interaction—quite often at a branch—important, but also less confusing and easier in some cases than having questions addressed online.").

306. Kline et al., *supra* note 305; *see also* Heun, *supra* note 305 (reporting that 38 percent of consumers interacted with their bank's mobile app more frequently during the pandemic, while 36 percent visited their bank branch more often during the pandemic).

307. A digital native is someone who grew up, and is therefore comfortable, with computer and internet technology. *See* Oliver Joy, *What Does It Mean To Be a Digital Native?*, CNN (Dec. 8, 2012), https://www.cnn.com/2012/12/04/business/digital-native-prensky/index.html [https://perma.cc/YHK4-LLRS].

308. *See* Anenberg et al., *supra* note 239 (noting that survey respondents under the age of thirty-five were only six percentage points less likely to have visited a local branch in the preceding year compared to respondents over the age of seventy-five).

309. *Id.*

history of discriminating against disadvantaged populations. Thus, notwithstanding fintech's emergence, lax bank antitrust enforcement is likely to continue harming LMI populations.

Using fintech is not an option for many communities that lack reliable internet access. Indeed, one-third of U.S. households lack high-speed internet.[310] Minority and low-income communities are disproportionately underserved.[311] In fact, Black households are 20 percent less likely than white households to have high-speed internet access when controlling for income, education, and employment.[312] As Professor Terri Friedline has observed, "[R]ates of access to high-speed internet . . . and smartphones . . . are nowhere near rates that are necessary for fintech to expand banking and financial services, let alone to presumably *replace* the physical banking infrastructure."[313]

Even in areas that have adequate internet access, LMI and minority consumers are often reluctant to use fintech. To be sure, "Black, rural, [and] low-income consumers are among the groups least willing to use fintech products."[314] Minority and low-income households strongly prefer to bank in person.[315] Thus, Black and Latino borrowers are significantly less likely than white borrowers to seek loans from fintech companies, even when controlling for internet access and other factors.[316]

LMI and minority consumers' reluctance to use digital financial services may be attributable, in part, to the fintech sector's history of discriminating against disadvantaged populations. The potential for fintech companies to use consumers' personal information in a discriminatory way is well documented.[317] As Professors Pamela

310. *See* TERRI FRIEDLINE, BANKING ON A REVOLUTION: WHY FINANCIAL TECHNOLOGY WON'T SAVE A BROKEN SYSTEM 141 (2021).

311. *See id.* at 138.

312. *See id.* at 141, 152 n.56.

313. *Id.* at 138.

314. Claire Williams, *Fintech Backers Tout Expanded Access to Financial Services, But Underserved Groups Aren't as Interested*, MORNING CONSULT (Mar. 11, 2021), https://morningconsult.com/2021/03/11/fintech-inclusion-regulation-poll [https://perma.cc/6BX3-BLHP].

315. FRIEDLINE, *supra* note 310, at 10 n.42.

316. *See* Andreas Fuster, Matthew Plosser, Philipp Schnabl & James Vickery, *The Role of Technology in Mortgage Lending*, 32 REV. FIN. STUD. 1854, 1890–91 (2019).

317. *See, e.g.*, Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 25–29 (2018) (discussing algorithmic discrimination in lending); Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1673–80 (2019) (discussing racial discrimination using education-based data in private student loan

Foohey and Nathalie Martin summarize, "[T]he 'tech' part of fintech results in inadvertent racial, ethnic, and gender discrimination based on algorithms that leverage big data."[318] The COVID-19 pandemic highlighted fintech's potential biases. For example, when Black-owned firms applied for Paycheck Protection Program (PPP) loans from online lenders, they were less than half as likely as white-owned firms to obtain all of the funding they sought.[319] The racial funding gap at online lenders was significantly higher than at traditional banks.[320] LMI and minority consumers' aversion to fintech may therefore be connected to previous discrimination.

As discussed in Part II.B, the existing bank merger framework already allows for higher levels of concentration than other industries in recognition of the fact that banks face competition from nonbank financial service providers.[321] Despite the presence of nonbank competitors, however, bank consolidation has harmed consumers and small businesses, especially in LMI and minority areas.[322] As this Section has shown, the emergence of fintech is unlikely to offset these anticompetitive effects because consumers still prefer to bank locally, especially in LMI areas. Notwithstanding fintech's growth, therefore,

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underwriting); Anya Price & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1285–86 (2020) (discussing proxy discrimination in insurance); Janine S. Hiller & Lindsay Sain Jones, *Who's Keeping Score?: Oversight of Changing Consumer Credit Infrastructure*, 59 AM. BUS. L.J. 61, 87–96 (2022) (discussing discrimination in alternative credit scoring); Lindsay Sain Jones & Goldburn P. Maynard, Jr., *Unfulfilled Promises of the FinTech Revolution*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 26–27), https://ssrn.com/abstract=4031044 [https://perma.cc/5C5J-HJ68] (documenting discriminatory practices involving alternative credit scoring); *see also* Alexander J. MacKay & Samuel N. Weinstein, Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response 16–20 (Dec. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract=3979147 [https://perma.cc/Q84H-MYC8] (discussing consumer harm from collusive pricing algorithms).

318. Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Racial Wealth Gap*, 2021 U. ILL. L. REV. 459, 498.

319. FED. RSRV. BANKS, SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON FIRMS OWNED BY PEOPLE OF COLOR 15 (2021), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color [https://perma.cc/JL78-MMSP].

320. *See id. But see* Sabrina T. Howell, Theresa Kuchler, David Snitkof, Johannes Stroebel & Jun Wong, *Automation and Racial Disparities in Small Business Lending: Evidence from the Paycheck Protection Program* 27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29364, 2022), https://www.nber.org/papers/w29364 [https://perma.cc/W3L9-ARD8] (finding that Black-owned businesses were approximately 12 percent more likely than other firms to get a PPP loan from a fintech lender).

321. *See supra* notes 135–137 and accompanying text.

322. *See supra* Part II.A.1–3.

strengthening bank antitrust remains vital for promoting competition in the financial sector.

B. Competitive Banking Markets Are Not Unstable

Proponents of bank consolidation have long asserted that robust competition could threaten the stability of the banking system. In fact, when Congress first established an oversight regime for bank mergers in the mid-twentieth century, some policymakers argued that banks should be exempt from antitrust law to insulate them from potentially destabilizing competitive pressures.[323] Critics warned that "[t]o permit 'unregulated and unrestricted competition' to become the business philosophy of banking could only have dire consequences for the general public which prefers a stable financial structure."[324] As this Section demonstrates, however, this fear is unfounded: there is no clear link between bank competition and financial instability.

