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Breaking Up Is Hard to Do: Why American Banks Remain Too Big to Fail

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BREAKING UP IS HARD TO DO: WHY AMERICAN BANKS REMAIN TOO BIG TO FAIL

Abstract: The 2008 Financial Crisis pushed the American economy to the brink of disaster. Fearing Great Depression-like consequences, the federal government bailed out several banks deemed "too big to fail." During the ensuing period of reform there were frequent calls to assure that taxpayers would never again be on the hook to save an institution because of the risk its size posed to the nation's economic health. The Dodd-Frank Act of 2010 promised to end this "too big to fail" phenomenon and increased regulatory requirements for banks. Still, in the decade after the crisis, America's biggest banks have only grown larger. This Note highlights that concerns about the size and power of financial institutions are a recurring theme in American history and argues that our current options to force the divestiture of banks are inadequate to ensure that no bank is "too big to fail."

INTRODUCTION

In the decade following the 2008 Financial Crisis, the American economy prospered.[1] Emergency government interventions in the financial sector averted the onset of another Great Depression and stimulated a strong recovery.[2] Yet the crisis continues to infect American life.[3]

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[1] *See* Nelson D. Schwartz, *The Recovery Threw the Middle-Class Dream Under a Benz*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/business/middle-class-financial-crisis.html [https://perma.cc/5QCB-MWQ3] ("A decade later, things are eerily calm. The economy, by nearly any official measure, is robust. Wall Street is flirting with new highs. And the housing market, the epicenter of the crash, has recovered in many places.").

[2] *Id.* (indicating that "the financial sector was supported in spectacular fashion" during the Financial Crisis). Faced with the prospect of another Great Depression, financial regulators, such as Ben Bernanke, the Chairman of the Federal Reserve from 2006 to 2014, implemented extensive emergency lending and capital infusion measures. *See* BEN S. BERNANKE, THE COURAGE TO ACT: A MEMOIR OF THE CRISIS AND ITS AFTERMATH 82 (2015) (arguing that the "financial crisis compared to, and arguably surpassed, the financial crisis that ushered in the Great Depression"). This was particularly a concern for Bernanke who, prior to entering public service, was an academic economist whose scholarly work examined the role the rescission of credit played in lengthening and increasing the severity of the Great Depression. *Id.* at 32–34; *see* Ben S. Bernanke, *Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression*, 73 AM. ECON. REV. 257, 257 (1983) (arguing that damage to credit flows because of the widespread failures of banks played an integral role in instigating the Great Depression). Because of this research and his other academic work examining the "financial accelerator theory" of economic downturns, Bernanke specifically advocated that "[f]irst, in periods of recession . . . monetary policy should be forcefully deployed to restore full employment and

The connection between the crisis and some conditions are obvious: the net worth of middle income families trails pre-crisis levels, homeownership rates remain low, and wealth inequality has increased.[4] Others are more tangential, but compelling: populism returned to American politics, student debt rates grew, and the New York Mets endured a decade of mediocrity.[5] Though many Americans still struggle with the fallout from the crisis, this pain has not extended to the crisis's culprit, America's biggest banks.[6] In contrast, these

normal levels of inflation. Second, policymakers must act decisively to preserve financial stability and normal flows of credit." BERNANKE, *supra*, at 35–36.

[3] *See* Matt Phillips, *The Bull Market Began Ten Years Ago. Why Aren't More People Celebrating?*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/business/bull-market-anniversary.html [https://perma.cc/L96W-L8CZ] (noting that although the crisis gave way to a ten-year bull market beginning in March of 2009, fewer Americans participated in the stock market and reaped these gains).

[4] *See* Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Second Quarter 2019, Release No. CB19-98 (July 25, 2019), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/F6V5-GGFN] (showing that homeownership in the second quarter of 2018 was 64.1 percent, while in the fourth quarter of 2007 the rate was 67.8 percent); Jessie Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Sept. 2017, at 1, 13, https://www.federalreserve.gov/publications/files/scf17.pdf [https://perma.cc/7CJT-FQGS] (highlighting that between 2013 and 2016, the net worth of the bottom 20% of income earners rose 6% while the income of the top 10% of income earners rose 40%); Schwartz, *supra* note 1 ("In 2016, net worth among white middle-income families was 19 percent below 2007 levels, adjusted for inflation. But among blacks, it was down 40 percent, and Hispanics saw a drop of 46 percent.").

[5] Jason Belzer, Opinion, *Why the New York Mets Can Thank Bernie Madoff for Their World Series Appearance*, FORBES (Oct. 30, 2015), https://www.forbes.com/sites/jasonbelzer/2015/10/30/why-the-new-york-mets-can-thank-bernie-madoff-for-their-world-series-appearance/#4d45fe2246f6 [https://perma.cc/6S39-7TMP] (highlighting that the New York Mets had reduced their payroll after the team owners lost millions in Bernie Madoff's Ponzi scheme); Manuel Funke et al., *The Financial Crisis Is Still Empowering Far Right Populists*, FOREIGN AFF. (Sept. 13, 2018), https://www.foreignaffairs.com/articles/2018-09-13/financial-crisis-still-empowering-far-right-populists [https://perma.cc/R7WT-7JRG] ("After five years, voting patterns usually return to their pre-crisis status quo, fractionalization within parliaments decreases, and the far right loses its momentum. This time is different. Ten years on, fractionalization, polarization, and far-right voting are all alive and well."); Philip Stevens, *Populism Is the True Legacy of the Global Financial Crisis*, FIN. TIMES (Aug. 30, 2018), https://www.ft.com/content/687c0184-aaa6-11e8-94bd-cba20d67390c [https://perma.cc/SY9B-8T4H] (arguing that the lasting legacy of the Financial Crisis will be that it created populist backlash against elites, who escaped the crisis largely unscathed). The owners of the Mets, the Wilpon family, lost nearly $170 million in Bernie Madoff's Ponzi scheme, which led them to reduce the team's payroll and borrow money from Major League Baseball to avoid selling the team. Belzer, *supra*. Prior to the crisis, the Mets were among the league's biggest spenders; after the crisis, the team joined the ranks of the spendthrift, small-market squads and posted a winning record just twice between 2009 and 2018. *New York Mets Team History & Encyclopedia*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/NYM/index.shtml [https://perma.cc/3NYU-WWJQ]; *see 2001 Compensation*, BASEBALL PROSPECTUS, https://legacy.baseballprospectus.com/compensation/?cyear=2001&team=&pos= [https://perma.cc/K5MD-G4JX]. Still, some have credited the team's 2015 National League Pennant to its shift away from spending big money in free agency and in favor of a renewed emphasis on developing young pitchers. Belzer, *supra*.

