# REGULATING BANK MERGERS: PAST AND PRESENT

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*For the first time in decades, bank merger policy stands at a crossroads. Amidst a new and wide-ranging antimonopoly movement, concerns regarding concentrated financial power and the structure of the American banking system have taken center stage. Following calls for public comment on revising the 1995 Bank Merger Competitive Review Guidelines by the Department of Justice, internal discord over reform efforts at the Federal Deposit Insurance Corporation ("FDIC"), and the failure of numerous regional banks, a fundamental reassessment of the law governing bank mergers and acquisitions is firmly underway. While some policy-makers and scholars have argued that antitrust law should play a larger role in preventing consolidation in the financial sector, this Article employs the methodology of legal history to emphasize the limits of reviving antitrust in banking.*

*Excavating the origins and evolution of the Bank Holding Company Act (the "BHCA") and the Bank Merger Act (the "BMA"), which govern regulatory oversight of bank mergers, reveals that an expansive conception of the public interest extending well beyond the bounds of antitrust doctrine guided the bank merger regime in its formative early years. By retracing the legislative, administrative, and judicial interpretations of the public interest approach to bank mergers, this Article foregrounds an alternative, and historically potent, mechanism through which to combat banking consolidation. Ultimately, the complex history of the BHCA and BMA provides an important reminder that while antitrust has long served as a critical weapon in the battle against concentrated economic power, it has not been the only weapon. As the future of bank merger policy hangs in the balance, a turn to the past may therefore yield a more promising way forward.*

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## I. INTRODUCTION

For the first time in decades, bank merger reform has returned to the spotlight. In July 2021, President Biden issued an executive order on promoting competition in the American economy which called for the "revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956," the two statutes that govern the approval of mergers and acquisitions by bank regulators.[1] Six months later, the Department of Justice issued another call for public comment on revising the 1995 Bank Merger Competitive Review Guidelines, the primary framework through which the Antitrust Division evaluates the competitive effects of mergers in the banking sector.[2] Not long after, controversy erupted at the FDIC as a majority of Democratic members of the FDIC Board issued a request for information regarding the bank merger review process without the approval of Republican Chairwoman Jelena McWilliams, raising new questions regarding administrative procedure.[3] The urgency of merger reform not only exposed the fault lines of internal agency dynamics in an age of political polarization, but also eventually led to the resignation of FDIC Chairwoman McWilliams.[4]

1. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36988–92 (July 14, 2021).
2. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Antitrust Division Seeks Additional Public Comments 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/TC3T-XVU6].
3. *See* Mehrsa Baradaran & Jeremy Kress, *Your Pocketbook Is Ruled by This Agency, and It's in the Middle of a Huge Fight*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/2021/12/14/opinion/jelena-mcwilliams-fdic-bank-regulation.html [https://perma.cc/KV77-YPHJ].
4. *See* Todd Phillips, *The Fracas at the FDIC*, 72 DUKE L.J. ONLINE 58, 58 (2022).

What has sparked these public disputes and renewed debate over bank merger policy after decades of neglect? Growing concerns over the continuous consolidation of the banking sector and the rapid pace at which mergers and acquisitions are now approved have led to a reevaluation of the bank merger framework that is long overdue. Though the U.S. once featured over 30,000 banks, today, fewer than 5,000 banks remain, and just six bank holding companies control over half of the total assets in the commercial banking system.[5] Moreover, federal banking agencies have not formally rejected a bank merger application since 2003, and the Department of Justice has not litigated a bank merger case since 1985.[6]

The stakes of permitting bank mergers and acquisitions to continue virtually unabated are high. Empirical studies have shown that banking consolidation facilitates concentration in the economy more broadly.[7] Bank mergers have also been linked to a decline in overall lending in local markets, higher fees and interest rates on mortgages and personal loans, harm to small businesses, and the closure of bank branches, especially in underserved and disadvantaged communities, raising further concerns regarding access and equity in credit provision.[8] In addition, the sobering lessons of the 2008 financial crisis laid bare the dangers of bank size and interconnectedness, revealing the risks of permitting banking conglomerates to become "too big to fail," "too big to supervise," and "too big to manage."[9] On the heels of a regional banking crisis that saw the collapse of First Republic Bank and Silicon Valley Bank, the second and third-largest bank failures in U.S. history, important questions surrounding bank size, systemic risk, and the structural diversity of the American banking system have reemerged.[10]

5. *See* Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 522 (2022); William R. Emmons, *Slow, Steady Decline in the Number of U.S. Banks Continues*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECON. BLOG (Dec. 9, 2021), https://www.stlouisfed.org/on-the-economy/2021/december/steady-decline-number-us-banks [https://perma.cc/3TZX-ANEW].

6. *See* Kress, *supra* note 5, at 526–27 n.22. While the decrease in merger denials by bank agencies and the inaction of the DOJ may reflect the development and publication of bank merger guidelines as well as informal guidance, the number and pace of approvals nevertheless remains troubling. *See* Jeremy Kress, *Fed Is a Rubber Stamp for Bank Mergers—It's a Problem*, AM. BANKER (Apr. 10, 2019, 9:49 AM) https://www.americanbanker.com/opinion/fed-is-a-rubber-stamp-for-bank-mergers-its-a-problem [https://perma.cc/ZAT6-LHW6].

7. *See* Kress, *supra* note 5, at 523.

8. *See id.* at 555–58 (highlighting the increased cost and reduced availability of credit following bank mergers, the decline in small business lending as larger banks seek out larger commercial customers, and the negative impacts of bank consolidation on low-and moderate-income and minority communities); *see also* Jeremy Kress & Rohit Chopra, Comment Letter on Bank Merger Competitive Review Guidelines (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581730/chopra_-_comment_doj_banking_merger_guidelines.pdf [https://perma.cc/2UPU-MDVH].

9. *See* Saule T. Omarova, *The "Too Big to Fail" Problem*, 103 MINN. L. REV. 2495, 2496 (2019); Jeremy Kress, *Solving Banking's "Too Big to Manage Problem*,*"* 104 MINN. L. REV. 171, 173 (2019); Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1528 (2018).

10. Joshua Franklin et al., *Silicon Valley Bank Shut Down by US Banking Regulators*, FIN. TIMES (Mar. 10, 2023) https://www.ft.com/content/6943e05b-6b0d-4f67-9a35-9664fb456504 [https://perma.cc/J96W-ZDYQ]; *The Collapse of First Republic Bank*, FIN. TIMES (May 1, 2023), https://www.ft.com/content/7b6055c2-710b-4293-b511-147320f66e09 [https://perma.cc/AHX9-LR56].

With the acquisition of First Republic Bank by J.P. Morgan, one of the most powerful financial institutions in the world, bank mergers have once again proven an essential stop-gap measure to restore stability amidst financial emergency.[11] Grappling with the long-term consequences of bank merger policy and the critical role of regional and community banks in the American economy has never been more timely.

Scholars and policy-makers have therefore begun to offer actionable roadmaps for revising the bank merger framework. One prominent proposal focuses on the revitalization of antitrust law as a means of curbing bank mergers. Contending that antitrust once played an important role in preventing bank consolidation but fell into disuse in the late twentieth century with the rise of the Chicago School, this reform proposition seeks to restore bank antitrust to its former glory.[12] Amidst a wide-ranging antimonopoly movement driven by the neo-Brandeisians, an influential group of scholars reimagining the very foundations of antitrust law, the revival of antitrust in banking appears at first blush both timely and promising.[13] By recovering the neglected history of bank merger reform, however, this Article reveals that antitrust has always occupied a tenuous place within the bank merger regime. Indeed, as banking regulators argued for decades, antitrust law has never been the most effective tool for combatting bank consolidation.[14]

As reformers increasingly place their faith in antitrust law, the time is ripe for a reexamination of the limits of reviving antitrust in banking.[15] As the long road to the Bank Holding Company Act (the "BHCA") of 1956 and the Bank Merger Act (the "BMA") of 1960 reveals, policy-makers designed the statutes governing bank mergers and acquisitions as comprehensive antimonopoly tools encompassing far more than the standards of the Sherman and Clayton Antitrust Acts. Indeed, Congress enacted the BHCA and the BMA at a time when antitrust law was thought to have little relevance or effectiveness in the uniquely regulated sphere of banking.[16] Banking regulators, moreover, continuously exercised their power under these statutes to reject bank mergers and acquisitions based on

11. Rachel L. Ensign & Ben Eisen, *First Republic Bank Is Seized, Sold to J.P. Morgan in Second Largest U.S. Bank Failure*, WALL ST. J. (May 1, 2023, 1:22 PM) https://www.wsj.com/articles/first-republic-bank-is-seized-sold-to-jpmorgan-in-second-largest-u-s-bank-failure-5cec723 [https://perma.cc/3W64-3F6J]. Regulators similarly supported a number of bank mergers amidst the 2008 financial crisis. *See* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 436 (2020) ("The biggest irony of the 2008 financial crisis is that the market crash was both initially triggered and ultimately alleviated by massive bank mergers.").

12. *See* Kress, *supra* note 5, at 528–29.

13. On the rise of the neo-Brandeisian movement and antitrust reform more broadly, see generally Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018) (U.K.); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

14. *See infra* Parts II–IV.

15. *See* Kress, *supra* note 5, at 583; Daniel K. Tarullo, *Regulators Should Rethink the Way They Assess Bank Mergers*, BROOKINGS (Mar. 16, 2022), https://www.brookings.edu/articles/regulators-should-rethink-the-way-they-assess-bank-mergers/ [https://perma.cc/D5JT-JS4K]; Kress & Chopra, *supra* note 8, at 1.

16. *See, e.g.*, Adolf A. Berle, Jr., *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589, 589 (1949) ("Application of the anti-trust laws to banking is a relatively new field of study. . . . Until relatively recent times, many lawyers would have considered anti-trust attack on practices and agreements with respect to banking operations as *prima facie* impossible.").

broad public interest considerations that extended well beyond the confines of antitrust doctrine.[17]

By retracing and interrogating the foundations of the American bank merger regime in the formative decades of the postwar era, this Article emphasizes an alternative and historically potent mechanism through which to combat banking concentration.[18] Foregrounding the importance of a public interest approach to bank mergers and acquisitions not only contributes to current debates regarding bank merger policy but also advances the ongoing project of antitrust reform as well.[19] For even as a more expansive vision of antitrust has begun to coalesce with the neo-Brandeisian movement—one that encompasses a broad range of objectives beyond consumer welfare—the history of the BHCA and BMA provides an important reminder that antitrust need not do all of the work.[20] While antitrust law has long served as a critical weapon in the battle against monopoly power and inequality, it has not been the only weapon. To address the economic and political ramifications of concentrated financial power in the mid-twentieth century, policy-makers determined that antitrust law should not be the sole, or even the primary, instrument in regulators' hands.[21] As the future of the American bank merger regime hangs in the balance, a turn to the past may therefore yield a more promising way forward.

Amidst growing debate over whether antitrust law can play a larger role in bank merger analysis, this Article poses a different question. Rather than asking whether antitrust law can do more to stem bank mergers, this Article asks whether it should in light of the historically complex and fraught relationship between financial regulation and competition policy. Part II recounts the long struggle to enact the BHCA and grounds the legislation in the failure of antitrust law to adequately combat rising levels of bank consolidation. Part III examines the early interpretations of the BHCA and emphasizes the importance of public interest considerations that eschewed the bounds of antitrust law in several key decisions restricting bank expansion. Part IV focuses on the enactment of the BMA, and the tensions and divisions among banking regulators and the Department of Justice as they battled for control over the implementation of bank merger policy in the late 1950s and early 1960s. The discord generated by the

17. Both the BHCA and the BMA require regulators to consider the overall impacts of a proposed transaction on the "public interest." *See* Bank Holding Company Act of 1956, Pub. L. No. 84-511, §§ 3(c), 11, 70 Stat. 133, 135 (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, 129 (codified as amended at 12 U.S.C. § 1828(c)).

18. Though several scholars advocated for a broader reading of competitive effects and the public interest under the BHCA and the BMA in the 1970s and 1980s, there has been no sustained historical reassessment of the relationship between banking and antitrust since. *See* Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, DUKE L.J. 580, 593 (1983); Stephen J. O'Brien, *The Development of Bank Regulation and Its Appropriate Competitive Standards: Grays Harbor—A Gathering Storm*, 31 BUS. L. 415, 423 (1975); *but see* Eugene J. Metzger & Marsha K. Greenfield, *Agency Discretion to Deny Bank Mergers: What Are the Limits?*, 98 BANKING L.J. 838, 839 (1981).

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

20. On neo-Brandeisian antitrust reform, see Khan, *supra* note 13, at 131; *see also* WU, *supra* note 13.

21. *See infra* Section II.C; Part III.

challenge of translating competing antimonopoly ideals into administrative practice eventually led to amending both the BHCA and the BMA in 1966.[22]

Part V traces the impact of the 1966 amendments, which narrowed the terrain upon which mergers and acquisitions could be evaluated by explicitly incorporating the language of the antitrust laws into the statutory guidelines. By placing their faith in antitrust, policy-makers not only diminished the significance of the public interest factors in the bank merger review process but contributed to a critical shift in the very conception of commercial banks themselves.[23] Rather than viewing banks as akin to public utilities, a tradition that stretched back to the very outset of the nation and reached an apex with the financial reforms of the New Deal, regulators who had been instructed to rely on the antitrust laws could more comfortably treat banks as ordinary market actors.[24] Part VI concludes by reflecting on the consequences of that choice for bank merger policy today and advocates for greater reliance on a public interest approach under the BHCA and the BMA. Policy-makers once recognized the limitations of antitrust law in banking in light of commercial banks' unique role in the economy and the regulatory perimeter that facilitated their protected status.[25] They created the BHCA and the BMA to provide regulators with broader and more flexible power to combat financial concentration.[26] The story of how those regulatory tools were once deployed, and how they came to be forgotten, deserves a more prominent place in contemporary debates surrounding the revival of antitrust in bank merger policy. This Article recounts that story and contends that the neglected history of bank merger reform must inform its future.

## II. THE LONG ROAD TO THE BHCA

For the first half of the twentieth century, antitrust law was considered inapplicable to commercial banks.[27] In light of their unique and essential role within the broader economy, banks had long been viewed as more akin to public utilities and subjected to heightened regulatory scrutiny.[28] Commercial banks were therefore deemed to be immune from antitrust prosecution.[29] Like the public utility holding company, the development of the bank holding company in the early twentieth century threatened the carefully regulated structure of the commercial banking system as holding companies could acquire innumerable banks despite restrictions on bank expansion.[30] After years of failed attempts at a

22. *See infra* Part IV.
23. *See infra* Part V.
24. *See infra* Section V.D.
25. *See infra* Section V.D.
26. *See infra* Section V.C.
27. *See* Berle, *supra* note 16, at 589–90.
28. *See infra* Section IV.A.
29. *See* Berle, *supra* note 16, at 589–90; *see also* BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT: PROMISE AND PERIL 8 (2001).
30. *See* WARD RALPH LAMB, GROUP BANKING: A FORM OF BANKING CONCENTRATION AND CONTROL IN THE UNITED STATES 80–90 (1961); *see also* Jamie Grischkan, *Banking and the Antimonopoly Tradition: The*

legislative solution, the Federal Reserve finally turned to antitrust law in an effort to prevent the unchecked growth of bank holding companies.[31] By retracing the long road to the BHCA, this Part demonstrates that the convergence of antitrust law and banking regulation in the mid-twentieth century unfolded not as a result of regulators' faith in antitrust, but as a measure of last resort.

### *A. Bank Holding Companies and the Public Utility Ideal*

When Congress passed the BHCA and the BMA in 1956 and 1960, respectively, the United States featured an exceptionally decentralized banking structure unparalleled anywhere else in the world.[32] Comprised of thousands of unit, or independent, banks restricted from expanding through branch offices or engaging in commercial activities, the American banking system reflected a deeply rooted commitment to combatting concentrated financial power.[33] In exchange for the valuable privileges of a bank charter, commercial banks were beholden to a heightened regulatory regime designed to ensure safety and stability as well as a democratized landscape of small unit banks incapable of accruing market power. This "monetary settlement," solidified under the National Bank Act of 1864, fashioned commercial banks as a kind of public utility, local franchises of the government protected from certain forms of competition in order to provide a sound currency and preserve both a democratic economy and polity.[34] As Hugh McCulloch, the first Comptroller of the Currency, explained in an 1863 letter,

> [t]he national system of banking has been devised with a wisdom that reflects the highest credit upon its author to furnish to the people of the United States a *national bank-note circulation without the agency of a national bank*. It is not to be a mammoth corporation; with power to increase and diminish its discounts and circulation, at the will of its managers, thus enabling a Board of Directors to control, to a large extent, the business and politics of the country. It can have no concentrated political power. . . . It will concentrate in the hands of no privileged persons a monopoly of banking.[35]

"It is, therefore, in my judgement," McCulloch concluded, "not only a perfectly safe system of banking, but it is one that is eminently adapted to the nature of our political institutions."[36]

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*Long Road to the Bank Holding Company Act*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY 208 (Daniel A. Crane & William J. Novak eds., 2023).

31. *See infra* Section II.A.

32. *See* CHARLES W. CALOMIRIS & STEPHEN H. HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT 183 (2014); Richard Sylla, *Small Business Banking in the United States, 1780–1920*, *in* SMALL BUSINESS IN AMERICAN LIFE 240, 253 (Stuart W. Bruchey ed., 1980).

33. *See, e.g.*, CALOMIRIS & HABER, *supra* note 32, at 153–79; Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VANDERBILT L. REV. 951, 951–52 (2021).

34. *See* Menand, *supra* note 33, at 958; *see also* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1148 (2017).

35. Morris Ketchum, *The National Banking Law—Opinion of the New Comptroller*, N.Y. TIMES, May 21, 1863, at 1 (emphasis added).