Scholars have traditionally theorized that competition in banking breeds instability. On this view, when banks are insulated from competition, they behave prudently to protect their inflated franchise values.[325] By contrast, however, when banks are exposed to robust competition, market pressures motivate banks to take excessive risks in an effort to generate higher returns.[326] This yield-seeking behavior, in turn, may undermine the stability of the broader financial system.[327] Thus, "[i]t is a hoary notion in banking that 'excessive competition' can lead to socially undesirable outcomes in the form of bank failures, runs, and panics."[328]

To be sure, some empirical evidence supports the traditional view that less competitive banking systems are more stable. For example, in a study of twenty-three developed countries, Professor Allen Berger and colleagues determined that banks with a higher degree of market

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323. *See* Casson & Burrus, *supra* note 59, at 677–78.

324. *Id.* at 678.

325. *See* Michael C. Keeley, *Deposit Insurance, Risk, and Market Power in Banking*, 80 AM. ECON. REV. 1183, 1185 (1990); Gabriel Jiménez, Jose A. Lopez & Jesús Saurina, *How Does Competition Affect Bank Risk-Taking?*, 9 J. FIN. STABILITY 185, 185 (2013).

326. *See* Jiménez et al., *supra* note 325, at 185; Diana Zigraiova & Tomas Havranek, *Bank Competition and Financial Stability: Much Ado About Nothing?*, 30 J. ECON. SURVS. 944, 944 (2016).

327. *See* Jiménez et al., *supra* note 325, at 185; Zigraiova & Havranek, *supra* note 326, at 944.

328. John H. Boyd & Gianni de Nicoló, *The Theory of Bank Risk Taking and Competition Revisited*, 60 J. FIN. 1329, 1329 (2005).

power maintain larger equity cushions and, as a result, "have less overall risk exposure."[329] This finding is consistent with the theory that banks in less competitive markets behave prudently to protect their franchise values.[330] More broadly, several studies have documented lower frequency or severity of financial crises in jurisdictions with more concentrated banking systems.[331] Commentators frequently point to Canada as a paradigmatic example of a relatively concentrated and unusually stable banking system.[332] Thus, some evidence supports the conventional view that greater competition undermines financial stability.

On the other hand, there are compelling reasons to believe that—contrary to the traditional view—more robust competition might actually enhance stability in the banking system. For example, banks in more competitive markets may charge lower interest rates on their loans, leading to fewer borrower defaults and loan losses.[333] Further, competitive pressures may incentivize banks to improve their efficiency, resulting in better-run banks that are more stable in the long run.[334] Moreover, stronger competition may encourage banks to

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329. Allen N. Berger, Leora F. Klapper & Rima Turk-Ariss, *Bank Competition and Financial Stability*, 35 J. FIN. SERVS. RSCH. 99, 100 (2009); *see also* Thorsten Beck, Olivier De Jonghe & Glenn Schepens, *Bank Competition and Stability: Cross-Country Heterogeneity*, 22 J. FIN. INTERMEDIATION 218, 219 (2013) ("[W]e show, on average, a positive relationship between banks' market power . . . and banks' stability.").

330. *See* Berger et al., *supra* note 329, at 100–01; *see also supra* note 325 and accompanying text.

331. *See, e.g.*, Thorsten Beck, Asli Demirgüç-Kunt & Ross Levine, *Bank Concentration, Competition, and Crises: First Results*, 30 J. BANKING & FIN. 1581, 1581 (2006) ("Using data on 69 countries from 1980 to 1997, we find that crises are less likely in economies with more concentrated banking systems."); Boubacar Diallo, *Bank Competition and Crises Revisited: New Results*, 129 ECON. LETTERS 81, 81 (2015) (concluding that "bank competition is detrimental to bank stability" in a study of 145 countries from 1997 to 2010).

332. *See, e.g.*, Michael D. Bordo, Angela Redish & Hugh Rockoff, *Why Didn't Canada Have a Banking Crisis in 2008 (or in 1930, or 1907, or. . .)?*, 68 ECON. HIST. REV. 218, 218–20 (2015).

333. *See, e.g.*, Jiménez et al., *supra* note 325, at 185 ("[I]ncreased competition across both the loan and deposit markets could lower loan rates, decrease borrower credit risk, and enhance financial stability."); Zigraiova & Havranek, *supra* note 326, at 944 ("A competitive banking sector results in lower lending rates, which support firms' profitability, leading to lower credit risk for banks.").

334. *See* Klaus Schaeck & Marin Cihák, *Competition, Efficiency, and Stability in Banking*, 43 FIN. MGMT. 215, 217 (2014) ("[W]e expect competitive environments to result in greater efficiency. Ultimately, efficiency improvements will also enhance stability as inefficiencies in banking are primarily due to poor lending decisions . . . .").

assume more diversified risks, thereby making the banking system more resilient.[335]

In fact, considerable empirical evidence suggests that bank competition enhances stability, contrary to conventional wisdom. For example, Professor Klaus Schaeck and colleagues determined that stronger competition in local banking markets "reduce[d] the likelihood of a crisis" in a study of forty-five countries between 1995 and 2005.[336] In a similar international analysis, Professor Deniz Anginer and colleagues found "a negative relationship between competition and systemic risk, consistent with the view that greater competition encourages banks to take on more diversified risks, making the banking system less fragile to shocks."[337] Within the United States, Professor Brian Akins and colleagues examined variations in state-level bank competition during the lead up to the 2008 financial crisis and found that "banks facing less competition [we]re more likely to engage in risky activities . . . and more likely to fail."[338] In light of these findings, some commentators have asserted that "policies that promote competition among banks may have the potential to also strengthen banking system stability."[339]

On balance, therefore, no clear consensus exists as to the relationship between bank competition and financial stability. Some empirical evidence supports the traditional view that robust competition breeds instability, while other studies suggest that

335. *See* Deniz Anginer, Asli Demirguc-Kunt & Min Zhu, *How Does Competition Affect Bank Systemic Risk?*, 23 J. FIN. INTERMEDIATION 1, 1 (2014) ("We find that greater competition encourages banks to take on more diversified risks, making the banking system less fragile to shocks.").

336. Klaus Schaeck, Martin Cihak & Simon Wolfe, *Are Competitive Banking Systems More Stable?*, 41 J. MONEY, CREDIT & BANKING 711, 713 (2009).