[6] Peter Eavis & Keith Collins, *Banks Have Changed. Except All the Ways They're the Same*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/interactive/2018/09/12/business/big-investment-

banks, which were rescued by taxpayer-funded bailouts during the crisis, have largely returned to business as usual.[7]

These bailouts sparked public backlash and the Dodd-Frank Act of 2010 (Dodd-Frank) promised to eliminate the practice of bailing out banks deemed "too big to fail."[8] But, instead of breaking up banks, the federal response centered on increasing capital and liquidity requirements, limiting proprietary trading and investments in hedge and private equity funds, enhancing consumer protection, and mitigating systemic risk.[9]

Many argue that these regulatory enhancements are sufficient, and breaking up banks would result in undue harm to the American economy without remedying the "too big to fail" problem.[10] In particular, opponents of bank breakups maintain that there must be large banks to fulfill the needs of large businesses that operate transnationally.[11] Moreover, some scholars have argued

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banks-dodd-frank.html [https://perma.cc/T58K-NQ3G] (noting that although banks have become better capitalized and bank executives' pay has diminished, the industry continues to be dominated by a small number of institutions and exercises tremendous power in Washington).

[7] *Id.* ("While the [Dodd-Frank] legislation overhauled much of what banks do, much remains the same.").

[8] *See* pmbl. H.R. 4173, 111th Cong. (2010) (stating that the purpose of the Dodd-Frank Act is "to end 'too big to fail'" and "protect the American taxpayers by ending bailouts"); Ross Douthat, Opinion, *The Great Bailout Backlash*, N.Y. TIMES (Oct. 25, 2010), https://www.nytimes.com/2010/10/25/opinion/25douthat.html [https://perma.cc/63TB-CNGK] (noting that in spite of the fact that bailouts likely prevented a more severe economic downturn they remained highly unpopular). Recognition of the "too big to fail" problem was not limited to narrow political corners. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 100–01, 210–11 (2010). In a 2009 speech, Alan Greenspan, who espoused free market ideals and regulatory restraint as Chair of the Federal Reserve Bank from 1987 to 2006, even called for the breakup of banks to solve the problems of banks being "too big to fail." *Id.* at 100, 210. He argued: "If they're too big to fail, they're too big." *Id.* at 210 (citing Alan Greenspan, Conversation at the Council on Foreign Relations C. Peter McColough Series on International Economics: The Global Financial Crisis: Causes and Consequence (Oct. 15, 2009), https://www.cfr.org/event/c-peter-mccolough-series-international-economics-global-financial-crisis-causes-and [https://perma.cc/R3KP-CXMN]).

[9] MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 322–23, 327 (highlighting the Basel III capital and liquidity requirements instituted by banking regulators after the Financial Crisis and the Collins Amendment to Dodd-Frank); *id.* at 704–09 (explaining the Volcker Rule's limit on proprietary trading and restrictions on "sponsoring or investing in private equity and hedge funds"); *id.* at 581 (describing the origination of the Consumer Financial Protection Bureau (CFPB) and the passage of the Consumer Financial Protection Act in Dodd-Frank); *id.* at 756 (noting Dodd-Frank's mechanism to address systemic risk).

[10] *Id.* at 761 (noting that big banks provide services not offered by their smaller counterparts); *see* BERNANKE, *supra* note 2, at 440–41 (arguing that the size of a firm is not the only factor in determining whether it poses a substantial systemic risk).

[11] *See* BARR ET AL., *supra* note 9, at 760 ("The view from the financial sector is that large complex financial organizations are necessary to serve large global corporations in a world of global competition . . . ."); BERNANKE, *supra* note 2, at 440 ("[S]urely size also has a positive economic value—for example, in the ability of a large firm to offer a wide range of services or to operate at sufficient scale to efficiently serve global nonfinancial companies. Arbitrary limits on size would risk destroying that economic value while sending jobs and profits to foreign competitors.").

that "too big to fail" is a misnomer; rather, systemic risk is a problem of interconnectedness, not size.[12] Their argument calls into question whether breaking up the banks would accomplish its purpose if the activities of smaller versions of the same entities continued to be intertwined.[13]

Nonetheless, Dodd-Frank's reform measures leave the "too big to fail" problem unresolved and increase the risk that banks will again require bailouts.[14] Large financial institutions—which are more prone to "short-term, high-risk" behavior—pushed the American economy to the brink and imposed the costs on its citizens.[15] This is particularly concerning given that banks have increased in size since the crisis,[16] and this concern is heightened by the Feb-

[12] *See* BARR ET AL., *supra* note 9, at 763 (highlighting that Professor Paul Krugman has argued that breaking up banks may be ineffective because "finance is deeply interconnected"); BERNANKE, *supra* note 2, at 440 ("Bear Stearns, which was only a quarter of the size of the firm that acquired it, JPMorgan Chase, wasn't too big to fail; it was too interconnected to fail."); Jesse W. Markham Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the Too-Big-to-Fail Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 261, 273–74 (2011) (noting that the problem posed by "too big to fail" banks is not that they are large but that they are entangled with core functions of the American economy and capable of having a crippling ripple effect). An illustration of the interconnectedness versus size dynamic is the implosion of Enron in the early 2000s, which did not trigger discussions of a federal bailout. *Markham*, *supra*, at 272. The energy conglomerate—which was large, but not as entangled with other industries as a comparably large bank—was permitted to fail; its failure, however, did not substantially harm the American economy or energy sector. *Id.* In contrast, during the financial crisis, preventing Bear Stearns' failure in March of 2008 was seen as essential. BERNANKE, *supra* note 2, at 215 ("[W]e were reasonably sure that [Bear Stearns'] unexpected bankruptcy filing would ignite even greater panic. Bear had nearly 400 subsidiaries, and its activities touched almost every other major financial firm. It had 5,000 trading counterparties and 750,000 open derivatives contracts."); *see* FIN. CRISIS INQUIRY COMM'N (FCIC), THE FINANCIAL CRISIS INQUIRY REPORT 280–91 (2011) (noting the systemic risk posed by Bear Stearns). This is reinforced by the repercussions of federal regulators' decision not to rescue Lehman Brothers. *See* FCIC, *supra*, at 343 (concluding that Lehman Brothers' failure had dire consequences).

[13] *See* BERNANKE, *supra* note 2, at 440 ("[T]he size of a financial firm is far from the only factor that determines whether it poses a systemic risk[;] . . . severe financial crises can occur even when most financial institutions are small.").