36. *Id.*

Despite concerted opposition throughout the second half of the nineteenth century, this uniquely decentralized system of commercial banks proved astonishingly resilient.[37] Thus, even as the second industrial revolution and the rise of managerial capitalism fostered economies of scale and scope never before seen, commercial banking remained a predominantly small and local affair.[38] Indeed, restrictions on expansion and minimum capitalization requirements meant that many towns and rural areas across the nation featured only one, or a handful, of commercial banks.[39] The American banking system thus fostered local bank monopolies in order to prevent the domination of financial resources by massive bank conglomerates.[40] Amidst rising criticism of the anticompetitive features of this system and a growing chorus of support for branch banking, subsequent Comptrollers of the Currency went on to reaffirm the public character of commercial banking and the political, as well as economic, motives behind its dispersed structure. As Charles Dawes typified in an 1894 publication, *The Banking System of the United States*,

> [f]rom the standpoint from which we shall consider a bank in its relation to the business community, we shall not treat it as a private corporation organized for profit, but will regard it as in the nature of a public corporation, its officers as public officers serving the business community . . . ." [41]

As the "creators of the great bulk of the money" of the nation and a "species of trusteeship for the community," banks, in Dawes' estimation, needed to remain rooted in the localities they served.[42] As Dawes explained in a speech at the 1902 meeting of the American Bankers Association:

> Those of us who oppose branch banking . . . know that a branch banking system would cost the community less in the amount of interest which must be collected . . . . We admit that there would be a less number of banks . . . and greater facility in the movement of money between the different sections of our country, and greater convenience to some lines of business.[43]

Yet Dawes went on to defend the economic costs of unit banking as a necessary price to pay for the preservation of small business and individual opportunity, upon which American democracy depended:

37. *See* Christian A. Johnson & Tara Rice, *Assessing A Decade of Interstate Bank Branching*, 65 WASH. & LEE L. REV. 73, 80 (2008) ("[E]very comptroller in office until 1922 agreed that national banks could not open a bank in more than one location. Likewise, during the next fifty years, there was little if any branching of any kind occurring at the *state* level."); *see also* GEORGE E. BARNETT, STATE BANKS AND TRUST COMPANIES SINCE THE PASSAGE OF THE NATIONAL-BANK ACT 135 (1911) (in 1911 "[u]nder none of the state banking laws has there been built up an important system of branch banks").

38. *See* ALFRED D. CHANDLER JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 40–43 (7th prtg. 1982).

39. *See* CALOMIRIS & HABER, *supra* note 32, at 154, 321–22.

40. *See id.* at 154.

41. Charles G. Dawes, The Banking System of the United States and Its Relation to the Money and Business of the Country 7 (1894).

42. *Id.* at 7–9.

43. *Branch Banking in the United States, in* BD. GOVERNORS FED. RSRV. SYS., BRANCH BANKING IN THE UNITED STATES: CIRCA 1932 87–88 (Fed. Rsrv. Bank of St. Louis 2012) (quoting PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL CONVENTION OF THE AMERICAN BANKERS' ASSOCIATION 119–20 (1902)).

> The position we do take at this time is this: That to let the great central banks of our cities into competition with the smaller banks of the country by taking down the restrictive legislation of present laws would so injure the opportunities for credit of the present great class of borrowing customers of small banks . . . it would be most unwise for us at this time to adopt. . . . Thank heaven this great system has been built up under the American theory as distinguished from the monarchical theory—by protecting . . . the right to grow of fifteen thousand differentiated banking units as distinguished from a great central bank protected by government and ramifying out in its commercial influence by branches . . . .[44]

Thus, by the dawn of the twentieth century, thousands of national and state unit banks dotted the landscape, a geographically segmented and peculiarly fragmented financial structure that limited competition in the service of democratic ideals.[45]

The development of the holding company in the Gilded Age therefore proved a potent weapon for those looking to evade the regulatory constraints of federal and state banking laws. Through a bank holding company, which was not itself a bank but a corporation chartered under liberalized state general incorporation laws, enterprising businessmen could acquire the stock of innumerable banks and businesses despite prohibitions on branch banking and mixing banking and commerce.[46]

Unit bankers, threatened by the emergence of a new competitor capable of evading the restrictions on bank expansion, waged early campaigns against the bank holding company device.[47] They were soon joined, however, by a much broader coalition of populist and Progressive reformers.[48] Alongside public utility and railroad holding companies, which thwarted the authority of new administrative commissions designed to provide heightened supervision of these critical industries, the bank holding company became another target in the

44. *Id.* at 88 (quoting PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL CONVENTION OF THE AMERICAN BANKERS' ASSOCIATION 119–21 (1902)); *see also* Jamie Grischkan, Banking, Law, and American Liberalism: The Rise and Regulation of Bank Holding Companies in the Twentieth Century 164 (2022) (PhD dissertation, Boston University) (on file with author).

45. *See* Sylla, *supra* note 32, at 240 ("Among the industrializing nations of the nineteenth century, the United States was unique in terms of the vast numbers of small, independent banks that occupied central places in its monetary and financial system."); *see also* CALOMIRIS & HABER, *supra* note 32, at 81–82.

46. *See* GAINES THOMSON CARTINHOUR, BRANCH, GROUP AND CHAIN BANKING 199 (1931); LAMB, *supra* note 30, at 80–90.

47. *See* LAMB, *supra* note 30, at 39.

48. *See id.* at 38–43 (detailing the opposition of unit bankers to various forms of banking concentration including bank holding companies); *see also* JONATHAN KASPAREK, FIGHTING SON: A BIOGRAPHY OF PHILIP F. LAFOLLETTE 91 (2006) (emphasizing the centrality of the campaign against chain and group banking to Wisconsin Progressive Philip LaFollette's gubernatorial campaign, and connecting it to the fight against public utility holding companies and chain stores). *See generally* JOHN MAURICE CLARK, SOCIAL CONTROL OF BUSINESS (L.C. Marshall ed. 1926) (tracing the rise of the Progressive movement for the "social control" of business and its regulatory contours); LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914) (praising local savings banks and advocating for the regulation of banks as public utilities while criticizing holding companies).

Progressive battle for government oversight of private power.[49] Despite mounting opposition, however, both state and federal efforts to regulate bank holding companies were largely ineffective.[50] Even the establishment of the Federal Reserve in 1913 left the unit banking system intact, further encouraging the growth of bank holding companies.[51] Though Congress held extensive hearings on bank holding companies, as well as branch and chain banking, in 1930, the onset of the Great Depression largely halted bank holding company expansion and reform efforts as policy-makers focused on stemming the bleeding of a hemorrhaging financial system.[52]

The solution fashioned in 1933 upon the heels of Franklin D. Roosevelt's historic election brought both transformation and continuity to American commercial banking. The Banking Act of 1933 did not fundamentally alter restrictions on branch banking, for example, but instead established federal deposit insurance as the solution to the banking crisis.[53] Together with the Banking Act of 1935, it nevertheless wrought profound changes in other elements of the banking sector. It effectively separated commercial and investment banking, introduced rate regulations in the form of prohibiting interest payments on checking accounts and permitting rate caps on other forms of deposits, and imposed additional barriers to entry by requiring an assessment of public need and convenience to obtain a bank charter.[54]

These provisions strengthened commercial banks' quasi-public nature under the law, for structural separation, rate regulation, and entry restriction represented the hallmarks of public utility regulation.[55] As policy-makers shored up restrictions on competition as critical to bank safety and soundness, commercial banks' resemblance to local utilities reached new heights.[56] And just as the

49. *See* JAMES C. BONBRIGHT & GARDINER C. MEANS, THE HOLDING COMPANY: ITS PUBLIC SIGNIFICANCE AND ITS REGULATION 319–36 (1932).

50. Following the Panic of 1907, the Pujo Committee had recommended a prohibition on corporate ownership of national bank stock, but the initiative was not included in the reforms that followed. *See* H.R. REP. NO. 62-1593, at 163 (1913).

51. *See* ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877–1917 235–59 (1999).

52. *See* GERALD C. FISCHER, BANK HOLDING COMPANIES 10 (1961) (pointing to Wisconsin and Missouri as states that regulated bank holding companies, and West Virginia and New Jersey as states that prohibited group banking); LAMB, *supra* note 30, at 80–102.

53. *See* CALOMIRIS & HABER, *supra* note 32, at 154. While prohibitions on interstate bank branching endured, a number of states did move to allow some form of intrastate branching following the bank failures of the Great Depression. *See* LAMB, *supra* note 30, at 34.

54. *See* Prasad Krishnamurthy, *George Stigler on His Head: The Consequences of Restrictions on Competition in (Bank) Regulation*, 35 YALE J. ON REGUL. 823, 825, 842–45 (2018); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 817–19 (2018); Ann Fleming, *Anti-Competition Regulation*, 93 BUS. HIST. REV. 701, 706, 713–14 (2019).

55. *See* Ricks, *supra* note 54, at 768–69.

56. *See* Daniel R. Fischel, Andrew M. Rosenfield & Robert S. Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 302–03 (1987). Certainly, important differences remained. Though competition was restricted, it was not wholly supplanted by regulation through commissions. In addition, banks were not subject to the same kinds of entry barriers and high fixed costs faced by traditional public utilities like water, gas, and electricity provision. In his sweeping legal history of banking regulation, J. Willard Hurst thus

holding company had imperiled the carefully drawn landscape of state and municipal control of utilities,[57] drawing the ire of the public and policy-makers alike, so too did the bank holding company threaten the product and entry restrictions reaffirmed by the Banking Acts of 1933 and 1935. Thus, by the time Congress enacted the Public Utility Holding Company Act of 1935 ("PUCHA") after exposing the rampant abuse and corruption wrought by holding companies in the utility sector, it offered a critical precedent for a renewed battle for control over the bank holding company device.[58]

President Roosevelt himself took up that battle in the winter of 1938, directly linking the bank holding company to the maligned public utility holding company in a January press conference.[59] Behind the scenes, early discussions on bank holding company reform within his administration revolved around "death sentence" legislation modeled after the PUCHA.[60] In a confidential Federal Reserve memo authored in December 1937, several members of the Board detailed plans to provide for the dissolution of all bank holding companies within five years: "The purpose of this memorandum," they stated plainly, "is to present some facts concerning the present status of bank holding companies and to suggest statutory requirements which would (a) Limit their future expansion (b) Result in their eventual though not immediate dissolution and (c) Simplify and strengthen the procedure of regulating them."[61] Henry Morgenthau Jr., the Secretary of the Treasury, similarly advocated abolishing bank holding companies.[62]

By the spring of 1938, FDR called out the particular threat posed by bank holding companies in his annual address to Congress.[63] Warning of the danger concentrated private power posed to the "liberty of a democratic people," FDR declared that it was "hardly necessary to point out the great economic power that might be wielded by a group which may succeed in acquiring domination over banking resources in any considerable area of the country."[64] "That power is particularly dangerous when it is exercised from a distance," he went on, "and notably so when effective control is maintained without the responsibilities of complete ownership."[65] Drawing an explicit parallel to public utility holding

referred to commercial banking as a "poorly defined and poorly implemented public utility." *See* JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970 153 (1973).

57. *See* HURST, *supra* note 56, at 153, 202–06.

58. On the enactment of the Public Utility Holding Company Act, see WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 108–29 (2002).

59. Franklin D. Roosevelt, U.S. President, Press Conference (Jan. 14, 1938) (transcript available in the Franklin D. Roosevelt Presidential Library & Museum); *see* Grischkan, *supra* note 30, at 211–12.

60. *See* Grischkan, *supra* note 30, at 211, 230.

61. Confidential Memorandum from G.W. Blattner, C.E. Cagle & M.B. Wingfield to Messrs. Morrill, Wyatt, Paulger, Goldenweiser, and Smead (Dec. 30, 1937) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 17, Folder 1, Item 1).

62. *See* Transcript of Group Meeting (Jan. 5, 1938), (Franklin D. Roosevelt Presidential Library & Museum, Diaries of Henry Morgenthau Jr. April 27, 1933 – July 27, 1945, Series 1, Volume 105).

63. FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO THE STRENGTHENING AND ENFORCEMENT OF ANTITRUST LAWS, S. DOC. NO. 75-173, at 1 (1938).

64. *Id.* at 1, 8.

65. *Id.* at 8.

companies, FDR cautioned, "[w]e have seen the multiplied evils which have arisen from the holding company system in the case of public utilities, where a small minority ownership has been able to dominate a far-flung system. We do not want those evils repeated in the banking field . . . ."[66] FDR concluded by imploring Congress to enact legislation that would "prevent holding companies from acquiring control of any more banks" and eventually provide for their elimination.[67]

A bill introduced in 1938 by Representative Wright Patman, who had long opposed big banks and big business, reflected the preference for dissolution, and featured a death sentence provision that mandated the unwinding of all bank holding companies within three years.[68] For these advocates of reform, the bank holding company deserved no place in the American banking landscape. Though they favored dissolution, a remedy associated with antitrust law,[69] their legislative proposals derived from a different and much more deeply rooted antimonopoly tradition, that of the public utility ideal.[70] The bank holding company device posed a threat to the enduring compromise that had defined commercial banking for over a century, a compromise that envisioned commercial banks as government instrumentalities and deliberately restricted bank size and competition in significant ways.[71]

Even advocates of unit banking had long acknowledged that branch banks and bank holding companies might increase competition and lower interest rates.[72] Nevertheless, unit banking had been repeatedly preserved and shored up for reasons that extended beyond competition. The idea that unit banks were best situated to provide credit within their localities and facilitate broad access to capital, as well as political concerns regarding the connections between a dispersed banking structure and democratic governance, had long contributed to the survival of unit banking.[73] Like public utilities, banks' role as creators of money rendered them critical economic actors distinct from ordinary businesses, and subject to a heightened form of regulatory oversight that substituted in certain aspects for market forces.[74] Antitrust law, with its focus on preserving competition, therefore appeared an impractical and illogical mechanism through which

66. *Id.*

67. *Id.* at 8–9.

68. *See* H.R. 8890, 75th Cong. (1938).

69. Grischkan, *supra* note 30, at 215.

70. On the history of the public utility concept, see William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, 139, 139–45 (William J. Novak & Naomie Lamoreaux eds., 2017).

71. *See* Menand, *supra* note 33, at 996–1001; *Branch Banking in the United States*, *supra* note 44, at 47–71; Sylla, *supra* note 32, at 257–59.

72. *See Branch Banking in the United States*, *supra* note 43, at 87–88.

73. *See id*. at 80–92 (detailing early twentieth century arguments in favor of unit banking that rested on political and social grounds, including the need for local access to credit and the danger concentrated financial power posed to democratic governance); *see also* Baradaran & Kress, *supra* note 3.

74. *See* Ricks, *supra* note 54, at 816–27 (discussing various elements of infrastructural regulation in banking); Menand, *supra* note 33, at 958, 996–1001 (recounting the pillars of the American Monetary Settlement which involve heightened supervision and regulatory restrictions related to size and structural separation).

to address the bank holding company problem. Indeed, the academic consensus at the time regarded antitrust law as inapplicable to the banking sector.[75] Rather, early bank holding company bills bore a striking resemblance to public utility holding company legislation.[76]

Nevertheless, after years of failed efforts to enact a bank holding company bill modeled along the lines of public utility regulation, reformers reached for a different weapon, one that had never before been used in the banking sector. By the mid-1940s, Marriner Eccles, a former bank holding company president turned Chairman of the Federal Reserve, had initiated an investigation into whether the Board of Governors had authority under the Clayton Antitrust Act to bring suit against a bank holding company.[77] Eccles's quest to rein in the rising power of bank holding companies through any means necessary eventually led the Federal Reserve to bring the first antitrust case in its history. In 1948, the Board of Governors officially filed suit against the Transamerica Corporation, the most formidable bank holding company in the nation.[78] And though his path-breaking efforts would result in a failed antitrust case against Transamerica, Marriner Eccles would ultimately pave the way toward a more comprehensive, and more powerful, antimonopoly weapon.

### *B. The Case Against Transamerica*

A.P. Giannini, the founder of Transamerica, presided over the largest bank in the world by 1945.[79] A brash visionary born in San Francisco in 1870 to Italian immigrants, Giannini had long defied regulators as he built a formidable banking empire during the first half of the twentieth century.[80] Transamerica, the holding company that owned the majority interest in Bank of America, as well as numerous other banks and nonbanking businesses, represented in the eyes of many government officials a dangerous monopoly looming over the financial sector.[81] As Leo Crowley, chairman of the FDIC, warned of Transamerica in a memorandum to Henry Morgenthau, the Secretary of the Treasury, on January 31st, 1938, "[a]t the present time the Bank of America has 490 branches. This represents a large concentration of credit in one group, or in fact, in the hands of one man."[82] Despite increasing apprehension regarding Transamerica's relentless expansion and defiant attitude toward regulators, however, Eccles held a different view of Giannini throughout the late 1930s.

75. *See, e.g.*, Berle, *supra* note 16, at 589–90.

76. *See infra* Section II.C.

77. On Eccles's role in bank holding company reform, see Grischkan, *supra* note 30, at 221–23.

78. *See infra* Section II.B.

79. Bank of America was the largest bank in the world in 1945 and was controlled by A.P. Giannini through Transamerica. *See* MARQUIS JAMES & BESSIE ROWLAND JAMES, BIOGRAPHY OF A BANK: THE STORY OF BANK OF AMERICA 293, 477 (1954).

80. *See id.* at 290–94.

81. Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18.

82. Letter from Leo Crowley, Chairman, FDIC, to Henry Morgenthau, Jr., Sec'y of the Treasury (Jan. 31, 1938) (Franklin D. Roosevelt Presidential Library & Museum, Diaries of Henry Morgenthau Jr. April 27, 1933–July 27, 1945, Series 1, Volume 354).

The son of Scottish and Irish immigrants, Eccles was born and raised in Utah and had a great deal in common with A.P. Giannini, the son of Italian immigrants who had grown up along the bustling docks of San Francisco.[83] As both outsiders to the Wall Street establishment and wildly successful bankers at the helm of prominent western bank holding companies, Eccles and Giannini agreed on several matters as the Depression gave way to the New Deal.[84] Eccles thus maintained a collegial relationship with Giannini throughout the late 1930s, even as he tussled with the SEC and the Comptroller of the Currency over alleged misrepresentations and unsound banking practices.[85] Indeed, Eccles helped Giannini negotiate an agreement with the Comptroller in the spring of 1940.[86] As late as 1941, Eccles defended Giannini by deeming the bank holding company bill sponsored by Henry Morgenthau and Senator Carter Glass unfairly discriminatory toward Transamerica.[87]

By 1942, however, Eccles' views of Giannini and Transamerica itself changed dramatically.[88] For Giannini had continued growing Transamerica to ever greater heights by acquiring the stock of numerous banks without meeting the requirements of its deal with the Comptroller, who denied permission for new branches.[89] Undeterred, Giannini attempted to secure approval for new branches from the Federal Reserve through indirect means.[90] His attempt at playing the agencies against each other ultimately failed, however, as the Federal Reserve, the Comptroller, and the FDIC agreed to present a united front in rejecting any requests for expansion by Transamerica. In a letter dated February 14, 1942, the Board made clear that all three agencies would continue to "decline permission for the acquisition directly or indirectly of any additional banking offices . . . by

83. *See* MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 3–7 (Sidney Hyman ed., 1951); FELICE BONADIO, A.P. GIANNINI: BANKER OF AMERICA 1–16 (1994).