337. Anginer et al., *supra* note 335, at 2 (studying sixty-three countries between 1997 and 2009). Several additional studies corroborate this view. *See, e.g.*, Schaeck & Cihák, *supra* note 334, at 225–32 (documenting lower bank risk-taking in competitive markets); Andre Uhde & Ulrich Heimeshoff, *Consolidation in Banking and Financial Stability in Europe: Empirical Evidence*, 33 J. BANKING & FIN. 1299, 1305–10 (2009) (concluding that national banking market concentration has a negative effect on financial stability).

338. Brian Akins, Lynn Li, Jeffrey Ng & Tjomme O. Rusticus, *Bank Competition and Financial Stability: Evidence from the Financial Crisis*, 51 J. FIN. & QUANTITATIVE ANALYSIS 1, 1 (2016).

339. Schaeck et al., *supra* note 336, at 713.

competition actually reduces the incidence of financial crises.[340] The literature is so inconclusive that a meta-analysis of thirty-one different analyses found "little interplay between competition and stability."[341] Simply put, there is "no academic consensus on whether bank competition leads to more or less stability in the banking system."[342] Contrary to critics' suggestions, therefore, there is no conclusive evidence that strengthening bank antitrust would exacerbate financial instability.

IV. REVIVING BANK ANTITRUST

As this Article has demonstrated, the erosion of foundational antitrust principles over the past forty years has led to unprecedented concentration in the U.S. financial sector. Widespread bank consolidation, in turn, has harmed customers, small businesses, and the broader economy. Accordingly, this Part proposes a two-pronged roadmap to revive bank antitrust. First, Section A recommends strategies to enhance the prevailing antitrust framework by strengthening and expanding existing analytical tools. Section B then urges antitrust enforcers to broaden their focus beyond the Chicago School's narrow consumer welfare standard by conducting more comprehensive analyses of the competitive harms that bank consolidation imposes on society. Collectively, these reforms would help alleviate concentration in the financial sector and thereby mitigate harms from consolidation throughout the U.S. economy.

A. Strengthening Analytical Tools

As a first step toward revitalizing bank antitrust, policymakers should strengthen and expand the analytical tools used to identify anticompetitive bank consolidation. This Section proposes four specific enhancements: (1) reducing the HHI threshold in the Bank Merger Guidelines, (2) deemphasizing mitigating factors in bank merger reviews, (3) evaluating the mix of large and small institutions in markets experiencing mergers, and (4) considering the effects of

340. *Compare supra* notes 325–328 and accompanying text (suggesting that competition breeds instability), *with supra* notes 332–335 and accompanying text (suggesting that competition reduces instability).

341. *See* Zigraiova & Havranek, *supra* note 326, at 944.

342. Beck et al., *supra* note 329, at 219; *see also* Boyd & de Nicoló, *supra* note 328, at 1340 ("[W]e are unaware of any compelling theoretical arguments that banking stability decreases (or increases) with the degree of competition in bank markets.").

common ownership of competing banks. Each of these reforms is broadly consistent with the Chicago School's emphasis on restraining consumer prices. By better calibrating the analytical toolkit, however, these strategies would increase the likelihood that antitrust enforcers actually protect consumers and small businesses from anticompetitive mergers.

1. *Lower the HHI Threshold*. To mitigate competitive harms from bank consolidation, policymakers should reduce the HHI threshold that triggers enhanced scrutiny of bank mergers. Recall that under the 1995 Bank Merger Guidelines the enforcement agencies are unlikely to challenge a proposed merger if the post-merger HHI would be below 1800 or the merger would cause the HHI to increase by less than 200 points.[343] This 1800/Δ200 threshold has proven insufficient to prevent anticompetitive harms.[344] Indeed, even bank mergers that comply with the 1800/Δ200 threshold are associated with higher cost and lower availability of financial products.[345] Accordingly, the DOJ and the banking agencies should reduce the HHI threshold for enhanced screening of bank mergers. As one possibility, the agencies could commit to heightened scrutiny of a bank merger that would increase a market's HHI by more than 100 points to a level above 1500—the same HHI threshold at which nonbanking mergers "potentially raise significant competitive concerns" according to the DOJ's general merger guidelines.[346]

Reducing the HHI threshold would reinforce a bank's obligation to demonstrate that a proposed merger's public benefits outweigh its anticompetitive effects. In contrast to mergers in other industries, a bank merger that would substantially lessen competition is not necessarily unlawful.[347] Unique to banking, an otherwise anticompetitive merger is permissible if the merging banks "establish

343. *See supra* note 130 and accompanying text.

344. *See supra* Part II.A (documenting harms to consumers, LMI communities, and small businesses).

345. *See, e.g.*, Mann, *supra* note 217, at 24 (concluding that bank mergers below the 1800/Δ200 HHI threshold were associated with an 8 percent decline in small business lending).

346. HORIZONTAL MERGER GUIDELINES, *supra* note 130, at 19; *see also supra* note 135 and accompanying text (discussing the 1500/Δ100 threshold for nonbanking mergers). The banking agencies and the DOJ should conduct empirical analyses to determine an appropriate HHI threshold that would prevent anticompetitive bank mergers but not preclude socially beneficial consolidation.

347. *See supra* notes 73–74.

that the merger's benefits to the community would outweigh its anticompetitive disadvantages."[348] The banks could show, for example, that the proposed merger would enable the combined firm to offer new products, better service, or greater convenience for customers.[349] As the Supreme Court has emphasized, however, in order to offset anticompetitive effects, purported public benefits must be specific, and the banks must demonstrate that they would not be achievable absent the proposed merger.[350] Thus, lowering the HHI threshold would not necessarily result in more bank merger denials, but it would intensify banks' burden to demonstrate the public benefits of potentially anticompetitive combinations.

To be sure, reducing the HHI threshold would elicit objections from the banking sector, which has argued that the 1800/Δ200 threshold is already too stringent compared to the 2500/Δ200 threshold that triggers a presumption of anticompetitiveness in other industries.[351] The comparison to the 2010 Guidelines' 2500/Δ200 threshold, however, is inapposite. First, a proposed bank merger that exceeds the Bank Merger Guidelines' HHI threshold merely receives enhanced scrutiny rather than a presumption of anticompetitiveness, as is the case for nonbank mergers that exceed the 2500/Δ200 threshold.[352] In this way, the Bank Merger Guidelines' HHI screen is more akin to the 1500/Δ100 threshold in the 2010 Guidelines for potentially anticompetitive mergers that "warrant scrutiny."[353] Second, the costs of "false negatives"—or misguided decisions to allow anticompetitive mergers—are higher in banking than in many other industries.[354] Compared to other industries with lower entry barriers,

348. United States v. Third Nat'l Bank in Nashville, 390 U.S. 170, 182 (1968).

349. *Cf. id.* at 185–86 (discussing potential public benefits of bank mergers).