[14] *See* Randall D. Guynn, *Are Bailouts Inevitable?*, 29 YALE J. ON REG. 121, 123–24 (2012) (noting the "choice of evils" faced by regulators during the financial crisis: either bail out the bank or risk severe economic destabilization because of an unsystematic resolution of a bank that is "too big to fail"); Arthur E. Wilmarth Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 956 (2011) [hereinafter Wilmarth, *Dodd-Frank*] ("Dodd-Frank does not solve the [too big to fail] problem"); Eavis & Collins, *supra* note 6 (highlighting the "defanging" of the CFPB, the delay in implementing the Volcker Rule, and gradual erosion of capital holding requirements).

[15] Arthur E. Wilmarth Jr., *A Two-Tiered System of Regulation Is Needed to Preserve the Viability of Community Banks and Reduce the Risks of Megabanks*, 2015 MICH. ST. L. REV. 249, 255–56 [hereinafter Wilmarth, *Two-Tiered*] ("[M]egabanks have shown a strong and persistent tendency to pursue short-term, high-risk strategies . . . .").

[16] *Id.* at 264 ("The federal government's massive support for the largest U.S. financial institutions helped them to expand their leading positions in broader segments of the financial markets. The Big Four [J.P. Morgan Chase, Bank of America, Citigroup, and Wells Fargo] and Goldman [Sachs] con-

ruary 2019 announcement that SunTrust and BB&T Banks intend to merge, which suggests that a new age of bank mergers may be on its way.[17]

The consequences of these banks' growth are not solely economic.[18] The rescue of "too big to fail" banks, while many Americans struggled to stay afloat, undermined Americans' belief in the fair administration of laws.[19] This has in turn threatened the health of our democratic institutions.[20] In sum, the failure of Dodd-Frank to restrain America's biggest banks and the erosion of the act's measures to remedy the "too big to fail" problem call for renewed consideration of bank breakups.[21]

Though not the laws' primary focus, Dodd-Frank and the Riegle-Neal Act of 1994 (Riegle-Neal) include measures that give regulators the authority to

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trolled total banking and nonbanking assets equal to 56% of the U.S.'s gross domestic product (GDP) in 2011, up from 43% five years earlier.").

[17] Michael J. de la Merced & Emily Flitter, *The Financial Crisis Put a Chill on Big Bank Deals. That Ended Tuesday*, N.Y. TIMES: DEALBOOK (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/business/dealbook/bbt-suntrust-bank-mergers.html [https://perma.cc/FK9P-EPQG] ("The industry will be closely watching how regulators react to the BB&T-SunTrust deal. If it succeeds, it could usher in an era of deal-making. If it is blocked, the decade-long drought will continue.").

[18] *See* JOHNSON & KWAK, *supra* note 8, at 90 (noting Wall Street's excessive clout in politics through its campaign spending, lobbying, and the revolving door); MELVIN UROFSKY, LOUIS BRANDEIS: A LIFE 326 (2009) ("Brandeis tried to teach . . . that in a democratic society the existence of large centers of private power is dangerous to the continuing vitality of a free people.").

[19] *See* JOHNSON & KWAK, *supra* note 8, at 208 (arguing that layering on more regulations will not prevent future crises if banks remain the same size); Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1288–94 (2013) [hereinafter Wilmarth, *Turning a Blind Eye*] (noting the extent to which financial reforms have been undercut by Wall Street); Schwartz, *supra* note 1 (indicating that the harms brought by the financial crisis have been shared unequally).

[20] *See* Douthat, *supra* note 8 ("The bailout became law because the legislative branch was stampeded with the threats of certain doom. It vested unprecedented economic authority in a single unelected official . . . . And it used public funds to insulate well-connected private actors from the consequences of their recklessness. Its creation short-circuited republican self-government . . . ."); *see also* Neil Irwin, Opinion, *Why the Financial Crisis Was Bad for Democracy*, WASH. POST (Apr. 5, 2013), https://www.washingtonpost.com/opinions/why-the-financial-crisis-was-bad-for-democracy/2013/04/05/84d668de-9c73-11e2-9bda-edd1a7fb557d_story.html [https://perma.cc/83N5-B5EZ] (noting the democratic consequences resulting from the fact that most major decisions during the financial crisis were made by unelected officials rather than Congress). In *Democracy in America*, Alexis De Tocqueville famously noted the importance of fairness to Americans, writing: "Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people." TIMOTHY WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 30 (2018).

[21] *See* BERNANKE, *supra* note 2, at 441 ("I agreed with the administration view that breaking up large firms was likely not the best way to solve the too-big-to-fail problem, at least not until other, more incremental options had been tried and found wanting."); Wilmarth, *Two-Tiered*, *supra* note 15, at 264 (indicating that the biggest banks have only grown larger since the financial crisis); Eavis & Collins, *supra* note 6 (noting the erosion of post-crisis reforms).

break up banks.[22] This Note explores the tools these laws give the government to break up large banks, why they have gone unused, and potential changes to the regulatory structure that could encourage or require the divestiture of large banks.[23] Part I begins by detailing the history of banking in the United States.[24] It highlights the nation's aversion to centralized and powerful banking institutions.[25] This Part also identifies how the banking industry changed over the course of the twentieth century—gradually shedding restraints imposed in the aftermath of the Great Depression that culminated in the formation of banks that were "too big to fail" and the 2008 Financial Crisis.[26] Part II examines the current regulatory framework designed to end the "too big to fail" problem and provisions of Riegle-Neal and Dodd-Frank that allow the government to break up banks.[27] Part III argues that these regulatory options are largely inadequate and unlikely to be used, thus reform efforts, which would face significant hurdles, should center on imposing nondiscretionary asset caps.[28]

I. The United States' Historic Mistrust of Big Banks

Americans have long feared the banking sector's power.[29] Nonetheless, efforts to restrain this power through the political process have met significant resistance.[30] These battles have fundamentally shaped banking regulation in the United States.[31] Section A of this part details the rise of banking in the

[22] *See* Dodd-Frank and Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5331(a)(5) (2012) (providing regulators the power to force banks to sell or transfer assets when necessary to mitigate the grave risk they pose to the United States); *id.* § 5365(d)(5)(B) (allowing regulators to force banks to sell or transfer assets to enable an "orderly resolution"); Riegle-Neal Interstate Branching and Banking Efficiency Act of 1994, 12 U.S.C. § 1842(d)(2)(A) (2012) (prohibiting the approval of mergers that result in a bank controlling more than ten percent of total deposits in the United States); *id.* § 1842(d)(2)(B) (prohibiting the approval of mergers that result in a bank controlling more than thirty percent of any state's total deposits).

[23] *See infra* notes 195–245 and accompanying text.