84. *See* Elliot V. Bell, *Bank Law an Issue in Giannini Dispute*, N.Y. TIMES, Dec. 4, 1938, at F1.

85. Letter from Marriner S. Eccles, Chairman, Fed. Rsrv., to A.P. Giannini, Founder, Transamerica Corp. (Nov. 2, 1940) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 1, Item 15) (Eccles wished "banking leaders in the various parts of the country had an equally vigorous and progressive attitude toward the mission of banking in contributing to the solution of our economic problems").

86. *See* BONADIO, *supra* note 83, at 261–73.

87. Letter from Marriner S. Eccles, Chairman, Fed. Rsrv., to Franklin D. Roosevelt, President, U.S. of Am. (Jan. 23, 1941) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 17, Folder 5, Item 1) ("We feel that the proposed bill is punitive in that it is directed against one particular banking group . . . .").

88. *See* JAMES & JAMES, *supra* note 79, at 449–50; Grischkan, *supra* note 30, at 217.

89. Letter from Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., to A.P. Giannini, Founder, Transamerica Corp. (Aug. 29, 1942) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 2, Item 8).

90. Having been denied permission for new branches in California by the Comptroller, Giannini attempted to condition his purchase of a Pasadena bank, the First Trust and Savings Bank of Pasadena, upon its securing approval for new branches from the Federal Reserve. *See* Extract from Minutes of the Board, Meeting of Feb. 6, 1942 (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 2, Item 2).

Transamerica Corporation . . . ."[91] In a stunning rebuke, Transamerica responded one month later by refusing to accede to the Board's directives. "[W]e are unable to find any requirement of law or regulation that information regarding our plans to acquire stock be communicated to the Board of Governors before any such plans are consummated," wrote Transamerica's Vice President and Treasurer.[92] "It does not seem to us that it would be practical to do so," he stated forthrightly.[93] Though Eccles attempted to find alternate means through which the Board could prevent Transamerica's expansion, his efforts were unsuccessful.[94]

As the Federal Reserve confronted the inadequacies of regulatory power over bank holding companies, Eccles shifted his focus back to a legislative solution. In its 1943 Annual Report, Eccles pleaded for Congressional action on a bank holding company bill that would provide the Board with the authority to control the expansion of holding company groups in the future.[95] With "death sentence" legislation off the table as both unworkable and undesirable, however, Eccles began to look to antitrust law as a more immediate solution to the Transamerica problem. Though the Federal Reserve had been granted authority under section 11 of the Clayton Antitrust Act to enforce the provisions related to banking,[96] it had never utilized its statutory power to bring a section 7 case involving acquisitions of bank stock.[97] Eccles's investigation thus signified a pathbreaking effort, as the overwhelming consensus in the 1940s rested on the presumption that the antitrust laws did not apply to commercial banking, a regulated industry subject to its own unique forms of government supervision.[98] By instructing the Board's legal counsel to investigate the potential of bringing a section 7 case, Eccles not only fashioned a new weapon against Transamerica's seemingly impenetrable defenses but also raised more profound questions regarding the role of antitrust law in combatting concentrated financial power.[99] For Eccles, the turn to antitrust was, therefore, a measure of last resort. Having exhausted every other means of combatting the uncontrolled expansion of

91. Letter from Chester Morrill, Sec'y, Bd. of Governors of the Fed. Rsrv. Sys., to Transamerica Corp. (Feb. 14, 1942) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 4, Item 7).

92. Letter from W.L. Andrews, Vice President & Treasurer, Transamerica Corp., to Bd. of Governors of the Fed. Rsrv. Sys. (Mar. 17, 1942) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 4, Item 7).

93. *Id.*

94. *See* Peoples Bank v. Eccles, 161 F.2d 636, 640–43 (D.C. Cir. 1947) (finding that the Board's attempt at conditioning membership in the Federal Reserve System on a promise not be acquired by or affiliate with Transamerica amounted to an "invasion of the legislative field" and that the Board's condition as a "mere device to check the growth of a holding company" had no foundation in the Federal Reserve's authorizing statute), *rev'd*, 333 U.S. 426 434–35 (1948) (finding that the declaratory judgment sought was an inappropriate remedy for administrative action that had yet to come to fruition).

95. BD. OF GOVERNORS OF THE FED. RSRV. SYS., THIRTIETH ANNUAL REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM 36–37 (1943).

96. Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 41 ANTITRUST BULL. 255, 260 (1996).

97. Benjamin J. Klebaner, *Federal Control of Commercial Bank Mergers*, 37 IND. L.J. 287, 302 (1962).

98. *See* Berle, *supra* note 16, at 589–90.

99. *See* Grischkan, *supra* note 44, at 260–61.

Transamerica, Eccles now faced an uphill battle to prove that section 7 of the Clayton Act belonged in the Federal Reserve's arsenal.

By the summer of 1944, the Board of Governors began debating the feasibility of an antitrust proceeding against Transamerica.[100] The weight of precedent was against the Federal Reserve, however. As Adolf Berle, Jr. would assert just a few years later, "[a]pplication of the anti-trust laws to banking is a relatively new field of study. . . . Until relatively recent times, many lawyers would have considered anti-trust attack on practices and agreements with respect to banking operations as *prima facie* impossible."[101] Two lines of reasoning underlay that presumption. The first was an older notion derived from mid-nineteenth-century Supreme Court precedents that banking and insurance transactions did not constitute commerce, thereby exempting them from the antitrust laws.[102] In 1944, however, the Court determined that insurance transactions did constitute commerce, thereby opening the door for banking to be considered commerce as well.[103] The second, and more compelling, line of reasoning derived from the banking laws themselves; namely, the idea that they conveyed a statutory intent to treat banks, the recipients of the sovereign privilege of money creation, as a "field apart . . . in part a government operation, and outside the scope" of antitrust law.[104] Commercial banks, in this view, shared a close kinship with public utilities, and the Federal Reserve's jurisdiction under the Clayton Act was thought to be limited to the issue of interlocking directorates.[105]

Eccles, however, remained undeterred by the reigning consensus regarding banking and the antitrust laws. By 1945, he had arranged to meet with Attorney General Tom Clark, who had initiated his own preliminary inquiry into Transamerica. Writing to Eccles in advance of the conference, Clark outlined the challenges of bringing a case against Transamerica under the Sherman Antitrust Act. Despite Transamerica controlling "approximately 40% of the banking offices and . . . 36% of the commercial banking deposits in the five-state area," the DOJ had not been able to "develop substantial evidence either that the Transamerica Corporation achieved its present dominating position in the commercial banking field through illegal trade practices . . . or that it abused its

100. Memorandum from George B. Vest to Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys. (Aug. 19, 1944) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 3, Item 1); *see also* J.P. Dreibelbis, Four Courses Open to Board, (Jan. 31, 1945) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 3, Item 6).

101. Berle, *supra* note 16.

102. *See* Nathan v. Louisiana, 49 U.S. 73, 81 (1850) (the "individual who uses his money and credit in buying and selling bills of exchange . . . is not engaged in commerce"); *see also* Paul v. Virginia, 75 U.S. 168, 183 (1868) (determining that issuing a contract for insurance was not a transaction of commerce under the Constitution).

103. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 545 (1944).

104. Berle, *supra* note 16, at 590; *see also* Mary Louise Ramsey, *Banks and the Antitrust Laws: An Unresolved Problem*, 37 AM. BAR ASS'N J. 427, 430 (1951); William T. Lifland, *Banking Practices and the Antitrust Laws*, 42 NOTRE DAME L. REV. 465, 470 (1967).

105. *See* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 41 ANTITRUST BULL. 255, 261 (1996); SHULL & HANWECK, *supra* note 29, at 8 ("When the Sherman and Clayton antitrust laws were passed, in 1890 and 1914 respectively, banking was largely immunized.").

dominant position once it was achieved."[106] Clark advised that while he had discovered instances of Transamerica using coercive tactics, it had been "impossible . . . to pin down a sufficient number of them to make a prima facie case on the theory suggested."[107]

Though Eccles acknowledged that "the most desirable method of dealing with the bank holding company problem generally was through truly effective legislation," he nevertheless pushed forward as bank holding company bills continued to languish in Congressional committees.[108] With Congressional hearings underway on amending section 7 of the Clayton Act, Eccles wrote to the chairman of the House Judiciary Committee to request that a House bill be revised to include both bank assets and stock acquisitions.[109] That request would go unanswered, however, and the Celler-Kefauver Act would eventually close the asset acquisition loophole only for corporations subject to the authority of the Federal Trade Commission, thereby excluding banks.[110] Transamerica, meanwhile, showed no signs of slowing its expansion as it became the centerpiece of a postwar antimonopoly crusade that would not only survive, but finally succeed, a decade after World War II.[111]

Though historians have long characterized the postwar period as one bereft of antimonopoly movements, public concern over the relationship between economic concentration and democracy endured in the aftermath of World War II.[112] From the enactment of the Celler-Kefauver Act in 1950, which amended the Clayton Antitrust Act, to the formation of the Small Business Administration, policy-makers continued their efforts to rein in corporate power.[113] The Federal Reserve followed these policy developments and changes in antitrust jurisprudence as it built its case against Transamerica. Thus, in 1947, Eccles wrote to Attorney General Tom Clark again in light of the Supreme Court's decision in *American Tobacco Co. v. United States*,[114] which seemed to "eliminate the need in certain cases for the kind or extent of proof which had previously been thought

106. Letter from Tom C. Clark, Att'y Gen., to Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys. (Oct. 31, 1945) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 3, Item 8).

107. *Id.*

108. Letter from Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., to Tom C. Clark, Att'y Gen. (Oct. 16, 1945) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 17, Folder 8, Item 3).

109. *See* Shull, *supra* note 105, at 264.

110. *See id.*

111. *See* Grischkan, *supra* note 30, at 222.

112. *See, e.g.*, ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR, 106 (1995) (arguing that the postwar period marked the "end of reform" as concern over monopoly power and economic structure gave way to compensatory liberalism focused on aggregate growth and fiscal policy); Richard Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS 188, 188–89 (1965).

113. *See* Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1317–25 (2020). Fears of concentrated financial power and its impact upon democratic governance similarly drove bank holding company reform efforts in the postwar years. *See* Grischkan, *supra* note 30, at 222–23.

114. 328 U.S. 781, 810 (1946).

necessary in antitrust proceedings."[115] "I am wondering, therefore," Eccles inquired, "if your Department has considered whether the decision in the Tobacco case might not lessen to a considerable extent the doubt which heretofore it has entertained as to the ultimate success of an antitrust proceeding against Transamerica."[116] Attorney General Clark did not respond to Eccles' letter, however, as the appointment of a new Treasury Secretary ended the era of consensus among the federal agencies regarding Transamerica.[117] With no hope of prompt legislative action and silence from the DOJ, Eccles finally decided to proceed with the first antitrust case in the history of the Federal Reserve and break up the Transamerica empire.

Supported by the legal opinion of the Board's general counsel regarding the Federal Reserve's authority under sections 7 and 11 of the Clayton Antitrust Act, Eccles formally notified the Attorney General, the Chairman of the FDIC, and the Comptroller of the Board's antitrust investigation into Transamerica in November of 1947.[118] Nearly two months later, however, President Truman informed Eccles that he would not reappoint him as Chairman of the Board of Governors, leaving Eccles convinced that the Gianninis had arranged for his removal.[119] Yet even with Eccles replaced as Chairman by Thomas McCabe, the battle against Transamerica raged on. The Federal Reserve brought formal charges in June of 1948, and hearings officially began later that summer.[120] The Board relied heavily on statistical evidence of Transamerica's dominant position in the five-state area of California, Nevada, Oregon, Washington, and Arizona, arguing that its control of 41% of all commercial banking offices, 39% of all commercial bank deposits, and 50% of all commercial bank loans constituted a tendency toward monopoly in violation of section 7 of the Clayton Act.[121] Transamerica vigorously denied the charges, and argued that its bank acquisitions had uniformly procompetitive impacts by providing services in underbanked areas and to those often excluded by traditional commercial banks.[122]

Nevertheless, in June 1951, Rudolph M. Evans, the hearing officer for the case, issued an opinion concluding that Transamerica's acquisitions "tended to create a monopoly" in violation of the Clayton Act.[123] The Federal Reserve Board subsequently voted 3-2 to adopt Evans's findings, emphasizing

115. Letter from Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys. to Tom C. Clark, Att'y Gen. (Feb. 26, 1947) (Marriner S. Eccles Papers, University of Utah, J. Willard Marriott Library, Special Collections, Box 19, Folder 4, Item 2).

116. *Id.*

117. *See* MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 446–47 (Sidney Hyman ed., 1951).

118. *Id.* at 449–50.

119. *See id.*; *see also* ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, VOLUME I: 1913-1951 656 (2010); *Confirmation of Nomination of Thomas Bayard McCabe, of Pennsylvania, to be a Member of the Board of Governors of the Federal Reserve System: Hearing Before the Comm. of Banking and Currency*, 80th Cong. 188 (1948) [hereinafter *McCabe Confirmation Hearings*].

120. *Clayton Act Proceeding: Transamerica Corporation*, 38 FED. RSRV. BULL. 368, 368 (1952).

121. *See id.* at 390–91; Grischkan, *supra* note 30, at 224.

122. *Clayton Act Proceeding: Transamerica Corporation*, *supra* note 120, at 382, 390.

123. *Id.* at 368.

Transamerica's sheer size as a threat to actual and potential competition and characterizing its unrelenting expansion as driven by the desire for control rather than operating efficiencies.[124]

Two Governors dissented, however, and argued that the record did not support the conclusion that Transamerica's bank acquisitions substantially lessened competition and tended to create a monopoly.[125] In a separate statement, Governor Oliver S. Powell took issue with the Board's overreliance on the Clayton Act. Though Governor Powell acknowledged that he was "reluctant to disagree with my esteemed colleagues, some of whom have had long experience with the respondent in this case," he criticized the Board's use of antitrust precedent that did not capture the particularities of the banking sector.[126] "The Board of Governors of the Federal Reserve System is unlike a court in that the Board is supposed to be an expert in banking and can weigh special factors in banking cases over and above reliance on court decisions based on non-banking business," he contended.[127] In Powell's estimation, the Board "did not have a clear objective" in bringing the section 7 case against Transamerica.[128] As Powell explained, "the record makes it clear, and the Board's Solicitor has never denied that keen competition is present in the five States in which Bank of America affiliates operate."[129]

Foregrounding the decentralized nature of the American banking system, a deliberate policy choice that fostered local bank monopolies, Powell articulated the difficulties inherent in attempting to apply antitrust doctrine to the commercial banking sector:

> The Board's position . . . fails to recognize that a certain amount of monopoly is inherent in banking. Overbanking has been a curse in past years and the supervisory authorities protect a banking monopoly in hundreds of communities. In this way, banking differs from gasoline stations, which were involved in the Standard Oil case, upon which the Board relies as a major legal basis for its decision.[130]

Thus, in Powell's view, the problem was not monopoly itself, which antitrust law was designed to combat. Rather, the problem was a matter of scale, and the imbalance of public and private power embodied by Transamerica.[131] The bank holding company device allowed unregulated corporations to thwart the

124. *Id.* at 381, 390:

> As the size and resources of a banking group increase, its power to suppress potential competition increases. Its size alone may discourage and prevent the establishment of independent banks in direct competition with it, or serve as an inducement to existing small banks, likely to be, or already, in direct competition with it, to sell to the group at its solicitation.

125. *Id.* at 392, 395–98.
126. *Id.* at 395.
127. *Id.* at 396.
128. *Id.*
129. *Id.*
130. *Id.*
131. *See id.*

carefully regulated structure of commercial banking.[132] A government-sanctioned local bank monopoly was one thing, an unsupervised accrual of market share in a bank holding company quite another. For Powell, the solution to that problem nevertheless had to be found outside of the Clayton Act. Highlighting the ambiguities of the statistical picture the Board presented for the purposes of antitrust analysis, and uncertainty as to whether Transamerica's control of sizeable amounts of deposits and loans indicated "merely better service to the public by Transamerica banks," Powell instead questioned whether the proceeding was a "means of stopping practices on the part of Transamerica and its affiliates which seem not to be in the public interest."[133] Thus, for Powell, section 7 of the Clayton Act proved an ill-suited mechanism for confronting the broader economic and political concerns regarding Transamerica's growing dominance of commercial banking in the western United States.

When Transamerica appealed the Board's decision to the Third Circuit, the Court ultimately agreed with Governor Powell and overturned the Board's ruling.[134] While the Court affirmed the applicability of section 7 of the Clayton Act to the banking sector, it found the case the Board presented to be deficient in two critical ways. First, the Court argued, the Board relied on a statistical analysis of a five-state area, despite its own "finding that the local community in which a commercial bank is located is its area of competition."[135] The Court found this determination "wholly unsupported by evidence," as the Board provided "no valid reason" for taking "five states rather than one, the seven included in the federal reserve district or all 48."[136]

Second, the Court found that the Board failed to examine the actual competitive effects of Transamerica's expansion in the areas served by the acquired banks. "[T]he acquisition of the stock of two or more corporations engaged in interstate commerce is not per se a violation" of section 7 of the Clayton Act, explained the Court.[137] "On the contrary," it clarified:

> [S]uch acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a monopoly. Otherwise the acquisition is entirely lawful, so far as Section 7 is concerned. . . . Evidence of mere size and participation in a substantial share of the line of business involved . . . is not enough.[138]

The Board, however, "made no findings with respect to either present or possible future competition between the individual acquired banks in the communities in which they operate."[139] Indeed, "as to 38 of the acquired banks," the

132. BD. OF GOVERNORS OF THE FED. RSRV. SYS., THIRTIETH ANNUAL REPORT OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM 36 (1943).

133. *Clayton Act Proceeding: Transamerica Corporation*, *supra* note 120, at 396–97.

134. Transamerica Corp. v. Bd. of Governors of the Fed. Rsrv. Sys., 206 F.2d 163, 170 (3d Cir. 1953).

135. *Id.* at 169.

136. *Id.*

137. *Id.* at 170.

138. *Id.*

139. *Id.* at 168.