350. *See id.* at 186, 190.

351. *See, e.g.*, BPI Comment Letter, *supra* note 279, at 2, 11; Wachtell Comment Letter, *supra* note 279, at 4.

352. *Compare* BANK MERGER GUIDELINES, *supra* note 133, at 3 ("The [DOJ] and the banking agencies are likely to examine a transaction in more detail if it exceeds the 1800/Δ200 threshold . . . ."), *with* HORIZONTAL MERGER GUIDELINES, *supra* note 130, at 19 ("Mergers resulting in highly concentrated markets [with an HHI above 2500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.").

353. HORIZONTAL MERGER GUIDELINES, *supra* note 130, at 19.

354. *Cf.* Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J.L. & PUB. POL'Y 5, 8 (1999) (discussing "false positives" and "false negatives" in antitrust enforcement); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984) (asserting that "judicial errors that tolerate baleful practices are self-correcting").

regulation and competitive disadvantages deter new banks from forming to counteract the harmful effects of an anticompetitive merger.[355] Moreover, in light of banking's unique and essential role in the economy, anticompetitive bank mergers inflict more extensive and longer-lasting societal harms than anticompetitive mergers in most other industries.[356] Thus, policymakers should strengthen the Bank Merger Guidelines' HHI threshold despite the banking sector's objections.

As an alternative, or in addition, to lowering the HHI threshold, the enforcement agencies could supplement their analyses with other concentration metrics. While widely considered to be a conceptual advancement over the four-firm concentration ratio previously used in bank antitrust, the HHI has nonetheless been subject to criticism.[357] Skeptics contend, for example, that the HHI undervalues smaller firms' competitive significance and is insufficiently sensitive to inequality in firms' market shares.[358] To mitigate the HHI's shortcomings, the DOJ and banking agencies could use other measures of concentration, such as the Hall-Tideman Index (HTI) or comprehensive industrial concentration index (CCI), in addition to the HHI.[359] If appropriately

355. *See generally* Zaring, *supra* note 37, at 1441–46 (documenting a dearth of de novo bank charters).

356. As the Supreme Court stated—and as quoted in this Article's epigraph—"[I]f the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ." United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963). In fact, policymakers have established special protections to promote competition in the provision of credit because of its essential role in the economy. *See, e.g.*, 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, 859–65 (2013) (discussing the Bank Holding Company Act's prohibition on tying the provision of credit to the purchase of another product or service).

357. *See, e.g.*, Jay Greenfield, *Beyond Herfindahl: Non-Structural Elements of Merger Analysis*, 53 ANTITRUST L.J. 229, 233 (1984) (discussing shortcomings of the HHI).

358. *See, e.g.*, Michael O. Finkelstein & Richard M. Friedberg, *The Application of the Entropy Theory of Concentration to the Clayton Act*, 76 YALE L.J. 677, 706–07 (1967) (criticizing the HHI for understating the role of small competitors); Stephen A. Rhoades, *Market Share Inequality, the HHI, and Other Measures of the Firm-Composition of a Market*, 10 REV. INDUS. ORG. 657, 672–73 (1995) (concluding that the HHI undervalues market share inequality among competitors).

359. *See* Jacob A. Bikker & Katharina Haaf, *Measures of Competition and Concentration in the Banking Industry: A Review of the Literature*, ECON. & FIN. MODELLING, Summer 2002, at 1, 6–17 (reviewing alternative concentration measures). The HTI resembles the HHI but weights the market shares of individual banks by their rankings within the market, thereby granting more significance to the total number of competitors. *See id.* at 9–10. The CCI "is the sum of the proportional share of the leading bank and the summation of the squares of the proportional sizes of each bank, weighted by a multiplier reflecting the proportional size of the rest of the industry."

calibrated, these alternative metrics could augment the traditional HHI analysis and thereby help antitrust enforcers identify anticompetitive consolidation in the banking sector.

2. *Deemphasize Mitigating Factors*. In addition to reducing the HHI threshold, policymakers should stop placing significant weight on mitigating factors in bank antitrust analysis. Recall that under the Chicago School's influence, the banking agencies and the DOJ have frequently cited factors—including branch divestitures and potential market entry—as mitigating the potential anticompetitive effects of a bank merger.[360] In practice, however, these purported mitigants do not significantly alleviate the harmful consequences of bank consolidation. Accordingly, antitrust enforcers should deemphasize mitigating factors in future bank merger evaluations.

One of the most common mitigating factors cited in bank antitrust—branch divestitures—appears to be of dubious societal value. When a proposed merger exceeds the 1800/Δ200 HHI threshold, the banking agencies and the DOJ often require the merging banks to sell certain branches and their associated deposits as a condition of approval.[361] In theory, branch divestitures mitigate anticompetitive harms because they reduce the merged banks' presence in the market and bolster the competitive position of the divested branches' acquirer.[362] In reality, however, divestitures have proven ineffective in maintaining the competitiveness of local banking markets.[363] Despite

Id. at 11. The CCI is thus thought to reflect both the market share of a dominant firm and the dispersion of smaller competitors. *See id.*

360. *See supra* Part I.B.1.b; *see also* Christopher L. Holder, *The Use of Mitigating Factors in Bank Mergers and Acquisitions: A Decade of Antitrust at the Fed*, FED. RSRV. BANK OF ATLANTA ECON. REV., Mar.–Apr. 1993, at 32, 34–40 (documenting the Federal Reserve's reliance on mitigating factors in bank merger approval orders).

361. For example, in 2019, the DOJ required BB&T and SunTrust to divest twenty-eight branches and $2.3 billion in deposits as a condition of the banks' merger. *See* Press Release, Dep't of Just., Justice Department Requires Divestitures in Order for BB&T and SunTrust To Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger [https://perma.cc/2W82-S4CK].

362. *See* Burke, *supra* note 145, at 6–10.