[24] *See infra* notes 29–155 and accompanying text.

[25] *See infra* notes 29–155 and accompanying text.

[26] *See infra* notes 116–155 and accompanying text.

[27] *See infra* notes 156–219 and accompanying text.

[28] *See infra* notes 220–245 and accompanying text.

[29] *See* Johnson & Kwak, *supra* note 8, at 14 (highlighting a historic mistrust of financial institutions in the United States).

[30] *See* Wilmarth, *Turning a Blind Eye*, *supra* note 20, at 1288–94 (indicating staunch opposition from Wall Street to Dodd-Frank reform measures).

[31] *See* John C. Coffee Jr., *Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 Cornell L. Rev. 1019, 1020 (2012) (arguing that there is only sufficient impetus for financial reform after a major financial crisis and that "[a] good crisis should never go to waste"). President Obama's Chief of Staff, Rahm Emanuel, obviously concurred with Professor Coffee's assessment and, in November of 2008, highlighted that the Financial Crisis offered a unique opportunity for reform, saying "[y]ou never want a serious crisis to go to waste . . . [and t]his crisis provides us an opportunity to do things that you could not do before." Gerald F.

United States, demonstrating that concerns over the size and power of the financial sector are hardly new, while also demonstrating the important role played by the First and Second Bank of the United States in developing the American economy.[32] Section B explains the rise of the trust movement, shows how the Panic of 1907 led to emergence of the Federal Reserve Bank, and sheds light on how the lack of regulatory oversight contributed to the Stock Market Crash of 1929 and the Great Depression.[33] Finally, Section C highlights the changes imposed after the Great Depression that resulted in the most stable banking period in United States history, why deregulatory efforts began in the 1970s and continued until the early 2000s, and how these deregulatory efforts led to the 2008 Financial Crisis.[34]

A. Early History of Banking in the United States

Since the founding of the United States, banks have generated controversy.[35] Indeed, one of the most divisive controversies confronted by the federal government in its first half-century of existence was the creation of the First Bank of the United States.[36] Among the failures of the Articles of Confederation was its inability to establish proper conditions for economic growth.[37] At

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Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008), https://www.wsj.com/articles/SB122721278056345271 [https://perma.cc/Y3WH-8PTQ]. Still, Emmanuel's optimism may have been misguided. *See* Coffee, *supra*, at 1029, 1082 ("It is still too soon to say that the 2008 crisis was wasted, but it has not been exploited."). As Professor Coffee argues, "regulatory oversight is never constant but rather increases after a market crash and then wanes as, and to the extent that, society and the market return to normalcy." *Id.* at 1029. This is compounded by the fact that, "the public's passion for reform is short-lived and support it gives to political entrepreneurs who oppose powerful interest groups on behalf of the public also quickly wanes." *Id.* These attributes are evident in financial reform; the time-window for change is short, and what can be passed will likely be undermined soon thereafter. *Id.* at 1029–30.

[32] *See infra* notes 35–75 and accompanying text.

[33] *See infra* notes 76–115 and accompanying text.

[34] *See infra* notes 116–155 and accompanying text.

[35] JOHNSON & KWAK, *supra* note 8, at 14 (indicating that "[s]uspicion of large, powerful banks is as old as the United States").

[36] *Id.* at 15, 17–18 (highlighting the constitutional debate over the First and Second Bank of the United States and President Jackson's "bank war").

[37] *See* RON CHERNOW, ALEXANDER HAMILTON 224–25, 345 (2004) [hereinafter CHERNOW, ALEXANDER HAMILTON] (noting that the failure of the Articles of Confederation to encourage capitalism drove Alexander Hamilton's push for a new constitution). Although the Articles of Confederation's problems were numerous, financial difficulties posed the most pressing challenge to the new country. *Id.* at 224. The Articles of Confederation did not provide a power to tax, leaving the federal government unable to raise money to pay off "the gargantuan debt inherited from the Revolution" except through voluntary contributions from the states, which seldom came. *Id.* at 224, 226. States' attempts to pay their debts through tax assessments were increasingly met with violence, as most Americans were equally cash strapped. *Id.* at 224–25. Rebellions by indebted farmers, such as Shay's Rebellion in Massachusetts, sprang up throughout the Union. *Id.* at 225. The rebels sought radical reforms, which included the annulment of debts and an equal division of property. *Id.* Though state

its birth, the United States had an archaic financial system and was basically bankrupt.[38] The country's economic development was hindered by the unavailability of credit and absence of a uniform currency; bartering remained the dominant form of economic exchange.[39] President Washington's Secretary of the Treasury, Alexander Hamilton, believed a national bank was required to solve these problems and put the country on the path to economic prosperity and political stability.[40]

In 1791, Congress heeded Hamilton's call and passed a bill chartering the First Bank of the United States.[41] The Bank would have both public and private characteristics.[42] In addition to accepting deposits from and lending to private citizens, the Bank would carry out the government's fiscal responsibilities.[43] Despite fulfilling this governmental function, control of the Bank would largely be private, with the government holding only a minority stake.[44]

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militias put down the rebellions, state legislatures adopted debt-relief measures and weakly enforced property rights. *Id.* at 225, 345. Hamilton was not blind to farmers' plight, but he believed that the state's actions, which were permitted under the Articles of Confederation, ran counter to what a capitalist society required. *Id.* at 225. This reinforced his belief that rather than states attempting to pay off their debts, the country needed a strong federal government that could "redistribute the tax burden equitably across the states." *Id.*

[38] *See id.* at 224 ("Money problems pervaded all others under the Articles of Confederation. America was virtually bankrupt . . . ."); Peter Rousseau & Richard Sylla, *Emerging Financial Markets and Early United States Growth*, 42 EXPLORATIONS ECON. HIST. 1, 2 (2005) (characterizing the Articles of Confederation-era American economy as "primitive" and "effectively bankrupt"). In a report delivered to Congress in 1790, "[t]he grand total of the national debt estimated by Hamilton amounted to $79.1 million, about 40 percent of the estimated gross domestic product (GDP) in 1790." Richard Sylla, *Financial Foundations: Public Credit, the National Bank, and Securities Markets*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 59, 67 (Douglas A. Irwin & Richard Sylla eds., 2011) (internal citation omitted).

[39] *See* CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 347–38, 356 (indicating the absence of a uniform currency and that the scarcity of money resulted in bartering). Where deals were not done by barter, stand-ins for money were often used instead. *Id.* at 348. For instance, "in the south, warehouse receipts for tobacco often doubled as money." *Id.* Hamilton believed that a uniform currency was essential to ending this antiquated form of exchange and would allow the poor to purchase goods in smaller quantities. *Id.* at 356.