Court pointed out, "there could hardly be a finding of such competition since none of them is located in the same community as any other acquired bank."[140] Though ten other bank acquisitions occurred in the same locality, the Court reiterated that the "mere showing of common ownership will not support an inferential finding that competition between them exists and may be lessened."[141]

The Court nevertheless agreed that the quantitative analysis the Board presented disclosed "a tremendous concentration of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against sound public policy."[142] It made clear, however, that the Clayton Act did not constitute the proper channel through which to address Transamerica's ever-growing power:

> It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide. Our only question is whether the theory upon which the Board based its decision meets the legal tests which are required under Section 7 of the Clayton Act to determine whether Transamerica's bank stock acquisitions tend to create a monopoly of commercial banking. We are compelled to agree with Transamerica that it does not do so.[143]

### C. *The Enactment of the BHCA*

Congress quickly acted on the Third Circuit's directive. Though numerous hearings in both the Senate and the House had been held on different bank holding company bills in 1947, 1950, and 1952,[144] the Board's failed attempt to combat Transamerica's expansion via Clayton Act proceedings drove more urgent Congressional attention and, ultimately, legislative action. Thus, by 1953, hearings once again got underway.[145] The debates that ensued revealed the muddled meanings of monopoly and competition in banking, and the widening chasm between the objectives of antitrust law and bank holding company reform. For though policy-makers repeatedly paid homage to the preservation of competition, many of their concerns revolved around more nebulous conceptions of domination and the political consequences of concentrated financial power.[146] Indeed, the potent antitotalitarian sentiment of the postwar period played a critical role in propelling the eventual enactment of bank holding company legislation. From Roosevelt's antimonopoly message in 1938 to invocations of Nazi

140. *Id.*

141. *Id.*

142. *Id.* at 169.

143. *Id.*

144. *See, e.g.*, *A Bill Providing for Control and Regulation of Bank Holding Companies, and for Other Purposes: Hearing on S. 829 Before the S. Comm. on Banking and Currency*, 80th Cong. (1947) [hereinafter *1947 Hearings*]; *see also* Benjamin J. Klebaner, *The Bank Holding Company Act of 1956*, 24 S. ECON. J. 313, 314 n.3 (1958) (collecting examples).

145. *Bank Holding Legislation: Hearings on S. 76 and S. 1118 Before the H. Comm. on Banking and Currency Part 2*, 83d Cong., 239–44 (1953) (inserting into the Congressional record the entire opinion in *Transamerica Corp. v. Bd. of Governors of the Fed. Rsrv. Sys.*).

146. *See id.* at 243.

Germany's monopolistic financial structure, antifascist currents coursed through the discourse surrounding bank holding company regulation.[147] As Senator Paul Douglas of Illinois typified in a 1956 debate:

> Prior to Hitler there were only three banks in Germany . . . These played ball and helped the cartels and monopolies . . . which financed Hitler's final drive to power. Thus, concentration of financial power helped on the concentration of economic power, and then the two joined hands to aid in creating a dictatorship of political power. . . .[148]

The belief that a decentralized financial system was critical to the survival of American democracy thus occupied a central place in the enactment of the Bank Holding Company Act. Antifascism, rather than competition as defined by the Sherman and Clayton Acts, represented the guiding light of bank holding company reform.

Economic arguments in favor of restrictive legislation similarly focused on preventing domination by bank holding companies and preserving a unit banking structure comprised of independent local banks. As Representative Brent Spence of Kentucky wrote in a 1955 House Report, "[i]ndependent unit banks, by their willingness to bear substantial local risks, have accelerated the economic development of the United States."[149] "Most of our leading companies . . . were once small," he continued, "and got started because local banks had confidence in the ability of the founders."[150] "And who is so likely to recognize these as the local banker who has the power to act on his intimate knowledge, and who will benefit his bank and his community by developing a substantial customer and employer,"[151] Spence inquired, before insisting on the superiority of the American banking system: "Your committee should like to reemphasize the fact that this is the only country left where most communities are served by home-owned and home-managed banks which are aware of and responsive to the needs of the people of their areas."[152]

Though the Report went on to cite the importance of competition in banking, it was immediately linked to the policy of unit banking: "While our banking structure has evolved down through the years to meet changing economic requirements, this country has held steadfast to the doctrine that competition should prevail in the banking industry. Our national banking policy has aimed at protecting and fostering the growth of independent unit banks."[153] Emphasizing the inextricable ties between economic and political structure, the Report went on to portray the bank holding company as a threat not merely to unit banking, but to American democracy itself:

> [B]ank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history,

147. *See* Grischkan, *supra* note 30, at 226–29.
148. 102 CONG. REC. 6857 (1956) (statement of Rep. Douglas).
149. H.R. REP. NO. 84-609, at 5 (1955).
150. *Id.*
151. *Id.*
152. *Id.* at 5–6.
153. *Id.* at 2.

> it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community . . . . Its activities are usually fully integrated with the local economic and social organization. The bank holding company device threatens to destroy this democratic grassroots institution.[154]

Thus, the competition depicted by Representative Spence, and the House Committee on Banking and Currency more broadly, was a particular kind of competition, carried on between small unit banks and enforced by the government through various barriers to entry. Certainly some policy-makers disagreed with the veneration of unit banking and its conflation with competition. Many Congressmen and regulators had argued for half a century that unit banking was distinctly anticompetitive and contended that branch banking offered economies of scale that would increase access to credit and lower costs for borrowers.[155] Though they recognized bank holding companies as the only available substitute for branching, they nevertheless agreed that a device designed to evade regulatory barriers to entry, even those they disagreed with, had to be brought under government supervision.[156]

The PUCHA therefore offered an influential model for policy-makers, even as they remained divided over the proper extent of competition in commercial banking. Public utility holding companies had continuously frustrated state and local supervision of utilities, which had long been subject to heightened regulatory control based on their infrastructural properties.[157]

Though important differences existed between bank holding companies and the notoriously pyramided public utility holding companies, Congressional hearings and debates repeatedly emphasized their similarities. A 1947 Senate report, for example, highlighted numerous provisions of a proposed bank holding company bill modeled on the PUCHA.[158] And in 1955, Speaker of the House Sam Rayburn, the Texas representative who spearheaded the enactment of the PUCHA, drew explicit parallels between the battle for bank holding company reform and the fight against public utility holding companies in a speech before the Independent Bankers Association. Cautioning that the nation was "in the throes of the third great forward surge of monopoly," and that "the last great

154. *Id.* at 1–2.

155. *See Branch Banking in the United States*, *supra* note 43, at 71–80 (tracing the rise of the branch banking movement in the late nineteenth century and the arguments in favor of branching liberalization, including the increasing of competition in concentrated local bank markets, greater efficiencies, and wider access to credit).

156. *See supra* Section II.A.

157. *See, e.g.*, David E. Lilienthal, *The Regulation of Public Utility Holding Companies*, 29 COLO. L. REV 404, 405 (1929).

158. *See* S. REP. NO. 80-300, at 7–11 (1947) (numerous provisions of the proposed bank holding company bill were "virtually identical with those contained in the Public Utility Holding Company Act"); *see also 1947 Hearings*, *supra* note 144, at 163 (statement of Marriner S. Eccles, Chairman, Bd. of Governors of the Fed. Rsrv. Sys.) ("[T]he definitions and exemptions provisions of Section 3 are patterned upon identical provisions in the Public Utility Holding Company Act of 1935.").

merger movement was characterized particularly by the pyramiding of control through holding companies in the utility industry," Rayburn admitted that he could see "in retrospect" that "we did not adequately appreciate that the same undermining of community control could develop in the banking industry as had developed in the electric utility industry."[159] Calling out the inadequacy of antitrust law in the face of bank holding company expansion, Rayburn offered his "wholehearted and unequivocal endorsement" of the bank holding company bill that had been introduced by Representative Spence.[160]

One year later, Congress finally enacted the BHCA of 1956 by an overwhelming majority.[161] Propelled across the finish line by the Federal Reserve's failed Clayton Act case, the final form of the legislation reflected a different approach to controlling acquisitions by bank holding companies in the commercial banking sector. Though the statute contained language affirming the preservation of competition in banking as an objective, and included an antitrust savings clause, the BHCA offered something more to regulators.[162] It granted the Federal Reserve sweeping new power to regulate all future bank holding company expansion and directed the Board in section 3(c) to consider five factors in making its decisions.[163] Several of the factors mirrored familiar standards set forth for the granting of bank charters and the approval of branches,[164] including the "financial history . . . of the company . . . and the banks concerned," "their prospects," the "character of their management," and the "convenience, needs, and welfare of the communities . . . ."[165] Under the fifth and final factor, however, Congress instructed the Board to consider "whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking."[166]

By permitting the Federal Reserve to incorporate the "size [and] extent" of a bank holding company into a broad calculation of the "public interest," Congress rendered the BHCA a more malleable tool for combatting the concentration of financial power via the holding company device.[167] For as the *Transamerica* case had demonstrated in stark relief, the bank holding company facilitated the accrual of market power across vast geographic areas, while often leaving untouched the competitive landscape of local communities.[168] By purchasing unit

159. 101 CONG. REC. 3822 (1955) (statement of Speaker Rayburn).

160. *Id.* at 3822–24. As Rayburn declared, "[m]oreover, I was assured then that the Clayton Antitrust Act already gave the Federal Reserve Board adequate authority to curb holding company expansion in the commercial banking system. As you know, the . . . Court held otherwise in the Transamerica case." *Id.* at 3822.

161. Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(c), 70 Stat. 133 (codified as amended at 12 U.S.C. § 1842(c)); Klebaner, *supra* note 144, at 313.

162. *See* Bank Holding Company Act of 1956 § 3(c) (codified as amended at 12 U.S.C. § 1842(c)).

163. *Id*.

164. *Report Under the Bank Holding Act*, 44 FED. RSRV. BULL. 776, 799 (1958).

165. Bank Holding Company Act of 1956 § 3(c) (codified as amended at 12 U.S.C. § 1842(c)).

166. *Id.*

167. *Id.*

168. *See supra* notes 134–43 and accompanying text.

banks across multiple states, the bank holding company could grow to unprecedented proportions even as local market concentration remained unchanged. Antitrust law, therefore, offered little to regulators concerned about the absolute size of a bank holding company, whether in terms of the systemic risk it posed or its threat to the viability of the unit banking system and American democracy itself. The BCHA thus presented the Federal Reserve with new authority to intervene in bank holding company development that extended well beyond the confines of antitrust law.[169]

## III. THE MEANING OF THE "PUBLIC INTEREST" UNDER THE BHCA

The very first proceeding before the Federal Reserve Board under the BHCA quickly exposed the ambiguities of the BHCA, however, and the difficulty of translating its broad policy goals into administrative practice.[170] The case involved an application by the First New York Corporation ("FNYC") to become a bank holding company and acquire the First National City Bank of New York, as well as its trust affiliate, the City Bank Farmers Trust Co., and the County Trust Co. of White Plains, New York.[171] According to the acquisition plan, submitted in November 1956, these entities would be consolidated into newly chartered national banks under the control of the FNYC.[172] Both the complexity of the transaction and the novelty of the BHCA regime rendered this application particularly controversial as it tested the boundaries of the Federal Reserve's authority under the newly constituted terrain of federal bank holding company regulation.[173]

The BHCA instructed the Federal Reserve Board to weigh the five statutory factors included in section 3(c) in deciding whether to approve or deny the expansionary designs of FNYC.[174] Section 3(b) of the statute also stipulated that the Federal Reserve notify the Comptroller of the Currency when a transaction involved the acquisition of national banks, and notify the appropriate state banking authorities in the case of state banks.[175] As Board members soon discovered,

169. The Senate report accompanying the final bill reflected that view by distinguishing the fifth factor from other standards already employed in bank supervision:

> *The factors required to be taken into consideration by the Federal Reserve Board under this bill also require contemplation of the prevention of undue concentration of control in the banking field to the detriment of public interest and the encouragement of competition in banking*. It is the lack of any effective requirement of this nature in present Federal laws which has led your committee to the conviction that legislation such as that contained in this bill is needed. Under its provisions, the expansion of bank holding companies in the banking field would not be prohibited, but would be regulated in the public interest.

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

170. *See* Grischkan, *supra* note 44, at 284.

171. *See Application of First New York Corporation et al. to Become Bank Holding Companies*, 44 FED. RSRV. BULL. 887, 903 (Aug. 1958).

172. *Id.* at 903–04.

173. *See* Grischkan, *supra* note 44, at 284.

174. *See Application of First New York Corporation et al. to Become Bank Holding Companies*, *supra* note 171, at 904–05.

175. Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(b), 70 Stat. 133, 134–35 (codified as amended at 12 U.S.C. § 1842(b)).

however, implementing these statutory mandates only served to highlight the unresolved conflicts of the legislative process and of antimonopoly policy itself in the postwar era.[176]

After soliciting opinions from both the Comptroller of the Currency and the New York State Superintendent of Banks regarding FNYC's application to operate as a bank holding company, the Federal Reserve Board ordered a public hearing on the matter.[177] The Hearing Examiner ultimately recommended that the application by FNYC be denied, concluding that the transaction would be unlawful under New York state law.[178] In a supplemental report, the Examiner further concluded that the transaction was "not required for the needs and welfare of the community and area" and that its effect "may be to expand the size or extent of the holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking."[179]

The FNYC's application thus raised several foundational questions regarding the interaction of federal and state authority under the BHCA and the weight and meaning of the factors the Federal Reserve Board was required to consider in determining whether to approve bank holding company acquisitions.[180] Foregrounding the "primary importance" of the fifth factor, which focused on whether a transaction would "expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking,"[181] the Board embarked on a detailed analysis of the meaning of competition and the public interest under the BHCA in its final decision on the FNYC transaction.[182]

The Board began by addressing the size and extent of the FNYC, noting that it would encompass 117 banking offices spanning across New York City and Westchester County and control 20.37% of all commercial bank deposits in the combined area.[183] Critically, it distinguished this emphasis on size from the prevailing measures of competitiveness under antitrust law.[184] "[A]ll of the five

176. *See* J.L. Robertson, Member of the Bd. Governors Fed. Rsrv. Sys., Remarks Before the Independent Bankers Association, Twelfth Federal Reserve District, at the American Bankers Association Convention: A Long View of the Bank Holding Company Act 1 (Oct. 22, 1956) (transcript available at the Federal Reserve Bank of St. Louis FRASER digital library).

177. *See Application of First New York Corporation et al. to Become Bank Holding Companies*, *supra* note 171, at 904.

178. *Id.* at 905.

179. *Id.* at 903–05.

180. *See* Grischkan, *supra* note 44, at 287.

181. *Application of First New York Corporation et al. to Become Bank Holding Companies*, *supra* note 171, at 911.

182. The Board determined that the banks in question were "in sound financial condition, that their financial history has been good, that their prospects are favorable, and that their managements are of high quality," thereby quickly dispensing with the first three factors under the BHCA. Though it engaged in a more in-depth analysis of the fourth factor, and found that the transaction would increase the convenience of Westchester residents, though not their needs or welfare, the majority of the opinion focused upon the fifth factor. *Id.* at 908–11.

183. *Id.* at 911.

184. *See* Grischkan, *supra* note 44, at 288.

statutory factors require consideration of the effect of a proposed transaction upon the 'public interest,'" the Board explained:

> However, it must be noted that the fifth factor is specifically concerned with the relation of size and extent to the public interest; and in this respect the Holding Company Act, unlike the Clayton Act, expressly requires consideration of the effect of the size and extent of a holding company system.[185]

The Board then moved on to consider whether the transaction would reduce or eliminate competition between the banks FNYC intended to acquire as well as within New York City and Westchester more broadly. It found that existing and potential competition would likely be reduced both between City Bank and County Trust and within Westchester County.[186] Despite representatives of competing Westchester banks testifying that they would not be substantially harmed, and that the transaction would even "sharpen and increase competition," the Board insisted that there was a "reasonable likelihood that the plan would cause independent banks in the County to seek associations with other New York City banks . . . through the organization of new holding companies."[187] Such a result, it warned, "might sharpen and intensify rivalry between a few large banking organizations," but "would not tend to preserve competition in the banking field in the sense of maintaining a relatively large number of independent alternative sources of banking services."[188] The Board therefore held that FNYC's plans would "be inconsistent with the fifth statutory factor."[189] Concluding that the "[a]dverse considerations relating to the fifth statutory factor outweigh the favorable considerations relating to the other factors," the Board denied FNYC's application.[190]

The Board concluded by focusing on the distinct and controlling nature of its decision under the BHCA as compared to an inquiry under the Clayton Act:

> In reaching the above conclusions, the Board has considered, in relation to the fifth statutory factor, the question whether the proposed transaction would violate section 7 of the Clayton Act. . . . However, since the Board has concluded that the application should not be approved in light of the standards stated in the BHCA, it is unnecessary to determine whether the proposed acquisition of bank stocks would involve a violation of the Clayton Act.[191]

The Federal Reserve's decision was not unanimous, however. In a dissenting statement, two members of the Board sharply disagreed with the majority's assessment of the dangers of bank holding company size.[192] "Nothing in the Act

185. *Application of First New York Corporation et al. to Become Bank Holding Companies*, *supra* note 171, at 912.

186. *Id.*

187. *Id.* at 914.

188. *Id.*

189. *Id.* at 914–15.

190. *Id.*

191. *Id.* at 915–16.

192. *See* Grischkan, *supra* note 44, at 289.

can be construed as forbidding creation or expansion of holding companies as an evil itself," they declared, before clarifying that their "disagreement with the majority of the Board" was based on a "different interpretation of the Holding Company Act."[193] Rather than understanding the BHCA as prohibiting bank holding company expansion unless it "affirmatively contribute[d] to the public interest," the dissenters argued for greater regulatory permissiveness.[194] "In our opinion," they countered, ". . . the Board of Governors is not justified in preventing a holding company acquisition on the ground that it might, to a minor extent, diminish competition in the banking field." [195]

For Governors Vardaman and Mills, the record contained "little on which to base a reasonable finding that competition among banks in Westchester County would be materially diminished simply because the stock of The County Trust Company was owned by a corporation that also owned the stock of a large bank in New York City."[196] "It is not sufficient to talk in broad generalities about the enormous economic power that would stand behind" the acquired banks if they were owned by FNYC, they admonished.[197] "It is our obligation to examine the record realistically," they stated pointedly, "and on that basis there is an absence of persuasive explanation of *how*—in what specific ways—the competitive situation in Westchester County would be adversely affected by consummation of Applicants' plan."[198]

In Vardaman and Mills' estimation, the "fact that the proposed holding company would be considerably larger than any existing bank holding company" was "not germane to any problem stemming from a concentration of banking resources in First New York Corporation," as Congress had "not indicated that the magnitude of existing holding companies marks the maximum permissible limits of size and extent."[199] Rather, based on an examination of this situation alone, Vardaman and Mills saw "no weighty evidence that competition would be unduly lessened or that the aggregate size or extent of the banking institutions to be controlled by First New York Corporation would be out of keeping with the character of banking business being conducted in the metropolitan area of New York City."[200] "To hold otherwise," they concluded, "would be tantamount to saying that entry into Westchester County and comparable suburban areas . . . should be denied forever to any except the smaller New York City banks that might wish to extend the scope of their services through the holding company device."[201]

193. *Application of First New York Corporation et al. to Become Bank Holding Companies*, *supra* note 171, at 916–17.