363. There is some evidence that branch divestitures previously mitigated anticompetitive harms from bank mergers in the 1980s and 1990s. *See* Burke, *supra* note 145, at 23 (concluding that "divestitures have generally provided an effective public policy remedy" in a review of bank mergers between 1985 and 1992); Steven J. Pilloff, *What's Happened at Divested Bank Offices? An Empirical Analysis of Antitrust Divestitures in Bank Mergers* 1 (Bd. of Governors of the Fed. Rsrv. Sys. Fin. & Econ. Discussion Series, Working Paper No. 2002-60, 2003), https://www.federalreserve.gov/pubs/feds/2002/200260/200260pap.pdf [https://perma.cc/F9HW-UM8Z] (concluding that

having their accounts transferred to a new bank as part of a divestiture agreement, many customers—especially small businesses—voluntarily choose to remain with their original bank because of existing relationships with loan officers and other bank personnel.[364] As a result, merging banks often maintain their market shares notwithstanding branch divestitures, leading to anticompetitive outcomes.[365] Thus, although policymakers previously assumed that branch divestitures would neutralize the potential anticompetitive effects of a proposed bank merger, divestitures have proven to be an ineffective remedy, and antitrust enforcers should therefore deemphasize them as a mitigating factor.

Another commonly cited mitigating factor—a market's attractiveness for new entry—is equally unproven in alleviating the harms of bank consolidation. Under the Bank Merger Guidelines, the agencies may approve a merger that exceeds the 1800/Δ200 HHI threshold based on "expectations about potential entry by institutions not now in the market."[366] To evaluate a market's attractiveness for entry, the agencies consider recent de novo entry by out-of-market banks and demographic factors such as population growth rate and per capita income.[367] Attractiveness for entry is now "the most prominent mitigating factor cited when potentially anticompetitive consolidations are allowed."[368] However, the Federal Reserve's own research has cast

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"the policy of accepting branch divestitures as an antitrust remedy has been successful" in a review of bank mergers between 1989 and 1998). As described below, however, more recent evidence suggests that divestitures have declined in effectiveness as banks have grown larger over time.

364. *See* Gam & Zhang, *supra* note 205, at 4–5 (analyzing bank mergers between 1999 and 2014); Liebersohn, *supra* note 301, at 37–40 (analyzing bank mergers between 1994 and 2017).

365. *See* Gam & Zhang, *supra* note 205, at 4 ("[B]ank divestitures do not significantly change the local small business lending activities of either the merging or competing banks. . . . This finding suggests that antitrust divestitures are ineffective in maintaining competitiveness in the small business lending market."); Liebersohn, *supra* note 301, at 37–40 (concluding that branch divestitures have no effect on the small business loan market). Some evidence suggests that divestitures are more effective at maintaining competitiveness in the retail mortgage market. *See, e.g.*, Gam & Zhang, *supra* note 205, at 24–25; Liebersohn, *supra* note 301, at 35–37. However, divestitures appear to exacerbate racial disparities in mortgage lending, suggesting that divestitures dislocate racial minorities from the banking system. *See, e.g.*, Gam & Zhang, *supra* note 205, at 32.

366. BANK MERGER GUIDELINES, *supra* note 133, at 3.

367. *See supra* note 151 and accompanying text.

368. Adams & Amel, *supra* note 152, at 96. The agencies' reliance on potential competition as a mitigating factor is ironic because the Supreme Court has made it exceedingly difficult for the agencies to cite the loss of potential competition as an aggravating factor when challenging a

doubt on the extent to which attractiveness for entry actually mitigates anticompetitive harms. Indeed, Federal Reserve economists have found that past entry and demographic variables are generally not correlated with—and thus not predictive of—future entry.[369] Even bank lobbyists acknowledge that attractiveness for entry is unproven as a mitigating factor.[370] In the future, therefore, antitrust enforcers should discount a market's attractiveness for entry when evaluating a proposed merger's potential anticompetitive effects.

3. *Evaluate Mix of Large and Small Institutions in a Market.* As a supplement to the traditional HHI analysis, bank antitrust enforcers should expressly consider the mix of large and small institutions that would remain in a market following a merger. The Bank Merger Guidelines' narrow focus on deposit-based HHIs obscures an important determinant of a market's competitive dynamics: the size of the competing banks. Small, locally rooted community banks and large, multinational megabanks typically serve different customers, specialize in different products, and use different underwriting techniques.[371] Thus, two markets with identical deposit concentration metrics may nonetheless perform differently if one market is dominated by large banks and the other by small banks.[372] The HHI's blindness to competitors' size is part of the reason why large bank acquisitions of small firms often harm customers even when the HHI

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market extension merger. *See, e.g.*, United States v. Marine Bancorp., Inc., 418 U.S. 602, 632 (1974) ("[I]t [is] difficult to establish that the [potential competition doctrine] invalidates a particular geographic market extension merger.").

369. *See* Adams & Amel, *supra* note 152, at 117–18 (concluding that demographic variables are correlated with probability of entry only in extreme cases and that past bank entry is uncorrelated with new charter entry in rural markets).

370. *See* Paul Calem & Gregg Rozansky, *Bank Merger Applications in Law and Practice*, BANK POL'Y INST. 8 (Aug. 19, 2021), https://bpi.com/wp-content/uploads/2021/08/Bank-Merger-Applications-in-Law-and-Practice.pdf [https://perma.cc/3BVR-49KR] ("[W]e are not aware of any study assessing whether use of th[e attractiveness for entry] criterion as a mitigating factor in merger decisions yielded the intended longer-term outcome.").

371. *See* Allen N. Berger, Nathan H. Miller, Mitchell A. Petersen, Raghuram G. Rajan & Jeremy C. Stein, *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 240–41 (2005) (documenting that smaller banks lend to smaller firms and use softer underwriting criteria than larger banks).

372. *Cf.* Kwangwoo Park & George Pennacchi, *Harming Depositors and Helping Borrowers: The Disparate Impact of Bank Consolidation*, 22 REV. FIN. STUD. 1, 2 (2009) ("[A] greater presence of [large banks] tends to promote competition in retail loan markets but also tends to harm competition in retail deposit markets.").

does not suggest the merger would be anticompetitive.[373] As former Federal Reserve Governor Jeremy Stein and coauthors have asserted, "[T]he key issue might be not so much about banks having market power in the traditional Herfindahl-index sense but rather, the degree to which [customers] have choice over the size of the bank they do business with."[374]

To address this issue, the banking agencies and the DOJ should affirmatively consider the mix of megabanks, regional banks, and community banks in a market in addition to the HHI and other concentration metrics. The OCC's bank merger framework from the 1960s provides a good model. After Congress adopted the Bank Merger Act, the OCC implemented a "balanced banking structure" approach to bank merger analysis.[375] This approach "stressed the range of bank size," and the OCC sought to ensure that "each market [w]ould have a range of small, medium and large banks."[376] Contemporary antitrust enforcers should implement a similar approach, striving to avoid mergers that would deprive a market of competition among banks of a certain size.[377] This approach would subject transactions like First Citizens BancShares' 2020 acquisition of Entegra Bank to heightened scrutiny.[378] That deal eliminated Entegra—a small, $1.7 billion bank in southwest North Carolina—and left more than 95 percent of the deposits in one market controlled by medium and large banks.[379] Even though the relevant market's post-merger HHI was

373. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 465.