[40] *See id.* at 347. Hamilton believed a central bank was vital because "the country required an institution that could expand the money supply, extend credit to government and business, collect revenues, make debt payments, handle foreign exchange, and provide a depository for government funds." *Id.*

[41] *Id.* at 345, 349. The bank bill was easily passed in the Senate on January 20, 1791, emerging less than a month after Hamilton proposed the institution on December 14, 1790. *Id.* Although the bill eventually won approval in the House in a thirty-nine to twenty vote on February 8, 1791, it was opposed by a number of southern congressmen on constitutional and geographic grounds—mirroring the eventual divide among Washington's cabinet. *Id.* at 348–55.

[42] *See id.* at 347–49 (noting that Hamilton looked upon European central banks as an example of how the combination of public and private funds could unleash economic growth and meet key governmental functions).

[43] BARR ET AL., *supra* note 9, at 36 ("The First Bank acted as the federal government's fiscal agent, collecting tax revenues, securing the government's funds, making loans to the government,

President Washington's cabinet, however, was divided.[45] First, there was the question of whether it was constitutional for Congress to charter the bank through its constitutional power to make laws "which shall be necessary and proper," or if the power to create a bank was instead reserved to the states by the Tenth Amendment.[46] Second, the Bank debate revealed competing visions of American society.[47] President Washington's Secretary of State, Thomas Jefferson, opposed the Bank because it jeopardized his vision of the United States as an agricultural society.[48] Jefferson specifically feared that, as the government's creditor, the Bank would hold undue power over political decisions and lend preferentially.[49] In contrast, Hamilton fought for an entrepreneurial socie-

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transferring government deposits through the bank's branch network, and paying the government's bills . . . . [T]he Bank of the United States also accepted deposits from the public and made loans to private citizens and businesses.").

[44] CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 349. Hamilton advocated for separation between the individuals directing the country's monetary policy and political influence—an insight that has retained influence to this day. *Id.* Nonetheless, he still worried that this would prevent effective oversight and lead to wrongdoing. *Id.* This concern, as I will explain, was not unfounded. *See* JOHNSON & KWAK, *supra* note 8, at 19–20 (highlighting attempts by Nicholas Biddle, then-president of the Second Bank of the United States, to harm the economy to generate opposition to President Jackson's attempts to shutter the bank).

[45] *See* CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 352–54 (noting Hamilton and Jefferson's competing efforts to persuade President Washington).

[46] *See id.* (discussing the constitutional arguments raised by Hamilton and Jefferson). *See generally* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); *id*. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Hamilton argued that the ability to create a bank was a power implied by the Constitution and did not need to be "absolutely necessary" to fall within the ambit of the Necessary and Proper Clause. CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 354. This reasoning persuaded Washington to sign the bill in spite of his reservations. *Id.* Nevertheless, Jefferson was adamant in his belief that Congress did not have the power to create a bank and, in the aftermath of the bill's passage, went so far as to write to James Madison that state legislatures that create state banks that cooperate with the central bank could be found "guilty of high treason and suffer death accordingly." *Id.* at 352. The Supreme Court settled the constitutional argument in the seminal case regarding the Second National Bank, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Id.* at 355.The Court's conclusion was decidedly Hamiltonian: Congress could create a bank because the Necessary and Proper Clause does not require the exercise of power to be absolutely necessary, but rather appropriate to carrying out that power. *McCulloch*, 17 U.S. (4 Wheat.) at 419–21, 424 ("[T]he act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land."); *see* CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 355 (noting that Daniel Webster's oral arguments in the case "distinctly echoed" Hamilton's argument to Washington).

[47] *See* JOHNSON & KWAK, *supra* note 8, at 14–17 (comparing Jefferson's vision of America as an agrarian society characterized by decentralized political and economic institutions, with Hamilton's preference for strong political and economic institutions that could bolster industry).

[48] *Id.* at 14.

[49] *Id.* at 17. An additional consideration for Jefferson and southerners was that a national bank would foster the commercial sector's growth, which would endanger the institution of slavery. *Id.*

ty where the government actively supports commerce.[50] He believed that the Bank was essential to the United States' economic success because it would allow the nascent country to retire its war debts and encourage commercial transactions.[51]

President Washington sided with Hamilton.[52] This decision led to the development of a stable financial system that spurred economic progress, improved living conditions, and promoted political stability.[53] Capital became more readily available as the number of state-chartered banks grew from three in 1789 to over two hundred by 1814.[54] The increased availability of bank capital proved particularly potent when combined with a burgeoning equity market that enticed foreign investment.[55] These factors allowed for the introduction and expansion of businesses throughout the country.[56]

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[50] CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 345 ("As treasury secretary, [Hamilton] wanted to make room for entrepreneurs, whom he regarded as the motive force of the economy."). Hamilton argued that the key to a prosperous nation was to put Americans' savings to use. *Id.* at 347–48. If citizens deposited their money in a bank, the bank could then lend out that money. *Id.*

[51] *See* JOHNSON & KWAK, *supra* note 8, at 15–16 (noting that the First Bank "functioned broadly as advertised by Hamilton," facilitating transactions and improving the country's creditworthiness by establishing that the United States would honor its debts). Although the divide between Jefferson and Hamilton perhaps best illustrates these differences, they were not alone in holding these competing views. *See* BARR ET AL., *supra* note 9, at 35. These fundamentally different visions of American society were on display when the House of Representatives first considered the bank bill. *Id.* The division could largely be broken out geographically: "all representatives to the 'eastward' were for it and all to the 'southward' were against it, almost without exception." *Id.* (quoting RICHARD H. TIMBERLAKE JR., MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY 7–8 (1993)).

[52] CHERNOW, ALEXANDER HAMILTON, *supra* note 37, at 354.

[53] *See* Rousseau & Sylla, *supra* note 38, at 1, 2–5 (arguing that the development of United States finance, particularly banks, drove the country's economic growth during the founding era); Richard Sylla et al., *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1892*, 83 BUS. HIST. REV. 61, 62–63 (2009) (noting the importance of Hamilton's six financial innovations in achieving political and economic stability: "stable public finances and debt management; stable money; an effective central bank; a functioning banking system; active securities markets; and a growing number of business corporations, financial and nonfinancial").