194. *Id.* at 917.

195. *Id.*

196. *Id.* at 918.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Despite the dissent's protestations, however, it was the concern over size itself, and the desire to preserve a structure of geographically dispersed local banks, that prevailed.[202] Subsequent decisions by the Board reinforced the BHCA as an antimonopoly tool apart from and often more interventionist than antitrust law. When the Board denied an application by the First Bank Stock Corporation of Minnesota to acquire the Eastern Heights State Bank of St. Paul in 1960, for example, the Board again separated its determination that competition would be lessened by the proposed transaction from the doctrinal requirements of the Clayton Antitrust Act.[203] "The Board rejects Applicant's suggestion that only such a lessening of competition as would violate section 7 of the Clayton Act may be regarded as an adverse consideration under the Holding Company Act," it argued, clarifying that "in reaching a decision, any significant lessening of competition, even though it may not be such as to violate the Clayton Act, is to be weighed as an adverse consideration against any relevant favorable consideration."[204]

Several other decisions issued by the Board in the same period demonstrate a similar conviction regarding the unique meaning of competition and the "public interest" in the commercial banking sector. Denying an application by Northwest Bancorporation, a sizeable bank holding company in the Midwest, to acquire an independent bank in Rochester, Minnesota in 1957, the Federal Reserve stressed the need to maintain independent unit banks as a primary justification for its holding.[205] Contrasting the greater resources available to bank holding companies, the Board contended that they often have the "ability to act more quickly than a group of individuals in endeavoring to establish a new bank in an area which gives promise of supporting a successful banking operation."[206] Though the Board acknowledged that the establishment of a bank and its acquisition by a bank holding company "may benefit the community in some respects," it warned that

> such an entry into an area by a bank holding company . . . may . . . 'expand the size or extent' of the bank holding company system in such a manner or to such a degree as to have a strong tendency to preclude later entry by a bank which is not controlled by a bank holding company.[207]

"In the judgment of the Board," a majority of Governors concluded, "such an adverse situation exists in the present case and outweighs the favorable features of the proposed acquisition of stock."[208] Similarly, in another decision in December of 1957, the Board denied an application by Wisconsin Bankshares Corporation to acquire the stock of a newly proposed bank, the Capital National Bank of Milwaukee, based on concerns that the transaction would "impair the

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202. *Id.* at 915.
203. *See First Bank Stock Corporation*, 46 FED. RSRV. BULL. 486, 493–94 (1960).
204. *Id.* at 493.
205. *Northwest Bancorporation*, 44 FED. RSRV. BULL. 11, 11–12 (1958).
206. *Id.* at 12.
207. *Id.*
208. *Id.*

prospects" of an "independent bank moving into the vicinity" and a "lack of clear evidence of need" for an additional bank in that location.[209]

After the Board denied another application by the Northwest Bancorporation to acquire a unit bank in 1961, the bank holding company challenged the Board's reasoning in an appeal to the Eighth Circuit.[210] The application revolved around Northwest Bancorporation's proposed acquisition of the First National Bank of Pipestone.[211] In light of the fact that a different sizeable bank holding company owned the only other bank in Pipestone, Minnesota, the transaction would have placed all of the banking resources of Pipestone under the control of large bank holding companies.[212] While the Board asserted that it did not "regard the Holding Company Act as meaning that the mere size or extent of an applicant holding company's system should itself be regarded as an adverse consideration," and that the "existence of a subsidiary bank of another holding company in the area in which an applicant holding company proposes to acquire a bank does not . . . compel an adverse decision," it rendered both of those elements central to its decision.[213] Emphasizing the "adverse effect upon the public interest and preservation of competition that may follow from control of a large proportion of the banking resources of a community by relatively large bank holding companies," the Board concluded that the potential benefits of the transaction did not outweigh its costs.[214] Domination of credit provisioning by massive bank holding companies and political concerns regarding their power guided the Board's decision rather than quantitative measures of competition.

On appeal, Northwest Bancorporation argued that the Board's ruling was predicated upon an erroneous interpretation of section 3(c) of the BHCA and that its decision was arbitrary, capricious, and an abuse of discretion.[215] Contending that "competition would be enhanced rather than adversely affected by the proposed acquisition," Northwest Bancorporation alleged that the Board erred in weighing "mere bigness by itself" and the presence of "other holding companies doing business in the area" in making its decision.[216] The Court, however, disagreed and upheld the Board's ruling.[217]

Deferring to the "special competency" of the Board, entrusted by Congress to "approve or disapprove bank acquisitions by holding companies" in "the public interest," the Court determined that "its findings" were "not inadequate," that they were "supported by substantial and undisputed evidence . . . not arbitrary, capricious or an abuse of discretion," and were "therefore conclusive."[218] Importantly, the Court affirmed the Board's consideration of bank holding company

209. *Id.* at 16.
210. Nw. Bancorporation v. Bd. of Governors of the Fed. Rsrv. Sys., 303 F.2d 832, 833 (8th Cir. 1962).
211. *Id.*
212. *Id.* at 842.
213. *Northwest Bancorporation*, 47 FED. RSRV. BULL. 408, 410 (1961).
214. *Id.* at 410–11.
215. *Nw. Bancorporation*, 303 F.2d at 841–42.
216. *Id.* at 840–42.
217. *Id.* at 844.
218. *Id.* at 840–41.

size and the number of banks controlled by holding companies in a particular area: "The Board makes no assertion that mere bigness by itself justifies denial of the application. . . . Nevertheless, size and concentration of bank control in the area is indeed a factor which was and should have been considered by the Board in weighing the advisability of approving the acquisition . . . ."[219] Likewise, the Court declared, "[t]o exclude from consideration the existence of other holding companies and their banks doing business in the area would be to force the Board to act more or less in a vacuum. Realities must be recognized."[220] In the wake of the appeal, the Board's power to utilize the BHCA to preserve a structure of small unit banks and prevent the growth of large bank holding company groups in the public interest rested on firm ground.

By forging its own understanding of competition in banking beyond the parameters of antitrust doctrine, one which often fostered local monopolies of independent banks in furtherance of a broad conception of the public interest, the Federal Reserve solidified bank holding company regulation as closer to a scheme of public utility supervision in the years immediately following the enactment of the BHCA.[221] And though the Federal Reserve approved the majority of applications for expansion under the BHCA in the early years of administering the statute,[222] its willingness to deny permission for new bank holding companies and restrict the size and growth of existing ones in several high profile cases nevertheless signaled the power of the BHCA as a flexible and potent regulatory weapon.

Yet the ongoing disputes among Board members regarding the weight and meaning of the five factors designed to ensure the furthering of the public interest under the BHCA led the Federal Reserve to request formal guidance in its mandatory report to Congress in 1958. "Consideration of the novel problems arising under the Bank Holding Company Act has required much of the time of the Board and its staff," it explained, before honing in on the ambiguity of the "language of the Act" as raising a "number of difficult questions as to the interpretation of its provisions."[223] Emphasizing section 3(c) as particularly problematic, the Board identified the primary issue as the "difficulty of balancing considerations affecting competition and the public interest under the fifth factor and those affecting the convenience and needs under the fourth factor."[224]

Revealing the complexities and uncertainties that remained in the wake of the BHCA, the Report included several specific questions that had divided members of the Board. For example, the Board detailed a situation in which "a holding company proposes to acquire control of a large independent bank and merge it with an existing banking subsidiary."[225] "Can the fact that the resulting

219. *Id.* at 842.
220. *Id.*
221. *See* Grischkan, *supra* note 44, at 290.
222. *See* George R. Hall, *Bank Holding Company Regulation*, 31 S. ECON. J. 342, 347–50 (1965).
223. *Report Under the Bank Holding Company Act*, 44 FED. RSRV. BULL. 776, 779 (1958).
224. *Id.*
225. *Id.*

institution will be in a better position to furnish more intense competition to another large bank in the community and perhaps provide expanded services to the public outweigh the resulting reduction in banking units sufficiently to justify approval of the application?" it inquired.[226] Similarly, the Board asked "what weight . . . should be given to the potential long-run effect" of a proposed transaction or to the "cumulative effect of a series of such transactions, upon the banking structure of the area as reflected by the number of banking units offering alternative sources of banking services, particularly banks not associated with holding companies?"[227] In light of these ambiguities, the Board requested "a more precise statement of the purposes of the statute" and encouraged Congress to "provide more specific guidance for the exercise of the Board's discretion under the Act."[228] It would not take long for clarification to come, as the dramatic events of the late 1950s and early 1960s provoked not only the amending of the BHCA, but new legislation as well.[229]

## IV. THE 1966 AMENDMENTS TO THE BHCA AND BMA

### A. *The Enactment of the BMA*

Even as the Federal Reserve gained greater control over banking concentration via the holding company device, bank mergers rose precipitously throughout the 1950s. Though regulators had repeatedly acknowledged the lack of adequate control over mergers, Congress deferred action on the problem until after it had enacted the BHCA.[230] By 1959, however, over 1300 bank mergers had swept the nation and Congress could no longer ignore the issue.[231] Like the discourse surrounding bank holding company reform,[232] Congressional debate revolved around the political, as well as economic, consequences of financial concentration, and foregrounded the unique nature of commercial banks. Thus, the focus once again was largely on bank size and the complicated role of competition in the banking sector. As one section of a 1959 Senate report declared, "banking is vested with a public interest and must be regulated like public utilities and monopolies."[233] While the report went on to recognize the value of a certain degree of competition in banking, it nevertheless stressed the distinctive

226. *Id.*
227. *Id.* at 780.
228. *Id.*
229. *See infra* Part IV.
230. Though Congress enacted the National Bank Consolidation Act in 1918, which required prior approval from the Comptroller of the Currency for mergers involving national banks, and the Federal Deposit Insurance Corporation Act in 1950, which required prior approval for other bank mergers from the appropriate agency, these statutes did not specify the standards governing merger review and left significant gaps that rendered them ineffective. *See* Kress, *supra* note 11, at 444; Joseph E. Casson & Bernie R. Burrus, *Federal Regulation of Bank Mergers*, 18 AM. U. L. REV. 677, 681–83 (1969).
231. Shull, *supra* note 105, at 270.
232. *Id.* at 271.
233. S. REP. NO. 86-196, at 16 (1959).

functions of banks as "suppliers of funds, as depositories, and as fiscal agents."[234] As an "integral and essential part of the Nation's fiscal and monetary system," the report concluded, it would be "impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and vested with a public interest."[235]

Antitrust law therefore appeared to many policy-makers an inappropriate mechanism for addressing bank mergers, just as it had proven ill-suited to the battle against bank holding companies.[236] Indeed, as the Senate report reminded, "[f]ederal control over banking long antedated the antitrust laws."[237] Attributing the "banking collapse in the early 1930's . . . in large part" to "too much competition," the report urged the "handling of banking through banking laws, specially framed to fit the particular needs of the field, instead of relying on unrestricted competition and the antitrust laws."[238] And as late as 1959, the leading antitrust treatise included commercial banking on the list of industries exempt from the antitrust laws.[239]

Though the extent to which antitrust doctrine, and the DOJ, should impact bank merger policy remained a source of controversy, the final form of the legislation relied on a broad public interest standard that seemed to eschew the strictures of antitrust doctrine. Under the BMA, enacted in May 1960, the federal banking agency that served as the primary regulator of the acquiring or surviving financial institution—the OCC for national banks, the Federal Reserve for state member banks, and the FDIC for state nonmember banks and thrifts—had to approve a proposed merger.[240] Though the BMA required the banking agencies to take into "consideration the effect of the transaction on competition," along with the "convenience and needs of the community" and the "financial condition" of the banks involved, and stipulated that nothing in the legislation impacted the applicability of the antitrust laws, it granted banking regulators broad discretion to approve only those bank mergers it found to be in the "public interest."[241]

Some Congressmen continued to fight for greater reliance on antitrust law in banking, however, despite its status as a regulated industry subject to exceptional mandates. Emphasizing the highly permissive record of the OCC on bank mergers throughout the 1950s, Senators Paul Douglas, William Proxmire, Joseph Clark, Edmund Muskie, and Representatives Emmanuel Celler, Wright Patman,

234. *Id.*
235. *Id.*
236. *See supra* notes 231–35 and accompanying text.
237. S. REP. NO. 86-196, at 16 (1959).
238. *Id.* at 17–18.
239. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: ECONOMIC AND LEGAL ANALYSIS 42 (1959); Bernard Shull & Paul M. Horvitz, *The Bank Merger Act of 1960: A Decade After*, 16 ANTITRUST BULL. 859, 860 (1971).
240. *See* Act of May 13, 1960 (Bank Merger Act), Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c) (2018)).
241. *Id.*; Shull, *supra* note 105, at 272.

and others signaled their disagreement with the deference paid to regulators over the DOJ.[242] Indeed, concerns regarding the approval rates of the banking agencies, rather than the suitability of antitrust law as a remedy for rising bank concentration, occupied a prominent place in the debates over merger policy.[243] In the end, the BMA did mandate advisory opinions from the DOJ.[244] Banking regulators, however, were not required to follow the Antitrust Division's recommendations.[245] Ultimately, then, the Act left open the question of whether bank mergers approved by regulators would be wholly immunized from antitrust prosecution. The DOJ wasted no time in providing its own answer, as it challenged numerous mergers that had been approved under the BMA in the years immediately following its enactment.[246] Amidst public discord among the banking agencies and the DOJ, and lingering uncertainty as to the proper standards governing mergers in the banking sector, it would be the Supreme Court that finally provided clarity.[247]

### *B. The Supreme Court Enters the Fray*

In 1963, the Supreme Court held in *United States v. Philadelphia National Bank* that the merger of the second and third largest banks in the Philadelphia metropolitan area constituted a tendency toward monopoly in violation of section 7 of the Clayton Antitrust Act.[248] The Court's groundbreaking ruling not only solidified the applicability of the Clayton Act to commercial banking, an open question since the Federal Reserve brought the very first section 7 case against Transamerica,[249] but incited further controversy over who should ultimately serve as the arbiter of antimonopoly policy in banking. Uncertainty arose because the merger of Philadelphia National Bank with the Girard Trust Corn Exchange Bank, both national banks, had been approved by the Comptroller of the Currency,[250] which retained authority under the BMA to approve or deny mergers involving national banks.[251] Despite opinions from the Federal Reserve Board as well as the DOJ indicating that the merger would result in "substantial anticompetitive effects," the Comptroller, Ray M. Gidney, nevertheless sanctioned it.[252] One day later, the DOJ brought suit under the Clayton Antitrust Act to prevent the merger from going forward.[253]

242. *See* S. REP. NO. 86-196, at 25–29 (1959).
243. *See id.* at 26 (noting that the OCC did not disapprove a single merger application between 1950 and 1955).
244. Shull, *supra* note 105, at 272.
245. Act of May 13, 1960 (Bank Merger Act), Pub. L. No. 86-463, 74 Stat. 129 (codified as amended at 12 U.S.C. § 1828(c)); Shull, *supra* note 105, at 272.
246. Shull & Horvitz, *supra* note 239, at 867; Kress, *supra* note 11, at 445.
247. *See infra* Section IV.B.
248. *See* 374 U.S. 321, 371–72 (1963).
249. Transamerica Corp. v. Bd. of Governors of the Fed. Rsrv. Sys., 206 F.2d 163, 164 (3d Cir. 1953).
250. *Philadelphia Nat'l Bank*, 374 U.S. at 323, 333.
251. *Id.* at 332.
252. *Id.* at 332–33.
253. *Id.* at 333–34.

In finding that the merger violated the Clayton Act despite the Comptroller's approval of the transaction under the BMA,[254] the Court dramatically altered the players and the standards governing bank mergers. Dispensing with Philadelphia National Bank's argument that the BMA immunized "approved mergers from challenge under the federal antitrust laws" by directing the "banking agencies to consider competitive factors before approving mergers," the Court offered a different assessment of the place of antitrust in the uniquely regulated sphere of banking.[255] In the Court's estimation, Congress did not "embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary . . . or disruptive of that structure" merely by enacting the BMA.[256] "Moreover," the Court went on, "bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject."[257] By distinguishing commercial banks from public utilities and favoring an enlarged role for antitrust law within the scheme of federal banking regulation, the Court placed its thumb on the scale of dueling antimonopoly traditions still doing battle in the postwar decades.[258]

The outcome of the case appeared to further the Brandeisian preference for decentralization incorporated into the BHCA and the BMA. Throughout the majority opinion, Justice Brennan emphasized the distinctive character and central importance of unit banking to the American political economy. "Commercial banking in this country is primarily unit banking," he began, "[t]hat is, control of commercial banking is diffused throughout a very large number of independent, local banks . . . rather than concentrated in a handful of nationwide banks, as, for example, in England and Germany."[259] Stressing the singular privileges granted to commercial banks, he foregrounded the close ties between a dispersed banking structure and national economic prosperity. "Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits," he explained.[260] "This distinctive power gives commercial banking a key role in the national economy," he reasoned, "[f]or banks do not merely deal in but are actually a source of, money and credit."[261]

254. *Id.* at 371.
255. *Id.* at 350.
256. *Id.* at 352.
257. *Id.* As the Court further detailed:

> Rate regulation in the banking industry is limited and largely indirect, banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.