374. Berger et al., *supra* note 371, at 266. Former Federal Reserve Governor Daniel Tarullo made a similar observation: "If concentration levels in local markets remain roughly the same, but four national banks have displaced community and smaller regional banks as the dominant players in all those markets, is the competitive environment really unchanged?" Daniel K. Tarullo, *Regulators Should Rethink the Way They Assess Bank Mergers*, BROOKINGS INST. (Mar. 16, 2022), https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers [https://perma.cc/VET9-C352].

375. Kintner & Hansen, *supra* note 110, at 105.

376. *Id.*

377. Antitrust enforcers should be particularly wary of acquisitions that diminish competition among locally owned banks, which tend to provide unique products and services. *See* Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" as a Factor in Merger Policy*, 85 N.C. L. REV. 149, 214–20 (2006) (discussing the preservation of local control as a factor in bank merger reviews); *see also* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 460 (noting that the detrimental effects of bank mergers on LMI areas are especially pronounced when a local bank is acquired by a large, out-of-state bank).

378. First Citizens BancShares, Inc., 106 FED. RSRV. BULL. 44 (2020).

379. After the transaction, more than 95 percent of the deposits in the Transylvania County banking market were controlled by First Citizens (36 percent), Wells Fargo (22 percent), United

consistent with the 1800/Δ200 threshold when accounting for mitigating factors, the lack of size diversity among the remaining banks threatens to impair competition, particularly for small business loans.[380] Accordingly, a more effective bank antitrust framework would evaluate the mix of large and small institutions in a market in addition to the HHI.

4. *Consider Effects of Common Ownership*. As a further enhancement to the bank antitrust framework, authorities should consider how common ownership of banks by institutional investors could affect post-merger competition in ways that are unobservable by the traditional HHI analysis. A growing body of literature has demonstrated that markets behave less competitively when institutional investors own sizeable stakes in rival firms.[381] Researchers have documented the anticompetitive consequences of common ownership in several industries, including banking.[382] A greater level of horizontal shareholding among banks in a local market is associated with higher prices for deposit products, independent of the market's HHI.[383] That is, when competing banks are owned by the same institutional investors, the banks are more likely to raise their prices.

Community Bank (19 percent), Fifth Third Bank (11 percent), and PNC Bank (7 percent)—all of which had more than $20 billion in assets and were not headquartered locally. *See id.* at 48–49; Transylvania County, NC Banking Market, FED. RSRV. BANK OF ST. LOUIS CASSIDI (June 30, 2021), https://cassidi.stlouisfed.org/markets/37295/hhi [https://perma.cc/8YWY-YFNK].

380. *See* First Citizens BancShares, Inc., *supra* note 378, at 48–49 (discussing the Transylvania County banking market's post-merger HHI); Berger et al., *supra* note 371, at 266 (assessing competitive consequences in markets that lack banks of varying sizes).

381. *See generally* Martin C. Schmalz, *Recent Studies on Common Ownership, Firm Behavior, and Market Outcomes*, 66 ANTITRUST BULL. 12 (2021) (summarizing the literature).

382. *See* José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 227, 247–67 (2022) [hereinafter Azar et al., *Bank Competition*] (documenting the anticompetitive consequences of common ownership in banking); José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1528–51 (2018) (documenting the anticompetitive consequences of common ownership in the airline industry); Mohammad Torshizi & Jennifer Clapp, *Price Effects of Common Ownership in the Seed Sector*, 66 ANTITRUST BULL. 39, 57–64 (2021) (documenting the anticompetitive consequences of common ownership in the corn, soy, and cottonseed industries); Jin Xie, *Horizontal Shareholdings and Paragraph IV Generic Entry in the U.S. Pharmaceutical Industry*, 66 ANTITRUST BULL. 100, 105–09 (2021) (documenting the anticompetitive consequences of common ownership in the pharmaceutical industry).

383. *See* Azar et al., *Bank Competition*, *supra* note 382, at 234.

As Professors José Azar, Sahil Raina, and Martin Schmalz put it, "[W]ho owns the banks matters for how the banks compete."[384]

As currently implemented, however, the Bank Merger Guidelines ignore the role of common ownership in dictating a market's competitive dynamics. Thus, the prevailing approach to bank antitrust "greatly understate[s] the threat to competition when common ownership exists."[385] As Professor Einer Elhauge commented, "[T]he failure to consider horizontal shareholding levels in past merger analysis may help explain why merger retrospectives have repeatedly found that agencies and courts, despite their best efforts, have approved many mergers that (contrary to agency or court predictions) actually raised prices."[386]

To prevent anticompetitive outcomes, antitrust enforcers should consider the extent of common ownership in a banking market when evaluating a proposed merger. Authorities should closely scrutinize—and potentially block—mergers where the remaining competitors would have a high degree of horizontal shareholding.[387] This approach would subject transactions like BB&T's 2019 merger with SunTrust to closer investigation. The Federal Reserve calculated that the BB&T-SunTrust merger would increase the Atlanta, Georgia, banking market's HHI by 270 points to 1743—just below the 1800/Δ200 threshold for enhanced scrutiny.[388] However, the antitrust authorities overlooked that the four largest banks in Atlanta following the merger—controlling almost three-quarters of the market's deposits—would have a high degree of common ownership.[389] Thus, while the

384. *Id.* at 266.

385. Eric A. Posner, Fiona M. Scott Mortan & E. Glen Weyl, *A Proposal To Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 688 (2017).

386. Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 280 (2020).

387. Concentration metrics that reflect competitors' overlapping ownership—such as the "generalized concentration index, the GHHI," developed by Professors Azar, Raina, and Schmalz—can help identify markets where horizontal shareholding may lead to anticompetitive conduct. Azar et al., *Bank Competition*, *supra* note 382, at 266.

388. *See* BB&T Corp., 106 FED. RSRV. BULL. 1, 8 (2020) (assessing the Atlanta banking market's HHI with mitigating factors).