[54] Rousseau & Sylla, *supra* note 38, at 5 (noting that the amount of capital, measured in 1860 dollars, raised by banks rose "from $3 million in 1790 to $4.26 million by 1840"); Joseph Van Fenstermaker, *The Statistics of American Commercial Banking, 1812–1818*, 25 J. ECON. HIST. 400, 401 (1965) (indicating that there were three state-chartered banks in 1790 and over two hundred in 1814). Indeed, by 1825 the fledgling nation's banking system had eclipsed its former colonizer. Rousseau & Sylla, *supra* note 38, at 5. Though the country had fewer people, it "had roughly 2.4 times the banking capital." *Id.*

[55] *See* JOHNSON & KWAK, *supra* note 8, at 16 (noting that in 1803 European investors held a majority of United States securities).

[56] *See* Rousseau & Sylla, *supra* note 38, at 2–4 (arguing that the development of financial institutions drove the growth of American enterprise from 1790 to 1850).

Despite invigorating the United States' financial system, the First Bank faced staunch opposition.[57] Congress voted against extending the Bank's charter after its twenty-year term expired.[58] In the wake of the financial turmoil initiated by the War of 1812, Congress reversed course and chartered the Second Bank of the United States.[59] Even after surviving a constitutional challenge in *McCulloch v. Maryland*, the Second Bank met the same fate as the First Bank after a showdown with President Andrew Jackson.[60]

President Jackson's resistance to the Second Bank was in part economic.[61] He attributed the Financial Crisis of 1819 to the Bank's lending and favored hard currency over paper money, which he believed was necessary to prevent bankers from expanding or contracting the money supply to the detriment of ordinary Americans.[62]

Still, his resistance predominately stemmed from his fear of the Second Bank's growing political influence.[63] In addition to carrying on important ad-

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[57] *See* JOHNSON & KWAK, *supra* note 8, at 19 (discussing the failure to re-charter the Bank in 1811).

[58] *Id.*

[59] *Id.*

[60] *See McCulloch*, 17 U.S. (4 Wheat.) at 424 (upholding the constitutionality of the Second Bank as a proper exercise of Congress's power under the Necessary and Proper Clause); JOHN MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 208–12 (2009) (detailing the passage of a bill re-chartering the Second Bank of the United States and subsequent veto and electoral victory by Jackson in 1832).

[61] JOHNSON & KWAK, *supra* note 8, at 19 ("Jackson, however, opposed the Second Bank on both economic and political grounds. He hated paper money and believed only in the hardest of hard money—gold and silver. Paper money, he thought, allowed banks and bankers to distort the economy at the expense of common people."); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESS WON THEIR CIVIL RIGHTS 92 (2018) ("Jacksonians blamed the Second Bank's lending practices for the devastating financial panic of 1819, whose effects reverberated throughout the economy of the 1820s.").

[62] *See* JOHNSON & KWAK, *supra* note 8, at 19 (explaining Jackson's preference for hard money); WINKLER, *supra* note 61, at 92 (indicating Jackson blamed the Second Bank for the 1819 Financial Crisis). The Financial Crisis of 1819 occurred when the Second Bank attempted to exchange state banknotes for specie—gold and silver coins—at western and southern state banks to pay off debt issued to finance the Louisiana Purchase. BARR ET AL., *supra* note 9, at 37. The state banks lacked sufficient reserves to meet the request and, as a result, "foreclosed on outstanding mortgages and suspended convertibility of their banknotes. Depositors and holders of banknotes panicked, precipitating a series of runs and bank failures." *Id.* The Second Bank's reputation was further tarnished when it began foreclosing on numerous properties. *Id.* (citing RALPH C.H. CATTERALL, THE SECOND BANK OF THE UNITED STATES 84 (Nabu Press 2010) (1902)).

[63] *See* JOHNSON & KWAK, *supra* note 8, at 19 ("[T]he Second Bank's monopoly over government finances gave Biddle and his friends power (and profits) that, [Jackson] felt, rightfully belonged to the executive branch. The president was particularly enraged that Biddle used his economic power to curry favor with Congress, influencing elected representatives to support his aims . . . ."); MEACHAM, *supra* note 60, at 53 (noting that in the aftermath of the 1828 election Jackson increasingly believed that the Second Bank of the United States had grown too strong because it was not accountable to the public and "made loans to influence elections, paid retainers to pro-Bank lawmakers, and could control much of the nation's economy on a whim").

ministrative tasks as the government's fiscal agent, the Bank served numerous politicians; consequently, many of the Congressman who would dictate the Bank's future owed money to the Bank.[64] This included Senator Henry Clay, who proposed a bill to re-charter the Bank, intending to use the matter in his efforts to defeat President Jackson in the 1832 election.[65] When Clay's bill to re-charter the Bank passed both houses of Congress, President Jackson vetoed it, denouncing the bank as unconstitutional, injurious to states' rights, and a threat to liberty.[66]

The Second Bank would not go down without a fight.[67] The Bank's president, Nicholas Biddle, attempted to erode Jackson's popular support by causing a recession, which he accomplished by requiring immediate payments on state bank bills, restricting access to credit, and significantly reducing the money supply.[68] The Second Bank's fate was sealed when President Jackson won reelection.[69] Unsatisfied with merely letting its charter expire in 1836, President Jackson tried to destroy the Bank[70] He pushed for the sale of the government's stake in the Bank and, contrary to Congress's command, attempted to order the withdrawal of the government's deposits.[71] No deposits

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[64] JOHNSON & KWAK, *supra* note 8, at 19. Among the prominent politicians who owed money to the Bank were Whig Senators Daniel Webster and Henry Clay; consequently, both supported the Bank. *Id.* Prior to becoming a senator, Webster even defended the Bank before the Supreme Court in *McCulloch v. Maryland*. WINKLER, *supra* note 61, at 89.

[65] JOHNSON & KWAK, *supra* note 8, at 19–20 (noting the electoral dimensions of Clay's push to re-charter the Second Bank four years prior to the expiration of its charter).

[66] President Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832), https://avalon.law.yale.edu/19th_century/ajveto01.asp [https://perma.cc/9CD9-UKM7] ("[T]he powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people."). Declaring the bank unconstitutional, in spite of the Court's decision in *McCulloch*, marked a significant change in the conception of executive power. *See* MEACHAM, *supra* note 60, at 210–11. Jackson's declaration that "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution" gave no deference to the Supreme Court. *Id.*

[67] *See* JOHNSON & KWAK, *supra* note 8, at 20 (noting the efforts of Nicholas Biddle, the President of the Second Bank of the United States, to harm the economy to erode Jackson's support); WINKLER, *supra* note 61, at 93 ("Biddle used all of his corporation's amassed resources to fight back. The Second Bank called in loans, restricted access to credit, and reduced the nation's money supply . . . . Rather than break Jackson's resolve, Biddle's aggressive response proved to many the accuracy of Jackson's accusation that the Second Bank was an irresponsible, untrustworthy, and all-too-powerful corporation.").