*Id.*

258. *See* Grischkan, *supra* note 44, at 292.
259. *Philadelphia Nat'l Bank*, 374 U.S. at 325.
260. *Id.* at 326.
261. *Id.*

Despite acknowledging the special role of banks in money creation, Justice Brennan nevertheless insisted they should be subject to the competitive standards applicable to ordinary businesses. "There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries," he declared, as "[s]mall businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish."[262] "At the same time," he argued, "[the borrower's] concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage vis-a-vis larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally."[263] Thus, he determined, "[t]he fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important, but more so. . . . [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."[264] Invoking the Brandeisian faith in competition as a safeguard against tyranny, Justice Brennan concluded that "[s]ubject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."[265] While antimonopoly reformers concerned about the "rising tide of economic concentration in the American economy"[266] could find much to agree with in Justice Brennan's impassioned defense of a widely diffused banking structure, the Court's decision would ultimately have far-reaching consequences as it fundamentally reshaped the balance between federal banking supervision and antitrust law.[267]

*Philadelphia National Bank* quickly stirred controversy as many commentators and Congressmen who helped enact the BMA expressed their disagreement with the Court's opinion. Reponses to the *Philadelphia National Bank* case filled the pages of law reviews, trade magazines, and even major newspapers as policymakers expressed frustration and confusion over the state of bank merger policy.[268] Bankers also voiced concern over the newfound uncertainty surrounding the merger process, as the approval of federal banking agencies ceased to

262. *Id.* at 369.
263. *Id.* at 370.
264. *Id.* at 372.
265. *Id.*
266. *Id.* at 363.
267. Grischkan, *supra* note 44, at 294.
268. *See, e.g.*, Robert G. Leland, Note, *The Bank Merger Act and the Antitrust Law: Hopeless Conflict?*, 32 U. CIN. L. REV. 505, 516 (1963); J. William Via, Jr., *The Administration of the Bank Merger and Holding Company Acts: Confusion Compounded*, 51 VA. L. REV. 1517, 1520 (1965); Edward G. Guy, *The Applicability of Federal Antitrust Laws to Bank Mergers*, 48 FED. RSRV. BANK N.Y. MONTHLY REV. 80, 81 (1966); William T. Lifland, *The Supreme Court, Congress, and Bank Mergers*, 32 LAW & CONTEMP. PROBS. 15, 20 (1967); *Court Bars Merging 2 Philadelphia Banks: Decides Clayton Anti-Trust Act is Applicable*, CHI. TRIB., June 18, 1963, at 8; *Bank Merger Hit By Supreme Court: Justice Dept. Wins Anti-Trust Argument in Philadelphia Case*, L.A. TIMES, June 18, 1963, at 11.

offer assurances that a transaction would not be challenged and prohibited at a later date.[269] These debates were not merely academic, however, as Congress soon convened hearings on amending both the BMA and the BHCA.

Though Senator A. Willis Robertson introduced an amendment to the BMA to formally exempt banking from the antitrust laws, the final enacted version of the 1966 amendment to the BMA ultimately ensured the opposite outcome.[270] Heavily influenced by the Supreme Court's decision in *Philadelphia National Bank,* and wary of regulators' permissive approach to bank mergers at the time, Congress ultimately embraced antitrust principles under the 1966 Amendments.[271] The OCC, in particular, had served as a virtual "rubber stamp" for bank mergers throughout the 1950s and early 1960s.[272] With James Saxon at the helm of the OCC in the mid-1960s, a Comptroller who had approved countless bank mergers and ardently advocated deregulation,[273] key legislators viewed the DOJ as a more trustworthy ally in its battle to prevent the development of large-scale financial monopolies.[274] The Act therefore preserved the role of the DOJ in the bank merger regime by granting it thirty days to bring suit against a merger, and altered the wording of the competitive factor to reflect the language of the antitrust laws.[275] Though uncertainty lingered as to the Act's intent and meaning in the wake of the notoriously convoluted road to its enactment, subsequent Supreme Court decisions affirmed the shift toward antitrust and away from the "public interest" as the dominant approach for evaluating bank mergers.[276]

The BHCA was similarly amended to mirror the wording of the Clayton and Sherman Acts. Rather than conduct a broader inquiry into the "size or extent of the bank holding company system" and its consistency with "adequate and

269. *See, e.g.*, *Commercial Banks Still Ponder Implications of Trust Decision: Justice Department Batting Only .500 in Attempts to Thwart Mergers on the Basis of Court Ruling*, N.Y. TIMES, Jan. 6, 1964.

270. *See* Martin A. Traber, Note, *Legislative History of the 1960 Bank Merger Act and its 1966 Amendment: Judicial Misuse and a Suggested Approach*, 44 IND. L.J. 596, 610 (1969).

271. *See* Benjamin J. Klebaner, *The Bank Merger Act: Background of the 1966 Act*, 34 S. ECON. J. 250, 254 (1967); Traber, *supra* note 270, at 600–01.

272. *See, e.g.*, Letter from Emanuel Celler, Chairman, House Judiciary Committee, to Wright Patman, Chairman, House Select Committee on Small Businesses (April 1961) (on file with National Archives, R.G. 233, Records of the U.S. House of Representatives, 85th Cong., Committee On the Judiciary—Subcommittee on Monopolies and Commercial Law, Bank Mergers, Box 5.8):

> [M]ost of the important bank mergers that have occurred in recent years have involved national banks and have been approved by the present Comptroller of the Currency, Ray M. Gidney. In my judgment Mr. Gidney has rendered a public disservice by his rubber-stamping of virtually all national bank mergers that have been presented to him.

273. EUGENE N. WHITE, THE COMPTROLLER AND THE TRANSFORMATION OF AMERICAN BANKING, 1960-1990 10–12 (1992).

274. *See* James J. Saxon, Personal Papers: Unpublished Speech Draft and Notes (1966-1974) (on file with John F. Kennedy Presidential Library and Museum, JSPP-012-007-p0012) ("It seems to me that the key problem of the commercial banking industry today is still excessive control by regulation and statute, restraint on flexibility of financial expansion, prohibition and limitation on branching and mergers . . . ."). As Representative Wright Patman exclaimed in 1965, "[i]f you exempt banks from antitrust, you might as well shoot the policeman at the corner." Earl W. Kintner & Hugh C. Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COM. L. REV. 213, 234 (1972).

275. *See* Kintner & Hansen, *supra* note 274, at 235–36.

276. *See id.* at 236 ("The Act raised almost as many questions as it answered."); Shull & Horvitz, *supra* note 239, at 867.

sound banking, the public interest, and the preservation of competition in the field of banking," the Federal Reserve was to evaluate bank acquisitions according to the precepts of antitrust doctrine.[277] Replacing the fifth factor of section 3(c) with language nearly identical to section 7 of the Clayton Act and section 2 of the Sherman Act, and permitting the DOJ only thirty days to intervene after a decision by federal banking regulators, Congress provided greater certainty over the standards governing bank acquisitions by holding companies, but narrowed the terrain upon which competition could be measured.[278]

Ultimately, by expanding the role of antitrust at the expense of a public utility conception of commercial banks, the Supreme Court helped set the stage for the late twentieth-century unraveling of the foundational tenets of the American banking system. For the eclipsing of the public utility tradition in banking began on the eve of a revolution in antitrust law, one that left little room for the robust, interventionist approach of the postwar decades.[279] Moreover, even at the highwater mark of a structural approach to antitrust that favored decentralization, the Clayton Act would prove an insufficient barrier to banking consolidation.[280]

## V. BANKING AND ANTITRUST AFTER 1966

In the aftermath of the 1966 amendments to the BHCA and the BMA, antitrust principles came to dominate bank merger analysis. The centrality of antitrust doctrine in determining the bounds of bank mergers initially appeared to advance many reformers' efforts to preserve a decentralized banking system as the DOJ successfully challenged numerous horizontal mergers.[281] As macroeconomic pressures and shifts in the banking sector prompted an increase in market extension mergers, however, the limits of antitrust within the banking sector became more clear.[282] And in little more than a decade, the tides of aggressive antitrust enforcement would ebb dramatically. In its wake would remain a wholly different conception of banking than the one that had dominated for much of American history. Ultimately, the turn to antitrust as the primary bulwark against financial concentration had required a jettisoning of a regulatory philosophy that understood commercial banks as more akin to local utilities closely supervised by state and federal officials to serve sociopolitical as well as economic goals.[283]

277. Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(c), 70 Stat. 133, 135 (codified as amended at 12 U.S.C. § 1842(c)).

278. The amended section 3(c) of the BHCA did permit the Federal Reserve to balance the preservation of competition against the public interest, and thereby still allowed the Federal Reserve to override competitive considerations. But, its inquiry into competitiveness itself nevertheless remained curtailed under the 1966 Amendments. *See* An Act to Amend the Bank Holding Company Act of 1956, Pub. L. No. 89-485, § 3(c), 80 Stat. 236, 237 (1966); Anthony W. Cyrnak, *Convenience and Needs and Public Benefits in the Bank Holding Company Movement*, *in* THE BANK HOLDING COMPANY MOVEMENT TO 1978: A COMPENDIUM 266–68 (1978); Carstensen, *supra* note 18, at 591–93.

279. *See* Grischkan, *supra* note 44, at 294.

280. *See infra* Part V.

281. *See infra* Section V.A.

282. *See infra* Section V.C.

283. *See infra* Section V.D.

Certainly, broader ideological currents unleashed in the late twentieth century contributed to wide-ranging deregulation across the financial sector.[284] Nevertheless, the efforts of policy-makers to subject commercial banks to the full weight of American antitrust law as early as the 1950s and 1960s played a critical, yet overlooked, role in laying the groundwork for such a revolution.

### *A. Early Success Under the 1966 Amendments to the BHCA and BMA*

Utilizing its newly solidified authority to intervene in the bank merger process within thirty days of agency approval, the DOJ initiated several cases following the 1966 amendments to the BMA. In *United States v. First City National Bank of Houston*, the Comptroller had approved a merger between the First City National Bank of Houston and Southern National Bank of Houston, as well as a merger between the Provident National Bank and the Central Penn National Bank in Philadelphia, despite reports from the Federal Reserve and the FDIC indicating that both proposed transactions would have serious anticompetitive impacts.[285] The DOJ then filed suit under section 7 of the Clayton Act.[286] The District Court for the Eastern District of Pennsylvania limited its analysis to a review of whether the Comptroller's office had abused its discretion, and subsequently dismissed the case.[287] On appeal, however, the Supreme Court held that the 1966 Act required the courts to make an independent assessment of the legality of bank mergers, and interpreted the inquiry into a merger's impact on competition as synonymous with antitrust principles.[288] Upon remanding the case, the proposed merger of First City National Bank and Southern National Bank of Houston was abandoned.[289]

Shortly thereafter, the Court affirmed the equivalence of the competitive factor under the 1966 Act with antitrust doctrine in *United States v. Third*

284. *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 10, 19 (2014) (tracing the origins and influence of neoliberalism on deregulation in the late twentieth century); WU, *supra* note 13, at 83–92 (attributing the rise of the Chicago School to the weakening of antitrust law); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1657 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)).

285. 386 U.S. 361, 365 (1967).

286. *Id.* at 362, 365.

287. *Id.* at 364–65.

288. *See id.* at 369 ("[I]t is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal."); *see also id.* at 365 ("Section 7 of the Clayton Act condemns mergers where 'the effect of such acquisition may be substantially to lessen competition.' The Bank Merger Act of 1966 did not change that standard, or the machinery for obtaining the prior approval of the Comptroller . . . ."); United States v. Third Nat'l Bank of Nashville, 390 U.S. 171, 178 (1968):

> Last Term, in *United States v. First City National Bank of Houston* . . . this Court interpreted the procedural provisions of the 1966 Act, holding that the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. The task of the district courts was to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by "the convenience and needs of the community to be served."

289. Douglas V. Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 317 (1981).

*National Bank of Nashville*.[290] The case involved the merger of the second and fourth largest banks in Davidson County, Tennessee and again presented a familiar set of facts.[291] In spite of negative reports regarding the competitive impact of the merger from the Federal Reserve, the FDIC, and the Attorney General, the Comptroller approved the transaction.[292] When the DOJ brought suit under section 7 of the Clayton Act, the district court determined that the merger did not violate the antitrust laws and concluded that substantial evidence supported the Comptroller's decision that the merger was in the public interest.[293] On appeal, the Supreme Court overturned the district court's holding but affirmed antitrust law as the threshold against which any balancing of the public interest would proceed under the 1966 Act:

> Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages.[294]

The Court went on to find that under the "test enunciated in recent Clayton Act cases," the tendency of the merger of two of the largest banks in Nashville to "substantially . . . lessen competition" was eminently apparent.[295] The Court therefore remanded the case to the district court with instructions to reexamine the competitive factor as well as the balancing test it conducted with respect to the merger's impact on the "convenience and needs of the community."[296] Narrowing the grounds upon which a merger could be argued to benefit the community, the Court elevated competition, as defined by the Clayton and Sherman Acts, as the centerpiece of bank merger analysis.[297] The case was eventually settled by a consent decree that required Third National Bank of Nashville to create a new independent bank to replace the Nashville Bank and Trust Company.[298]

By 1970, the Supreme Court demonstrated its willingness to overturn lower court decisions approving mergers, even among relatively small commercial banks. In *United States v. Phillipsburg National Bank & Trust Co.*, the Court held that the merger of two competing banks in Phillipsburg, New Jersey, a suburban area along the Delaware River with a population of less than 20,000 in 1960, violated section 7 of the Clayton Act.[299] Though the two banks had assets

290. 390 U.S. at 181–84.

291. *Id.* at 173.

292. *Id.* at 179; *see* OFF. COMPTROLLER CURRENCY, ANNUAL REPORT 129–32 (1964) (the Office concluded there was no "tendency toward monopoly in the Nashville area or community" and emphasized the improvements in the "convenience and needs of the Nashville public" from the merged bank).

293. United States v. Third Nat'l Bank of Nashville, 260 F. Supp. 869, 884 (M.D. Tenn. 1966).

294. *Third Nat'l Bank*, 390 U.S. at 181–82.

295. *Id*. at 182–83.

296. *Id.* at 184, 192.

297. *See id.* at 186–87 (rejecting increased lending capacity and the stabilization of weak, rather than failing, banks as sufficient to demonstrate a merger's benefits to the community).

298. *See* Austin, *supra* note 289, at 320.

299. 399 U.S. 350, 352–53 (1970).

of only $23,900,000 and $17,300,000, respectively, they represented the first and second largest of the three Phillipsburg banks.[300] As the Court declared, the "[m]ergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities" were "subject to scrutiny" "under the antitrust standards of *United States v. Philadelphia National Bank* . . . which were preserved in the Bank Merger Act of 1966."[301] Drawing the geographic market narrowly and affirming the relevant product market as the "cluster of products . . . and services . . . denoted by the term 'commercial banking,'" the Court gave antitrust law real teeth in restricting horizontal bank mergers.[302]

### *B. Warring Interpretations of the BMA*

Despite the Court's confident assertions regarding the meaning and intended effect of the 1966 Act, not everyone agreed. From the FDIC to the Federal Reserve, public commentators, lower courts, and dissenting Supreme Court justices, alternative readings of the notoriously messy and controversial legislative history of the BMA endured. As early as 1963, Justice Harlan had articulated his opposition to rendering antitrust law paramount in bank merger analysis. Dissenting in *Philadelphia National Bank*, Justice Harlan argued that the Court's application of section 7 of the Clayton Act to bank mergers defied Congress's intent to provide a regulatory solution to rising concentration in the banking sector through the enactment of the BMA in 1960:

> In response to an apparently accelerating trend toward concentration in the commercial banking system in this country . . . numerous bills were introduced in Congress from 1955 to 1960. During this period, the Department of Justice and the federal banking agencies advocated divergent methods of dealing with the competitive aspects of bank mergers, the former urging the extension of § 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest. The Justice Department's proposals were repeatedly rejected by Congress, and the regulatory approach of the banking agencies was adopted in the Bank Merger Act of 1960.[303]

Justice Harlan therefore decried the Court's determination that the merger at issue violated the Clayton Act as sanctioning a "remedy regarded by Congress as inimical to the best interests of the banking industry and the public," one that would "serve to frustrate the objectives of the Bank Merger Act" and which found "no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute."[304] For Justice Harlan, the "special position occupied by commercial banking" necessitated a unique approach to mergers, for

300. *Id.* at 354.
301. *Id.* at 357–58.
302. *Id.* at 359.
303. 347 U.S. 321, 373 (1963) (Harlan, J., dissenting).
304. *Id.* at 373–74.

both "the nature of the operations performed and the degree of governmental supervision involved" rendered banking "fundamentally different from ordinary manufacturing and mercantile businesses."[305] Pointing to the numerous restrictions on competition mandated by federal and state banking regulations, he concluded that the specialized approach of the BMA, rather than the confines of antitrust law, represented the correct method of assessing bank mergers. [306]

One year later, Justice Harlan registered another dissent in *United States v. First National Bank & Trust Co. of Lexington*.[307] Protesting the majority holding that a merger between two Kentucky banks violated section 1 of the Sherman Act, he reiterated his view of commercial banking as a realm apart from the reach of antitrust law:

> In combination with the *Philadelphia National Bank* case, today's decision effectively precludes any possibility that the will of the Congress with respect to bank mergers will be carried out. The Congress has plainly indicated that it does not intend that mergers in the banking field be measured solely by the antitrust considerations which are applied in other industries.[308]

Following the 1966 amendments to the BMA, Justice Harlan continued to voice his disapproval of the Court's preference for formulaic antitrust standards to govern bank merger analysis, though he acknowledged he was bound by precedent to accept its applicability.[309]

The banking agencies also conveyed their consternation with the diminishing terrain upon which they could exercise their discretion under the bank merger statutes. In 1970, the FDIC tested the Court's bank merger jurisprudence by disapproving a merger between the Washington Mutual Savings Bank, the largest thrift institution in Washington, and Gray's Harbor Savings Loan, one of the smallest thrift institutions in the state.[310] Though the Board of Directors of the FDIC found that the merger "would not eliminate any meaningful competition" between the two institutions, it based its decision on concerns regarding the elimination of "potential competition" and the loss of banking alternatives in the future.[311] Focusing on the precedential effect of approving the merger, the Board

305. *Id.* at 374.

306. *Id.* at 375, 396.

307. 376 U.S. 665, 673–80 (1964) (Harlan, J., dissenting).

308. *Id.* at 679–80.

309. *See* United States v. Third Nat'l Bank in Nashville, 390 U.S. 171, 193 (1968) (Harlan, J., dissenting) (internal citations omitted):

> I continue to disagree, particularly in the banking field, with the 'numbers game' test for determining Clayton Act violations which was adopted by this Court in *United States v. Philadelphia National Bank*. However, I consider myself bound by that decision, and under its dictates I concur in the Court's finding that this merger would violate the Act.

*See also* United States v. Phillipsburg Nat'l Bank, 399 U.S. 350, 376–77 (1970) (Harlan, J., dissenting).

310. Wash. Mut. Sav. Bank v. FDIC, 347 F. Supp. 790, 793–94 (W.D. Wash. 1972). The FDIC is the primary regulator of state-chartered thrift institutions, or savings and loan associations, which historically served more limited functions like savings and real estate lending. Because the surviving institution in the proposed merger was a thrift, the FDIC had authority to deny the merger under the BMA. *See generally* CONG. RSCH. SERV., WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020).