389. The banks—Wells Fargo, Truist (the new name of the combined BB&T-SunTrust), Bank of America, and JPMorgan—all had Vanguard, BlackRock, and State Street among their top four shareholders, collectively owning between 18 and 21 percent of each bank. *See* Wells Fargo & Co.: Top Institutional Holders, YAHOO! FIN., https://finance.yahoo.com/quote/WFC/holders?p=WFC [https://perma.cc/32F9-UNY9]; Truist Fin. Corp., YAHOO! FIN., https://finance.yahoo.com/quote/TFC/holders?p=TFC [https://perma.cc/T9WX-KS9W]; Bank of Am.: Top Institutional

traditional HHI analysis indicated that the Atlanta market would remain competitive, a more probing analysis of the competitors' common ownership may have revealed the potential for anticompetitive conduct. To alleviate common ownership's anticompetitive consequences in the future, therefore, bank antitrust enforcers should evaluate the extent of horizontal shareholding as part of their merger analyses.

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In sum, the traditional HHI analysis, as currently implemented, is not well suited to detect and prevent anticompetitive bank consolidation. To bolster the prevailing antitrust framework, policymakers should lower the Bank Merger Guidelines' HHI threshold, deemphasize mitigating factors in bank merger reviews, consider the size of the banks remaining in a market, and evaluate the competitive effects of horizontal shareholding. To the extent that antitrust enforcers retain the Chicago School's consumer welfare orientation, strengthening the existing antitrust toolkit in this way is necessary to protect consumers and businesses from higher prices caused by anticompetitive bank mergers.

B. Expanding the Aperture: Considering Nonprice Competitive Harms

Even with stronger analytical tools, however, the Chicago School's narrow consumer welfare approach will not prevent harmful bank consolidation. That is because excessive bank concentration inflicts numerous societal costs that a circumscribed consumer welfare approach ignores. As documented above, bank consolidation diminishes product quality, increases entry barriers, and intensifies macroeconomic fragility—yet an antitrust enforcement regime premised on limiting consumer prices and maximizing efficiency fails to grapple with these broader harms.[390] To better protect the public, therefore, antitrust enforcers should move beyond their narrow focus on consumer prices and efficiency in favor of a more complete analysis of the numerous nonprice harms bank consolidation threatens to

Holders, YAHOO! FIN., https://finance.yahoo.com/quote/BAC/holders?p=BAC [https://perma.cc/Z6NG-J3CG]; JPMorgan Chase & Co.: Top Institutional Holders, YAHOO! FIN., https://finance.yahoo.com/quote/JPM/holders?p=JPM [https://perma.cc/PJZ8-5FTA].

390. *See supra* Part II.B.

impose. This Section sketches out how antitrust enforcers could incorporate nonprice considerations into their bank merger analyses and thereby shield the public from the broader costs of excessive financial sector concentration.

As an initial matter, preventing nonprice competitive harms is firmly within bank antitrust enforcers' statutory remit. As Professors Lina Khan and Tim Wu have documented, the U.S. antitrust laws were originally designed to promote not only a broad array of consumer interests but also far-reaching societal priorities, including the preservation of open markets and system stability.[391] The antitrust laws, as enforced for at least a century, sought to prevent extreme concentrations of economic and political power that could distort not only free enterprise but also democracy itself.[392] Although the Chicago School has narrowed bank antitrust enforcers' focus to consumer prices and efficiency, this circumscribed approach is neither required nor supported by statute.[393] To the contrary, history suggests that Congress intended antitrust enforcers and courts to adopt expansive interpretations of the ways in which market concentration impairs economic and political liberties.[394]

To effectuate antitrust policy faithfully, therefore, bank antitrust enforcers must consider nonprice competitive harms, such as market distortions created by the "too-big-to-fail" subsidy. As discussed above, certain large banks benefit from a perception that the government would bail them out if they were to experience economic distress.[395] This perception enables "too-big-to-fail" banks to borrow at favorable rates relative to smaller competitors, thereby granting big banks a competitive advantage and deterring new entrants.[396] Despite evidence that large mergers exacerbate the "too-big-to-fail" subsidy, however, "antitrust enforcers and courts d[o] not account for . . . the

391. *See* Khan, *Amazon's Antitrust Paradox*, *supra* note 26, at 737–46; WU, *supra* note 2, at 78–83.

392. *See* Khan, *Amazon's Antitrust Paradox*, *supra* note 26, at 740; WU, *supra* note 2, at 81–83; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060–65 (1979) [hereinafter Pitofsky, *The Political Content of Antitrust*].

393. *See* Khan, *Amazon's Antitrust Paradox*, *supra* note 26, at 739 ("Legislative history reveals that the idea that 'Congress designed the Sherman Act as a "consumer welfare prescription"' is wrong." (footnotes omitted)).

394. *See, e.g.*, Pitofsky, *The Political Content of Antitrust*, *supra* note 392, at 1060–65.

395. *See supra* Part II.B.2.

396. *See supra* notes 260–262 and accompanying text.

competitive distortions in creating [too-big-to-fail] firms."[397] Going forward, antitrust enforcers should routinely perform econometric analyses to assess whether a bank would accrue a new or expanded "too-big-to-fail" subsidy following a proposed merger. If models suggest that a merger, such as BB&T's combination with SunTrust, would enlarge the "too-big-to-fail" subsidy, antitrust enforcers should block the merger to prevent further competitive distortions.

Antitrust enforcers could further bolster their analysis by considering impairments in product quality likely to stem from a bank merger, including branch closures. Recall that antitrust enforcers do not currently consider reductions in branch access as part of a bank merger evaluation, and the law prohibits the banking agencies from blocking a branch closure after consummation of a merger.[398] To evaluate potential deterioration in product quality, antitrust enforcers should require merging banks to disclose planned branch closures during the antitrust review process instead of waiting until after consummation of the merger, as is current practice.[399] Once disclosed, enforcers should assess the extent to which an applicant's proposed branch closures would inconvenience consumers and deprive communities of financial services, with heightened scrutiny of planned branch closures in LMI areas. In addition to branch closures, antitrust enforcers should assess whether a proposed merger might impair customer service or threaten consumer privacy.[400] At a minimum, these potential diminishments in product quality should be weighed against any purported public benefits that might result from a proposed merger.[401] Further, as part of the antitrust review process, enforcers could seek commitments from a merging bank not to curtail certain services or sell consumers' personal data.

397. Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. POSTSCRIPT 33, 49 (2012).

398. *See supra* Part II.B.1.a.