[68] JOHNSON & KWAK, *supra* note 8, at 20–21.

[69] *Id.*

[70] *See id.* at 20 (detailing President Jackson's statement to his running mate, Martin Van Buren: "The Bank . . . is trying to kill me . . . *but I will kill it*.") (internal quotations omitted).

[71] BARR ET AL., *supra* note 9, at 38.

were removed, but President Jackson's onslaught diminished the Second Bank prior to the expiration of its charter.[72]

The economy continued to grow through the remainder of the nineteenth century, but President Jackson's demolition of the Second Bank had significant economic consequences.[73] Still, Biddle's ability to stifle the economy to meet his own political needs offers a glimpse at what Jackson, and Jefferson before him, feared more than a hampered financial system: a country controlled by the financial elite.[74] They believed it was better that the financial system be inefficient than pose a threat to American democracy.[75]

B. Economic Concentration of Gilded Age

Despite the Second Bank's demise, the ensuing period in American history proved prosperous.[76] The United States was a leader in technological and industrial development.[77] The growth of industry, however, was coupled with the use of this newfound wealth to influence the political process.[78] This was especially pernicious because of the power of trusts.[79]

The Trust Movement advocated for the rearrangement of the economy into monopolies that would operate without competition or government regula-

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[72] *Id.* ("The House rejected a proposal to sell the government's stock in the Second Bank and declared that the bank's deposits were safe. In 1833, in defiance of Congress, Jackson ordered the government's deposits removed from the Second Bank . . . [a]lthough the government's deposits were never actually withdrawn . . . ."); Jackson fired successive treasury secretaries for not withdrawing the money before attempting to nominate future Chief Justice, Roger Taney, to the position. *See* WINKLER, *supra* note 61, at 93. The Senate, however, defeated Taney's nomination.

[73] JOHNSON & KWAK, *supra* note 8, at 20–21. Because the Second Bank had functioned as a lender of last resort, in ensuing decades the banking system was more vulnerable to bank runs and suffered through more frequent and serious economic contractions. BARR ET AL., *supra* note 9, at 38–39; JOHNSON & KWAK, *supra* note 8, at 20. Bank runs occur where uneasy depositors rush to withdraw their funds from a bank and the bank is unable to meet the depositors' needs because their money is tied up in loans, which pay out over time. *See* Mark E. Van Der Weide & Satish M. Kini, *Subordinated Debt: A Capital Markets Approach to Bank Regulation*, 41 B.C. L. REV. 195, 201 (2000).

[74] JOHNSON & KWAK, *supra* note 8, at 21–22.

[75] *See id.* ("Jackson's victory ensured that a powerful private bank was not able to install itself in the corridors of political power and use its privileged position to extract profits for itself, inhibit competition, and hamper broader economic development.").

[76] *See id.* at 21 (noting that the U.S. economy continued to prosper even without the benefits of a central bank).

[77] *Id*. at 22 ("Americans were among the first to invent or commercialize many new technologies that arose after 1800, building companies based on innovation in agricultural implements, canals, telecommunications, steam power, railroads, chemicals, and other industries.").

[78] *Id.* at 23.

[79] *Id.* at 23–24.

tion.[80] This movement swiftly took hold in the United States: between 1897 and 1904, 4,227 Americans companies combined to form 257 conglomerates.[81]

It was not until Theodore Roosevelt became President after William McKinley's assassination in 1901 that the government began to counter monopoly power.[82] In contrast with his predecessor, President Roosevelt viewed the concentration of economic power as a hazard to democracy.[83] He directed his Department of Justice to block impending mergers and break up existing trusts—resuscitating the Sherman Antitrust Act, which barred monopolistic practices, but had largely laid dormant since its enactment in 1890.[84] First, Roosevelt's administration blocked the merger of Northern Securities Company, a corporation that James J. Hill and John Pierpont Morgan intended to use to consolidate power over western railroads.[85] Soon after, the Department of Justice brought an antitrust action against John D. Rockefeller's Standard Oil, which eventually resulted in the trust being broken up.[86] The ensuing Presidents, William Howard Taft and Woodrow Wilson, continued to bring antitrust actions to curb monopoly power.[87] When President Wilson left office, nearly all major trusts had been broken up or faced an antitrust action.[88]

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[80] WU, *supra* note 20, at 24. In the United States this included industrial behemoths like Standard Oil and AT&T. *Id.* Consolidation was justified on economic and sociopolitical grounds. *Id.* at 26–28. For instance, at the time many attributed the economic recessions of the 1890s to "ruinous competition," thus the monopoly, which eliminated competition, was seen as an appropriate salve. *Id.* at 26. Similarly, in line with Social Darwinists' thinking, which held sway during the era, the "[g]rowth of large business is merely a survival of the fittest." *Id.* at 26–28 (internal quotation omitted). Therefore it would be unnatural for the government to intervene; rather, the small and weak firm should stand aside for the large and strong firm. *Id.* at 28.

[81] *See* JOHNSON & KWAK, *supra* note 8, at 24; *see also* WINKLER, *supra* note 61, at 163, 168–69 (detailing that the "Great Merger Movement" occurred as corporations capitalized on changes in state corporate law, which no longer limited the size of a corporation, its business purpose, or ability to hold stock in other companies).

[82] *See* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 432–35 (1998) [hereinafter CHERNOW, TITAN] (noting that although Theodore Roosevelt's notoriety as a trustbuster may have been "somewhat overblown," he posed a far more significant challenge to trusts than William McKinley).

[83] WU, *supra* note 20, at 49 (highlighting that Roosevelt believed that Wall Street's corrupting influence over the country's economic policy perverted the democratic process and that failure to address this ill may result in the public agitating for the upheaval of a capitalist economy).

[84] JOHNSON & KWAK, *supra* note 8, at 25.

[85] *Id.*; *see also* WU, *supra* note 20, at 48–67 (discussing the Northern Securities litigation).

[86] WU, *supra* note 20, at 68.

[87] JOHNSON & KWAK, *supra* note 8, at 25–26.

[88] WU, *supra* note 20, at 74. Notably, President Taft brought seventy-five antitrust cases during his four years in office, exceeding the forty-five brought by President Roosevelt. *Id.* These were not minor actions; the trusts Taft brought actions against included U.S. Steel and AT&T, which were both controlled by J.P. Morgan and counted among the nation's largest trusts. *Id.*

The trust movement was not, however, confined to the consolidation of industry.[89] It also resulted in the concentration of financial power.[90] A small number of bankers provided the credit that allowed trusts to purchase their competitors' shares to consolidate their power.[91] Lead among these bankers was John Pierpont Morgan.[92] Nonetheless, the trust-busting movement did not reach the banks—a trend that has held into modern times.[93]

The concentrated power of the financial industry was apparent when the Financial Panic of 1907 sent the stock exchange into free fall.[94] The panic began after a stock manipulation effort initiated runs that enveloped one of New

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[89] JOHNSON & KWAK, *supra* note 8, at 24.