311. *Wash. Mut. Sav. Bank*, 347 F. Supp. at 795.

rested its denial upon the desire to preserve a particular banking structure that served broader social and economic values rather than on antitrust analysis as refined by the Supreme Court throughout the 1960s. As the Board explained in its opinion, "the proposed merger would establish a significant precedent for the approval of additional mergers in highly concentrated markets in the State of Washington and elsewhere . . . with the cumulative effect of further concentrating the banking resources of a given market in the largest institutions which operate there."[312]

When the two banks filed suit for a declaratory judgment compelling the FDIC to approve the merger, the district court found that the FDIC had exceeded its authority under the BMA by resting its denial upon "anticompetitive effects or 'implications' of a merger never contemplated by Congress in enacting" the 1966 Act, "nor by the courts in their 75 years of devising standards applicable to antitrust."[313] Proceeding to conduct an analysis according to "accepted antitrust principles," the Court detailed the deficiencies of the FDIC's assessment of the competitive effects of the merger.[314] From its reliance on statewide, rather than local market concentration ratios utilized under the Clayton Act, to its focus on absolute size and "simple gross percentages," the FDIC had failed to conform its reasoning to the dictates of antitrust law.[315] As the district court pointedly concluded, "the FDIC failed to take into account truly relevant factors upon which a rational opinion as to competition could be based in line with the established principles of antitrust law as written by Congress into the Bank Merger Act."[316] On appeal, the Ninth Circuit upheld the district court's ruling, affirming that the FDIC did "not have the power under the Bank Merger Act of 1966 to deny a merger application on the basis of a competitive standard more stringent than the antitrust laws of the United States."[317] Thus, in the wake of *Washington Mutual*, the scope of the regulators' authority to shape bank structure was significantly circumscribed.

### *C. Market Extension Mergers and the Limits of Antitrust*

The Federal Reserve also resisted the constraints of the 1966 amendments, particularly as a rise in market extension mergers reaffirmed the limits of antitrust law as a means of combatting concentration in the banking sector. Ironically, it was the Justice Department's success in challenging horizontal bank mergers under the BMA that contributed to a shift toward market extension mergers by the late 1960s.[318] These mergers entailed a bank or bank holding company expanding into geographic markets where it had not formerly competed, a trend facilitated by the easing of branching laws and restrictions on acquisitions

312. *Id.*
313. *Id.* at 797.
314. *Id.* at 798.
315. *Id.* at 799.
316. *Id.*
317. Wash. Mut. Sav. Bank v. FDIC, 482 F. Supp. 459, 464–66 (9th Cir. 1973).
318. Kintner & Hansen, *supra* note 274, at 251–53.

by out-of-state holding companies.[319] Yet market extension mergers in the banking sector proved harder to corral via antitrust doctrine.[320] Because these types of mergers involved banks that operated in separate geographic markets and therefore did not compete against each other, the DOJ relied on the potential competition theory when challenging these transactions.[321] That theory, which had proven viable in merger litigation outside the banking sector, posited that the acquisition of a leading bank in a different geographic market that is highly concentrated can reduce potential competition in two ways: one, by eliminating the possibility of the acquiring firm actually entering the target market de novo—or through a small "foothold" acquisition in the future—or two, by eliminating the procompetitive effect of the threat of entry by a firm outside the target market.[322] This theory did not fare well in the courts, however. The DOJ initiated numerous potential competition cases beginning in the late 1960s but did not prevail in a single one.[323]

After a series of district court losses, the DOJ finally appealed to the Supreme Court in *United States v. First National Bancorporation*.[324] The case involved the acquisition of the First National Bank of Greeley, the second largest bank in its market, by the First National Bancorporation, a bank holding company based in Denver that represented the largest banking organization in Colorado.[325] Though a majority of the Federal Reserve Board had approved the acquisition, three members of the Board had dissented on the grounds that the acquisition would tend to increase statewide banking concentration.[326] The DOJ agreed and brought suit on potential competition grounds, alleging that the acquisition would violate section 7 of the Clayton Act by "eliminating potential competition between the two banks, eliminating [First National] Bancorporation as a potential competitor in Greeley," and "eliminating the Greeley Bank as a potential member of a new holding company capable of entering commercial banking in other areas in Colorado."[327]

The heart of the DOJ's argument therefore rested on concerns regarding the future of Colorado's banking structure as a whole, rather than on the loss of

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319. *Id.* at 251.

320. *Id.* at 251–52; *see also* William A. Lovett & Thomas A. Devins, Jr., *Multiple Office Banking and Market Extension Mergers*, 57 N.C. L. REV. 261, 280 (1979).

321. Kintner & Hansen, *supra* note 274, at 251–53.

322. *See* Daniel J. Mahoney, *"When Bank Mergers Meet Antitrust Law There's No Competition.": Why Antitrust Law Will Do Little to Prevent Overconsolidation Within the Banking Industry*, 14 ANN. REV. BANKING L. 303, 326 (1995); Kintner & Hansen, *supra* note 274, at 251–53. On potential competition cases in the industrial setting, see Austin, *supra* note 289, at 335; United States. V. Falstaff Brewing Corp., 410 U.S. 526, 532 (1973); United States v. El Paso Nat. Gas Co., 376 U.S. 651, 652 (1964); United States v. Pennolin Co., 389 U.S. 308, 308 (1967); FTC v. Proctor & Gamble Co., 386 U.S. 568, 569 (1967).

323. *See* Austin, *supra* note 289, at 354; 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, 363–65 (2015).

324. 410 U.S. 577, 577 (1973); *see also* Austin, *supra* note 289, at 343.

325. *See* Austin, *supra* note 289, at 343.

326. *See* United States v. First Nat'l Bancorporation, 329 F. Supp. 1003, 1006 (D. Colo. 1971).

327. *See* Press Release, Dep't of Just. (July 8, 1970), https://www.justice.gov/archive/atr/public/press_releases/1970/337996.pdf [https://perma.cc/M888-GS75].

potential competition in Greeley itself. The district court denounced this approach, however, asserting that "[t]he case at bar . . . must be determined on its individual merits and not in relationship to any future horribles."[328] Despite the DOJ's emphasis on a trend of bank acquisitions in Colorado by bank holding companies and its fears of growing statewide concentration, the court reiterated the boundaries of analysis under the Clayton Act. "While we must consider the probable *future* effects of *this* particular acquisition," the court explained, "we may not evaluate the effects of this acquisition by prejudging the merits of pending acquisitions which are not presently before the Court."[329] Moreover, the court pointed out, banking regulators exercised substantial control over future de novo entry by banks and bank holding companies.[330] Based upon the number of existing banks and the slow growth of the Greeley area, the court noted that it appeared unlikely First National Bancorporation would obtain approval to enter the Greeley market de novo.[331] Though the DOJ appealed the district court's ruling, the Supreme Court affirmed in a per curium opinion.[332]

One year later, the Supreme Court elaborated on the deficiencies of the potential competition doctrine when applied to commercial banking. In its 1974 decision in *United States v. Marine Bancorporation*, the Court emphasized the unique nature of the banking sector and its regulatory barriers to entry in declining to find that a merger between two banks in different regions of the state of Washington violated section 7 of the Clayton Act.[333] The case involved the merger of the Washington Trust Bank ("WTB"), a state bank headquartered in Spokane, with the National Bank of Commerce ("NBC"), a large national bank headquartered in Seattle and owned by Marine Bancorporation, a sizeable bank holding company.[334] Because the two banks did not compete directly and the merger would have "no effect on the number of banks in Spokane," the DOJ again advanced a claim under the potential competition doctrine.[335] It argued that if the merger was prohibited, NBC would be likely to "find an alternative and more competitive means for entering the Spokane area," and that WTB, in turn, would "ultimately develop by internal expansion or mergers with smaller banks into an actual competitor" of NBC and "other large banks . . . outside Spokane."[336] The Government additionally asserted that the merger would "terminate the alleged procompetitive influence" that NBC exerted over Spokane banks "due to the potential for its entry into that market."[337] The district court, however, held that the merger would, in fact, "'substantially' increase competition in

328. *First Nat'l Bancorporation*, 329 F. Supp. at 1016.
329. *Id.* at 1020.
330. *Id.* at 1015.
331. *Id.*
332. United States v. First Nat'l Bancorporation, 410 U.S. 577 (1973).
333. 418 U.S. 602, 605–06 (1974).
334. *Id.* at 606–07.
335. The merger would substitute the NBC for WTB in the Spokane area, thereby keeping the number of banks in the market constant. *Id.* at 605.
336. *Id.*
337. *Id.*

commercial banking in the Spokane metropolitan area," a concentrated market due in large part to regulatory barriers to entry.[338] In light of the restrictions on entry, the district court found "no reasonable probability" that NBC would enter Spokane de novo in the absence of the merger.[339]

On appeal, the Supreme Court agreed and chastised the DOJ for failing to grasp the "conceptual difficulty" of its theory even after continuous losses in the district courts.[340] "[A]n important reason why [the Government] has been uniformly unsuccessful in the district courts," the Court expounded, "is that it fails to accord full weight to the extensive federal and state regulatory barriers to entry into commercial banking."[341] "This omission is of great importance," the Court continued, "because ease of entry on the part of the acquiring firm is a central premise of the potential-competition doctrine."[342] Distinguishing commercial banking from other industries in which firms base their decisions "regarding entry and the scale of entry into a new geographic market on nonregulatory considerations," the Court highlighted the long history of extensive federal and state control over both "entry into and exit from the commercial banking business . . . ."[343] More specifically, the Court detailed the numerous restrictions enacted by the state of Washington that limited branching as well as "de novo geographic expansion through branching and multibank holding companies."[344] Explaining that these barriers to entry "significantly reduce, if they do not eliminate, the likelihood" that NBC would be seen as either a "potential de novo entrant or a source of future competitive benefits through de novo or foothold entry," the Court ultimately upheld the district court's ruling.[345] More importantly, the Court extended its reasoning beyond the particular facts of the case and placed the final nail in the coffin of the potential competition doctrine as applied to commercial banking:

> As the Government's expert witness conceded, all banking markets in the country are likely to be concentrated. This is so because as a country we have made the policy judgment to restrict entry into commercial banking in order to promote bank safety. Thus, most banking markets in theory will be subject to the potential-competition doctrine. But the same factor that usually renders such markets concentrated and theoretical prospects for potential competition § 7 cases—regulatory barriers to new entry—will also make it difficult to establish that the doctrine invalidates a particular geographic market extension merger.[346]

338. *Id.* at 616 (quoting United States v. Marine Bancorporation, No. 237-71C2, 1973 WL 806, at *3 (W.D. Wash. Jan 31, 1973)).
339. 418 U.S. at 616.
340. *Id.* at 627–28.
341. *Id.*
342. *Id.* at 628.
343. *Id.* at 628–29.
344. *Id.* at 629.
345. *Id.* at 630.
346. *Id.* at 632.

In the wake of *Marine Bancorporation*, the limits of antitrust law as a mechanism for combatting the geographic expansion and growing size of banks and bank holding companies became clear. *Philadelphia National Bank* and its progeny had solidified the effectiveness of section 7 of the Clayton Act in precluding mergers between commercial banks in direct competition in the same relevant market.[347] Beyond this narrow set of circumstances, however, antitrust doctrine proved a feeble weapon for preventing the rise of large-scale banking organizations through market extension mergers. As eight district courts and the Supreme Court itself reminded the Justice Department, commercial banking remained a singular realm wherein market structure reflected the decisions of regulators as much as bankers, and competition itself remained a nebulous ideal that was to be carefully balanced against other values.[348] Indeed, whether a merger promoted or diminished competition in banking in many ways continued to depend on the eye of the beholder.

In the eyes of the Federal Reserve, competition had long since held a broader meaning than the antitrust laws could capture. For even at the peak of a highly interventionist antitrust regime intensely focused upon market structure, the lens of section 7 of the Clayton Act provided a limited view. With the relevant geographic market in commercial banking demarcated as localities, courts generally regarded the impact of market extension mergers upon regional or even national concentration as immaterial. [349] Similarly, antitrust doctrine focused upon relative market share, rather than the aggregate size of banking organizations.[350]

With over two decades of experience confronting the constraints of antitrust analysis in the banking sector, the Federal Reserve thus continued to advance its own vision of merger policy even in the wake of the 1966 amendments to the BHCA and BMA.[351] In 1967, for example, the Board rejected the application of BT New York Corporation, the largest bank holding company in the state, to acquire the Liberty National Bank and Trust Company, the third largest commercial bank in Buffalo.[352] Though they heeded the new language of section 3(c) of the BHCA, which mimicked both the Sherman and Clayton Act, the Board nevertheless proceeded to deny permission for BT New York Corporation's proposed acquisition on potential competition grounds.[353] Refuting BT New York's claims that its entrance into the highly concentrated Buffalo market would increase competition by strengthening Liberty National in comparison to its two larger rivals, the Board deemed as limited both the "probable impact on Liberty

347. *See* O'Brien, *supra* note 18, at 420.
348. *See* Mahoney, *supra* note 322, at 327.
349. *Id.* at 319.
350. *Id.* at 321–22.
351. *See* O'Brien, *supra* note 18, at 420; *see also* Thomas J. O'Connell, *Bank Mergers and Potential Competition*, 43 FORDHAM L. REV. 767, 791 (1975); Thomas Robertson, *Potential Competition, Bank Mergers and Acquisitions: An Analysis of Federal Reserve Board Decisions*, 1 ANN. REV. BANKING L. 311, 337 (1982); Metzger & Greenfield, *supra* note 18, at 843.
352. *BT New York Corporation, Suffern, New York*, 53 FED. RSRV. BULL. 769, 774 (1967).
353. *Id.*

National's largest competitors, and the benefits to the public from a greater statistical equalization in the overall market shares held by the three largest banks."[354] The Board further argued that Liberty National had the capacity to serve as the lead bank of a new bank holding company that might expand and contribute to the deconcentration of upstate New York banking markets more broadly.[355] Yet, by ignoring the issue of entry barriers and its own assessment that the banking needs of Buffalo were being "adequately met," the Federal Reserve made clear that it would continue to depart from antitrust doctrine in reviewing bank holding company acquisitions.[356]

Thus, even as the Justice Department went on to suffer defeat after defeat in its potential competition cases and the Supreme Court crippled the doctrine's application in the banking sector, the Federal Reserve rejected the narrowing scope of the Clayton Act and restrained numerous market extension mergers under the BHCA. In 1968, the Board issued another denial of an application by Charter New York Corporation ("CNYC"), a bank holding company with deposits of over 3.5 billion, to acquire the Central Trust Company in Rochester, New York.[357] After acknowledging that CNYC did not compete directly with Central Trust Company, and thus that the effect of the proposed transaction on "existing competition" did not present a "significant obstacle" to approval, the Board shifted its focus to "other competitive considerations . . . of much greater concern."[358] Noting that it "previously had occasion to express its views with respect to the inconsistency with the purpose and intent of the [BHCA] of proposals which tend toward creation of a banking structure consisting of a few giant banking organizations competing only among themselves in a State's significant banking markets," the Board went on to explicitly reference its BT New York Corporation decision.[359] "Many of the same considerations found to require denial of that application," the Board elaborated, "apply with equal force and effect to the proposal of [Charter New York Corporation] . . . ."[360] Reiterating the core objectives of the BHCA itself, the Board emphasized its authority to assess the competitive effects of a merger or acquisition according to its own interpretation of the BHCA's mandates:

> A judgment on a proposal's consistency or inconsistency with the competitive standard of the Bank Holding Company Act must be guided by the intent of Congress in enacting the legislation. . . . [T]he primary objectives of Congress in establishing a competitive standard to be applied to applications such as presently before the Board were to prevent the concentration of banking resources in the hands of a few large banking organizations and to protect and encourage a framework for a banking structure consisting of as many separate and competing banking organizations as can

354. *Id.* at 771.
355. *Id.* at 772.
356. *Id.*
357. *Charter New York Corporation, New York, New York*, 54 FED. RSRV. BULL. 925, 925 (1968).
358. *Id.* at 927.
359. *Id.*
360. *Id.*

> effectively and efficiently serve the convenience and needs of the banking public."[361]

Though the Board acknowledged that the 1966 amendments to the BHCA incorporated a "competitive standard identical with that of the antitrust laws," it nevertheless insisted that the new statutory language evidenced "no departure from the original goals of Congress" as the Clayton Act was "itself inspired by 'what was considered to be a rising tide of economic concentration in the American economy.'"[362] Yet, as the Federal Reserve had learned as early as 1953, when the Third Circuit overturned its decision in its first antitrust case against Transamerica, those standards were different.[363]

Those differences would eventually come to a head as the Board continued to deny mergers throughout the 1970s, abandoning any pretense of rooting its decisions in antitrust dictates.[364] In 1981, a bank holding company in Texas formally challenged the Federal Reserve's power under the BHCA in *Mercantile Texas Corporation v. Board of Governors*, fundamentally altering the future of bank merger policy in the process.[365] The case involved the proposed merger of two bank holding companies, Mercantile Texas Corporation, the fifth largest bank holding company in Texas, and PanNational Group Inc., a small bank holding company operating in Waco and El Paso.[366] The Board had denied approval for the transaction under section 3(c) of the BHCA, asserting that the merger would eliminate potential competition between the two bank holding company groups, producing substantially anticompetitive effects in both the Waco and El Paso markets.[367] The Board contended that Mercantile Texas Corporation would be likely to enter the Waco and El Paso markets in the future in a more procompetitive manner if the merger was rejected.[368]

When Mercantile Texas appealed to the Fifth Circuit, the Board argued that it had broad authority under the BHCA to deny mergers on anticompetitive grounds, even where the transaction would not violate the antitrust laws.[369] The Fifth Circuit flatly rejected the Federal Reserve's position, however. Because section 3(c) of the BHCA contained language purposefully borrowed from section 7 of the Clayton Act, the Court reasoned, the "principles developed under the Clayton Act" were "applicable to mergers of bank holding companies . . . as well as to mergers of banks under . . . the Bank Merger Act, which uses the same language."[370] "The legislative history of the two provisions," the Court went on, "establishes that Congress did not intend for the Board to apply a more stringent