399. *See, e.g.*, Letter from Patricia A. Robinson, Of Counsel, Wachtell, Lipton, Rosen & Katz, to Adam M. Drimer, Assistant Vice President, Fed. Rsrv. Bank of Richmond A-2 to -5 (Apr. 16, 2019), https://www.federalreserve.gov/files/Additional-Information-Response-20190416.pdf [https://perma.cc/TS8J-G6NM] (declining to disclose BB&T's and SunTrust's anticipated post-merger branch closures).

400. *See supra* Part II.B.1.a–b (documenting merger-related impairments in customer service and consumer privacy).

401. *See supra* notes 347–350 and accompanying text (noting that antitrust enforcers may authorize an otherwise anticompetitive bank merger if its public benefits outweigh its anticompetitive effects).

In addition to distortive subsidies and product quality, bank antitrust enforcers ought to consider macroeconomic resilience when reviewing a proposed merger. As discussed above, bank consolidation may threaten competition by intensifying risks to financial stability.[402] After the 2008 financial crisis, Congress amended the bank merger statutes to instruct the federal banking agencies to assess whether a proposed merger "would result in greater or more concentrated risks to the stability of the United States banking or financial system."[403] To date, however, the banking agencies' financial stability analyses have been conceptually rudimentary and permissive of large bank mergers.[404] In the absence of effective financial stability analyses by the banking agencies, the DOJ should incorporate financial stability into its antitrust reviews to prevent systemically risky mergers that could inflict severe economic damage and diminish competition throughout the economy.[405] Numerous empirical metrics for assessing systemic risk already exist—such as the Basel Committee on Bank Supervision's "global systemically important bank" score—and could inform the DOJ's financial stability assessments.[406]

More broadly, the banking agencies and the DOJ should take into account the full macroeconomic consequences of bank consolidation when making antitrust enforcement decisions. As discussed above, consolidation in the banking sector hastens consolidation throughout the economy.[407] Larger banks lend to larger businesses, thereby favoring incumbent firms, cutting off funding for new entrants, and impairing competition.[408] Bank mergers, in turn, are associated with less competitive labor markets throughout the economy.[409] Accelerating bank concentration also impedes monetary policy

402. *See supra* Part II.B.3.b.

403. 12 U.S.C. § 1842(c)(7).

404. *See* Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 470–71 (critiquing the banking agencies' financial stability analyses); *see also* Tarullo, *supra* note 374 (deeming the agencies' financial stability analyses "analytically underdeveloped").

405. In doing so, the DOJ should adopt a "precautionary approach" to financial stability, as Professor Hilary Allen has urged. *See* Hilary J. Allen, *A New Philosophy for Financial Stability Regulation*, 45 LOY. U. CHI. L.J. 173, 178–208 (2013).

406. See Kress, *Modernizing Bank Merger Review*, *supra* note 14, at 472–75.

407. *See supra* note 8 and accompanying text.

408. *See supra* note 8 and accompanying text.

409. *See supra* notes 223–224; *see also* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 572–95 (2018) (urging antitrust enforcers to review the labor-market effects of proposed mergers).

transmission and limits the Federal Reserve's ability to stimulate economic activity when conditions warrant.[410] Moreover, "financialization"—when finance constitutes an increasingly large proportion of a country's economy—is associated with declining productivity and increased economic inequality.[411] Going forward, therefore, bank consolidation's far-reaching anticompetitive consequences should inform the intensity of bank antitrust enforcement, and preventing excessive bank concentration ought to be a top priority of the broader antimonopoly agenda.

Finally, beyond the direct economic consequences of bank consolidation, policymakers should remain cognizant of political economy when making antitrust enforcement decisions. Bank consolidation threatens to distort the democratic process through large banks' legislative and regulatory lobbying, "revolving door" hiring practices, and sizeable political donations.[412] As Professor Art Wilmarth has documented, big banks' "political influence has expanded along with the growing significance of the financial sector in the U.S. economy."[413] Concentrating additional economic and political power in large banks may therefore lead to further distortions of public policy that facilitate banks' rent-seeking and impair broader societal interests. Preventing this type of distortion in the democratic process is a foundational tenet of U.S. antitrust law and should therefore guide bank antitrust enforcement in the future.[414]

In sum, to effectuate bank antitrust policy faithfully, enforcers must consider not only consumer welfare and efficiency but also a much broader range of nonprice competitive harms associated with excessive bank consolidation. The consumer welfare approach can play a role in effective bank antitrust enforcement if appropriately strengthened using the strategies proposed in Part IV.A. Because of the consumer welfare standard's narrow focus, however, bank antitrust enforcers must augment their analysis with a more expansive

410. *See supra* Part II.B.3.a.

411. *See* Stephen G. Cecchetti & Enisse Kharroubi, *Reassessing the Impact of Finance on Growth* 14 (Bank for Int'l Settlements, Working Paper No. 381, 2012), https://www.bis.org/publ/work381.pdf [http://perma.cc/DE7J-UTM3] (concluding that, past a certain point, large financial sectors are associated with lower economic productivity).

412. *See* Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1363–69 (2013).

413. *Id.* at 1283–84.

414. *See, e.g.*, Pitofsky, *The Political Content of Antitrust*, *supra* note 392, at 1060–65 (discussing the political origins of antitrust).

evaluation of potential nonprice harms. This dual approach—encompassing both price and nonprice considerations—is necessary to protect the public from the full range of anticompetitive consequences of excessive bank consolidation.

CONCLUSION

Bank antitrust has lost its way. For much of the twentieth century, Thomas Jefferson's vision for diffused, localized banks prevailed over Alexander Hamilton's preference for a centralized financial system. Over the past forty years, however, the Chicago School's emergence has produced rapid consolidation within the financial sector. Escalating bank concentration, in turn, has hurt consumers and small businesses, impaired macroeconomic resilience, and spurred conglomeration throughout the economy. Bank antitrust enforcers have failed to prevent these harmful consequences because the prevailing antitrust framework—guided by the consumer welfare standard—is narrowly focused on consumer prices and efficiency, with a misguided belief that markets are self-correcting and that antitrust intervention is typically unnecessary. A new approach is therefore needed to enhance bank competition. By strengthening analytical tools used to detect anticompetitive bank mergers and expanding the scope of bank antitrust to encompass nonprice harms, policymakers can better protect society from the economic and social costs of excessive bank consolidation. As this Article has demonstrated, robust bank competition is essential to thriving and fair commercial markets. Reviving bank antitrust should therefore be an essential cornerstone of a comprehensive pro-competition agenda for the U.S. economy.