361. *Id.* at 928.
362. *Id.*
363. *Clayton Act Proceeding: Transamerica Corporation*, 39 FED. RSRV. BULL. 1329, 1329 (1953).
364. *See, e.g.*, *Security Financial Services, Inc.*, 56 FED. RSRV. BULL. 834, 834 (1970); *United Banks of Colorado, Inc.*, 61 FED. RSRV. BULL. 315, 316 (1975).
365. 638 F.2d 1255, 1259 (5th Cir. 1981).
366. *Id.* at 1259.
367. *Id.* at 1259, 1262 n.8.
368. *Id.* at 1259–60.
369. *Id.* at 1259.
370. *Id.* at 1261.

standard than ordained by Section 7 of the Clayton Act."[371] "Above all," it emphasized, "Congress sought to establish 'uniform standards' for consideration of anticompetitive effects of bank mergers and acquisitions by bank holding companies."[372] Declaring that the Board's expansive interpretation of its authority to reject mergers for reasons other than antitrust violations would "destroy that uniformity," the Court narrowed the lens through which the Federal Reserve could evaluate transactions under the BHCA and the BMA.[373] As the Court stated plainly, "[w]e conclude that the statute denies the Board the broad discretion it claims. If the Board rejects a proposed merger on anticompetitive grounds, it must find a violation of the Sherman and Clayton Act standards . . . ."[374]

Six months later, the Eighth Circuit followed suit, holding in *County National Bancorporation v. Board of Governors* that "so far as anticompetitive factors are concerned the Board is limited to consideration of violations of the antitrust standards . . . ."[375] Furthermore, both the Fifth and Eighth Circuits confined the reach of "the convenience and needs" factor that had provided another avenue for banking agencies to consider broader competitive and structural considerations.[376] Together with the *Washington Mutual* case, these precedents strictly delimited the terrain of banking regulators' merger analysis to the strictures of antitrust law.[377] Despite initiating the battle to render bank holding companies subject to the antitrust laws in the 1940s in an effort to curb the domination of banking resources by statewide and regional giants, nearly four decades later it appeared that the Federal Reserve had lost the war. For it had long viewed antitrust law as a weapon of last resort, crafting the first Clayton Act case against Transamerica only after efforts to secure bank holding company legislation had repeatedly failed. Following the successful enactment of the BHCA in 1956, the Federal Reserve never again exercised its authority to bring a section 7 claim under the Clayton Act.[378] Moreover, the Board went to great lengths to consistently distinguish its decisions under the BHCA and BMA from antitrust doctrine

371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 1259.
375. 654 F.2d 1253, 1260 (8th Cir. 1981).
376. Though the Board sought to legitimate its more expansive interpretation of competitive effects by grounding it in the "the convenience and needs" factor as well, the Court imposed a narrow interpretation of that provision. Following in the footsteps of the Ninth Circuit in the *Washington Mutual* case, the Court found that the "convenience and needs of the community" did not "include consideration of any anticompetitive effects that a proposed bank holding company transaction may have." *Id.* at 1259–60; *see also Mercantile Texas Corp.*, 638 F.2d. at 1261–64 ("'[C]onvenience and needs' . . . refers to considerations other than competitive impact.").
377. *See supra* notes 311–17 and accompanying text; Carstensen, *supra* note 18, at 581–82.
378. *See* J.P. Dreibelbis, *supra* note 100; ECCLES, *supra* note 117, at 445; *see also Hearing on Bills to Amend the Clayton Act Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 84th Cong. 3–11 (1955) (statement of William McChesney Martin, Chairman, Fed. Rsrv. Sys.):

> In only one case has the Board instituted proceedings under the Clayton Act. . . . [I]t is important to bear in mind that lessening of competition and tendency toward monopoly are not the only factors which must be considered . . . with various banking transactions . . . . There are other factors which also have an important bearing upon the public interest . . . . The Board feels that section 7 of the Clayton Antitrust Act . . . is not an appropriate and practical means of controlling or restricting monopolistic tendencies in the banking field.

The *Transamerica* case remains the only section 7 case the Federal Reserve has brought. *Id.*

and make clear that its reasoning stood apart from the requirements of the Sherman and Clayton Acts.[379] The Federal Reserve had fought for antitrust law to serve merely as an additional tool in its antimonopoly arsenal. It had not anticipated that it would one day become its only tool.

### *D. Antitrust Primacy and Financial Deregulation*

By the early 1980s, the supremacy of antitrust law as the governing framework for bank merger policy had been solidified. Despite the protests of many banking regulators throughout the 1960s and 1970s, the turn to antitrust eventually helped lay the foundation for a wider paradigm shift within finance as well as the regulated industries more broadly.[380] Amidst technological transformations that rendered branching limitations and other geographic restrictions anachronistic, as well as the macroeconomic pressures of the era, antitrust appeared to offer a solution to a multipronged problem.[381] It could provide not only "uniformity" and a "discernable body of law" for merger policy, as the Fifth Circuit had contended, but a failsafe for the modernization of the financial sector.[382]

As outdated barriers to entry increasingly fell, regulators and scholars alike began to see antitrust as a protective measure amidst deregulation. As legal scholars wrote as early as 1970, "[t]here is reason to believe that the establishment of antitrust constraints on bank acquisitions has meant that the elimination of state restrictions on multiple-office banking is more likely to have beneficial effects."[383] A 1976 publication entitled "Does Antitrust Law Preclude the Need For Geographic Constraints On Banking?" similarly emphasized the potential for antitrust doctrine to facilitate adaptation to changing technology in the banking sector.[384] Noting that restrictive branching laws limited "statewide 'concentration' at the price of protecting local 'monopolies,'" the article contended that "[l]ess restrictive measures—including greater reliance on antitrust laws," were available to "protect markets against undue concentration, coercive restraints, and predatory practices."[385] The growing embrace of antitrust extended to other

379. *See* SHULL & HANWECK, *supra* note 29, at 84–85.

380. On the paradigm shift of the late twentieth century, see, for example, João Rafael Cunha, *The Advent of a New Banking System in the US: Financial Deregulation in the 1980s*, *in* FINANCIAL DEREGULATION: A HISTORICAL PERSPECTIVE 24, 24 (Alexis Drach & Youssef Cassis eds., 2021); Reuel Schiller, *Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market, in* BEYOND THE NEW DEAL ORDER: U.S. POLITICS FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 168, 168–85 (Gary Gerstle, Nelson Lichtenstein, & Alice O'Connor eds., 2019); SHULL & HANWECK, *supra* note 29, at 1–11; *see generally* COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES (Peter C. Carstensen & Susan Farmer eds., 2008).

381. *See, e.g.*, Geoffrey P. Miller, *Legal Restrictions on Bank Consolidation: An Economic Analysis*, 77 IOWA L. REV. 1083, 1111–18 (1992); Randall S. Krozner & Philip E. Strahan, *What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions*, 114 Q.J. ECON. 1437, 1460–63 (1999).

382. Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Rsrv. Sys., 638 F.2d. 1255, 1261 (5th Cir. 1981).

383. *See* Shull & Horvitz, *supra* note 239, at 888.

384. See Donald I. Baker, *Does Antitrust Law Preclude the Need for Geographic Constraints on Banking?*, 93 BANKING L.J. 1005, 1005 (1976).

385. *Id.* at 1015.

regulated industries as well, as sweeping ideological shifts ushered in a new era of deregulation in communications, transportation, and utilities.[386]

As the neoliberal turn took hold of the American political economy, the public utility tradition in banking increasingly faded from memory. With antitrust functioning as the primary gatekeeper of merger analysis, regulators became more comfortable treating commercial banks as akin to ordinary businesses.[387] As prohibitions on interstate banking fell and rate caps were repealed, the notion that market forces alone could adequately govern the banking sector seeped into reimagined origin stories proffered for a new era of American finance.[388] At the same time, antitrust law underwent its own revolution as the Chicago School eviscerated more expansive conceptions of the role the Sherman and Clayton Acts should play in checking concentrated economic power.[389] By the end of the twentieth century, the once robust public interest approach to bank mergers and acquisitions under the BHCA and BMA had been all but forgotten, the behemoth financial conglomerates that grew to tower over the American banking landscape monuments to its death.

## VI. CONCLUSION

Throughout the second half of the twentieth century, conflicting antimonopoly ideals continued to drive public debate over the structure of American banking. Whether bank size would remain a proxy for monopoly power and commercial banks analogous to local utilities, and whether the DOJ or banking regulators operating beyond the bounds of antitrust doctrine would dictate bank merger policy, these questions persisted well after the enactment of the BHCA and the BMA.[390] In the aftermath of the 1966 amendments, the answers became clear. By placing their faith in antitrust law, however, Congress and the courts diminished the role of more powerful and effective tools for deconcentrating the banking landscape. As policy-makers, regulators, and scholars once again debate how best to revise the bank merger regime amidst a new era of financial concentration, the historically convoluted relationship between antitrust law and financial regulation deserves reexamination. Retracing the origins of the BHCA and the BMA reveals the historical contingency of antitrust primacy in the banking sector. For these critical legislative victories arose out of the failure of antitrust

386. *See* COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES, *supra* note 380, at 2; Ricks, *supra* note 54.

387. *See, e.g.*, Alan Greenspan, Chairman, Fed. Rsrv. Sys., The Evolution of Banking in a Market Economy, Remarks at the Annual Conference of the Association of Private Enterprise Education (Apr. 12, 1997) (advocating the effectiveness of private market regulation for banks and the ineffectiveness of government intervention in financial markets).

388. *See, e.g.*, Ricks, *supra* note 54, at 793; CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 1 (2014).

389. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720–21 (2017); WU, *supra* note 13, at 102–09; JONATHAN BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 43–46 (2019); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43, 52–58 (2000).

390. Grischkan, *supra* note 44, at 298.

law to account for the nuances of bank market structure, and the economic, political, and social objectives of a decentralized financial system.[391]

Today, the financial sector bears little resemblance to the landscape of the mid-twentieth century, as numerous barriers to entry have fallen to allow competition to serve as a central feature of modern finance.[392] Yet despite the enhanced role of competition, many of the same concerns regarding the inability of antitrust law to prevent financial consolidation now animate efforts to reimagine bank merger policy. In light of historical barriers to entry, banking has largely remained competitive at local levels even as national aggregate concentration has grown.[393] In addition, the rise of nonbanks and fintech has continued to expand product markets, rendering the Clayton Act largely ineffective at countering bank mergers.[394] Indeed, as a number of scholars have noted, few of the mergers that created the megabanks now dominating the financial system could have been barred by antitrust law.[395] As one legal scholar presciently concluded nearly forty years ago, "[a]ssuming a movement to a national market in which efficiency depends upon greater aggregate sizes, the decision whether to have one hundred or one thousand firms cannot rest on traditional antitrust analysis."[396] Moreover, the harms posed by these financial giants go well beyond the calculation of competitive impact in defined geographic and product markets. From the systemic risk posed by bank size and interconnectedness, to concerns over moral hazard in light of the federal backstop of bank deposits, to issues surrounding access and equity in credit provision, the potential consequences of a bank merger cannot be fully captured through the lens that antitrust provides.[397]

Certainly, the American antitrust regime is undergoing its own dramatic changes as a new generation of reformers advocates broadening its core objectives beyond the consumer welfare standard.[398] Scholars have therefore argued that antitrust can do more to combat rising numbers of bank mergers.[399] While that is undoubtedly true, and while market definitions and Herfindahl-Hirschman Index ("HHI") thresholds—which measure concentration levels in defined markets—should be updated to reflect the new realities of twenty-first-century banking, antitrust need not serve as the first line of defense.[400] As the history of the BHCA and the BMA demonstrates, the bank merger regime was created to offer something distinctly more than antitrust law to regulators hamstrung by its

391. *See infra* notes 392–412 and accompanying text.

392. *See* Kress, *supra* note 11, at 451–54; Baker, *supra* note 323, at 355–56.

393. *See* Kress, *supra* note 11, at 453.

394. *See id.* at 451–54; Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended* Philadelphia National Bank *Holiday*, 13 FORDHAM J. FIN. & CORP. L. 595, 597 (2008).

395. *See* Baker, *supra* note 323, at 358–59; Pekarek & Huth, *supra* note 394, at 625–31.

396. Carstensen, *supra* note 18, at 608.

397. *See supra* notes 7–11 and accompanying text; *see also* Kress, *supra* note 11, at 464.

398. *See, e.g.*, WU, *supra* note 13, at 127–39; Khan, *supra* note 13, at 131–32; Maurice E. Struck & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement [https://perma.cc/Q7EK-9HQP].

399. *See* Pekarek and Huth, *supra* note 394, at 637–85; Kress, *supra* note 5, at 520.

400. *See* Kress, *supra* note 5, at 584 (advocating for the reduction of HHI thresholds, which trigger heightened review under the bank merger guidelines).

limitations.[401] Though policy-makers in the mid-twentieth century spoke of combatting monopoly and preserving competition in commercial banking, their goals often diverged from the meanings of those terms within antitrust analysis. The BHCA and the BMA provided them with more malleable and potent mechanisms through which to address the complex economic, political, and social objectives of money creation and credit provision.[402]

Amidst this new antimonopoly moment, revisiting the past illuminates an alternate way forward. Rather than elevating antitrust law as the principal mechanism through which to engage in structural reform, policy-makers should reinvigorate a broader and more flexible public interest approach under the bank merger statutes. Such an approach, moreover, is feasible under the current form of the BHCA and BMA and does not require revising the statutory language. In 2010, the Dodd-Frank Act mandated the addition of a financial stability factor to both the BHCA and BMA.[403] This factor directs regulators to explicitly consider size and interconnectedness in evaluating proposed transactions, but it remains underdeveloped and underutilized within the current merger framework.[404]

Thus, despite the constraints of the 1966 amendments to the BHCA and BMA, which incorporated the language of the antitrust laws and narrowed the discretion regulators once had to consider sheer size and the broader structural impacts of a bank merger or acquisition,[405] the financial stability factor has opened up new possibilities for expanding the bounds of merger review. Just as the Federal Reserve once considered "the size and extent" of a bank holding company and its impact upon "competition" as well as "the public interest" more broadly,[406] so too can regulators now assess the absolute size, stability, and long-term structural harms in rendering a decision under the bank merger statutes.[407] Recovering the historical practice of bank merger regulation is therefore critical, as it provides a foundation for reinvigorating the financial stability factor moving forward. Other statutory factors included in the BHCA and BMA, such as the impact of a merger upon "the convenience and needs of the community," can do more work in the merger review process as well, as recent scholarship has compellingly shown.[408]

401. *See supra* Section II.C.

402. *See* Kress, *supra* note 11, at 463–67 (acknowledging the limitations of antitrust in modern bank merger review and advocating for greater reliance on the other statutory factors under the BHCA and the BMA); *see also* Tarullo, *supra* note 15 (advocating revisions to competitive analysis of bank mergers along with renewed attention to financial stability and other statutory factors).

403. *See* Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., University of Pennsylvania Law School Distinguished Jurist Lecture: Financial Stability Regulation (Oct. 10, 2012).

404. *Id.*

405. *See supra* Part IV.

406. Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 3(c), 70 Stat. 133, 135 (codified as amended at 12 U.S.C. § 1842(c)).

407. Dodd-Frank Act, Pub. L. No. 111-203, § 604(d)-(f), 124 Stat. 1376, 160–02 (2010).

408. Recent scholarship has focused on the particular statutory tools that would facilitate a public interest approach to bank mergers, including a more stringent analysis of the "convenience and needs" factor and a strengthening of the financial stability factor added by the Dodd-Frank Act. *See* Kress, *supra* note 11, at 476–83; Tarullo, *supra* note 15 (deeming the financial stability factor "analytically underdeveloped more than a decade

Undoubtedly, reviving a public interest standard under the BHCA and the BMA provides less uniformity and certainty within the merger review process. Indeed, many decisions regarding mergers under the BHCA and the BMA in the postwar years were far from unanimous, with heated debate among regulators commonplace.[409] Critics may therefore argue that restoring a public interest approach risks the same confusion and instability in merger policy that spurred the embrace of antitrust principles in the first place. Yet, as the history of bank merger reform illustrates, antitrust law failed to exert the kind of robust check on financial consolidation that its advocates envisioned.[410] By the late twentieth century, the relationship between antitrust and bank merger regulation had become one of estrangement.[411] The allure of antitrust as a more neutral and effective arbiter of difficult policy choices should therefore be resisted.

More importantly, the turn to antitrust restricted the terrain upon which essential debates regarding financial power and credit provision could unfold and ultimately hollowed out the merger review process. The public interest approach, though admittedly less predictable than the quantitative thresholds of antitrust doctrine, makes room once again for those debates, for critical reassessments of our financial structure and the values that shape it. These kinds of conversations and conflicts are vital to mapping out a new, more equitable political economy for the twenty-first century.

The shift toward a public interest standard, moreover, does not require the rejection of all large-scale bank mergers, as the record of postwar merger decisions under the BHCA and the BMA affirms. Rather, it merely allows for a more sustained, careful and comprehensive examination of the full range of potential harms a proposed transaction poses, to the financial system writ large, to individual borrowers and communities, and to the American political economy itself.[412] Finally, bank regulators published detailed explanations of their decisions under the merger statutes throughout the postwar decades and self-consciously crafted these decisions as precedents to guide future decision-making.[413] Thus, through transparency as to their reasoning and publication of their decisions under the BHCA and the BMA, regulators applying a public interest standard can provide clarity and consistency even as they engage in a broader and more flexible assessment of a merger's impact beyond antitrust doctrine.

after it was added by the Dodd-Frank Act"). Revising the statutory language of the competitive factor under the BHCA and the BMA to extend beyond antitrust analysis represents an alternative, though less likely, option.

409. *See supra* Parts II–III.

410. *See supra* Part V.

411. *See* Baker, *supra* note 323, at 355; Kress, *supra* note 11, at 449–54.

412. The public interest standard would work in conjunction with, and contribute to reinvigorating, other tools designed to account for these concerns, like the Community Reinvestment Act. As scholars have long argued, the CRA has failed to accomplish its goals of ensuring investment in low-income and underserved communities because regulators sign off on mergers by banks with merely satisfactory CRA ratings. A revitalized public interest standard would therefore permit greater attention to these goals within the merger review process. *See* Kress, *supra* note 11, at 448–91.

413. *See supra* Sections V.B–V.C.

The convergence of antitrust law and banking regulation in the mid-twentieth century presented a challenge for regulators focused on more than competition as defined by the Sherman and Clayton Acts. For antitrust proved an ill-suited framework within which to address complex and multi-faceted concerns regarding the infrastructure and deployment of money, the number and absolute size of banks, their political power, and the public subsidies that underwrite their risk taking. Ultimately, retracing the history of bank merger policy offers a critical reminder that antitrust law represents merely one tool in a rich and varied antimonopoly toolkit, one that has been neglected for far too long.