[90] *Id.*

[91] *Id.*

[92] *Id.* ("A handful of bankers led by J.P. Morgan played a central role in this rapid transformation of the business landscape, giving Morgan an economic importance unmatched by any financier since Biddle . . . . Morgan's empire handled . . . as high as 40 percent of total capital raised at the beginning of the twentieth century.").

[93] *See* BARR ET AL., *supra* note 9, at 716 (indicating that the antitrust laws had not been used against banks throughout much of the twentieth century); JOHNSON & KWAK, *supra* note 8, at 26 (noting that concentration in the financial sector grew in tandem with trusts, but the Sherman Act was not employed to limit their size). In part, this stems from the widely held belief throughout the first half of the twentieth century that the federal antitrust laws, which rely on the Commerce Clause, could not be applied to banks because banks could not partake in commerce. BARR ET AL., *supra* note 9, at 716. The separation of banking and commerce is a long-held policy goal of American banking regulators that arose from a desire to limit the potential economic harm from a bank's failure and concerns that banks would lend money on a preferential basis to harm commercial competitors. *See* Arthur E. Wilmarth Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1554 (2007). This belief persisted until the Supreme Court held that banking was commerce and, therefore, subject to federal antitrust law. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 354 (1963) (holding that the antitrust laws applied to banks). Prior to this decision, Congress, believing that the antitrust laws were inapplicable, restrained interstate bank consolidation through the Bank Holding Company Act of 1956 (BHCA) and the Bank Merger Act of 1960. BARR ET AL., *supra* note 9, at 716. Regulators could limit concentration in the banking sector through the antitrust laws and the BHCA and Bank Merger Act, but these tools were rendered unnecessary throughout the second half of the twentieth century because interstate branching limitations made it virtually impossible for large banking institutions to accrue market power or attain a monopoly. *Id.* at 717–18. These geographic restrictions began to erode in the mid-1970s and were eventually eliminated by the Riegle-Neal Act of 1994, which allowed national banks to "operate in a state by acquiring a bank located in the state, giving national banks the power to branch nationwide by merger." *Id.* at 726. This set off a flood of bank mergers, resulting in the creation of large banking institutions. *Id.* at 726–27. In spite of its applicability to the banking sector, antitrust law was not used to block the mergers of these companies or force breakups in the aftermath of the crisis. Markham, *supra* note 12, at 268–69. Although the antitrust laws have not historically regulated banks' anticompetitive activities, in the aftermath of the financial crisis some scholars have proposed that antitrust could be an instrument to remedy the "too big to fail" problem. *Id.* This is unlikely antitrust law's current emphasis on economic efficiency and disregard for social and political factors. *Id.* at 278. But "antitrust is cyclical," and sociopolitical factors may again warrant consideration. E. Thomas Sullivan, *Foundations of Antitrust*, *in* THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST 100 YEARS 3, 4 (E. Thomas Sullivan ed. 1991).

[94] JOHNSON & KWAK, *supra* note 8, at 26–27.

York's largest financial firms, Knickerbocker Trust Company.[95] Knickerbocker sold off assets to meet depositors' demands, but could not meet its obligations.[96] Knickerbocker's failure prompted runs on other trusts.[97] Market uncertainty caused lending to dry up, which compelled would-be borrowers to liquidate assets to meet their obligations—further depressing asset values.[98] The absence of a central bank that could lend money to stymie bank runs magnified the economic harm.[99]

The financial system only stabilized after J.P. Morgan took matters into his own hands; he began lending from his own personal wealth, determining which banks should live and which should die.[100] The United States Treasury

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[95] *Id.* at 26. There were a number of circumstances that contributed to the onset of the Panic of 1907, which was largely expected by Wall Street. RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE 121 (1990) [hereinafter CHERNOW, THE HOUSE OF MORGAN] ("The folk wisdom of Wall Street says that if a crash is widely expected, it won't occur, for a saving fear will filter through the marketplace. This was refuted in 1907, when Wall Street spent a cliff-hanging year expecting a crash that *came*."). The economy spent much of the year teetering on the brink because of "tight money, Roosevelt's Gridiron Club speech attacking the 'malefactors of great wealth,' and excessive speculation in copper, mining, and railroad stocks." *Id.* at 122. The speculative activities of trust companies, however, were the spark that ignited the kindling. *Id.* "Trust companies were state-chartered intermediaries that competed with banks for deposits." Jon R. Moen & Ellis W. Tallman, *The Panic of 1907,* FED. RES. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/panic_of_1907 [https://perma.cc/N2JG-D7ZG]. Historically, trusts handled wills and estates, which most banks were not permitted to handle, and were a relatively risk-free business. CHERNOW, THE HOUSE OF MORGAN, *supra*, at 122. Through regulatory loopholes, however, they increasingly undertook risky investment and lending. *Id.* In particular, trusts were vulnerable to runs because they held less cash in proportion to their deposits than their banking counterparts, while still having to pay depositors on demand. Moen & Tallman, *supra* ("[Trusts] held a low percentage of cash reserves relative to deposits, around 5 percent, compared with 25 percent for national banks.").

[96] CHERNOW, THE HOUSE OF MORGAN, *supra* note 95, at 123. Knickerbocker Trust failed on October 22 after Morgan's team audited its books and wrote it off as a failure. *Id.* Knickerbocker's president, Charles Barney, committed suicide after Morgan declined his request for a meeting, leading a number of depositors to in turn take their lives. *Id.*

[97] *Id.* at 124 ("The Knickerbocker's failure triggered runs on the other trusts, especially the Trust Company of America . . . ."). Depositors took dramatic steps to pull their funds from trusts, waiting in lines through the night and paying stand-ins to save their places. *Id.* In an effort to slow runs, "trust tellers counted out the money in slow motion." *Id.*

[98] *See id.* ("The price of call money—that is, the interest rate on margin loans to buy stocks—zoomed to 150 percent. Nevertheless, there remained a shortage of ready funds."); JOHNSON & KWAK, *supra* note 8, at 26. The Panic of 1907 and the Financial Crisis are eerily similar. Moen & Tallman, *supra* note 95. As economists John Moen and Ellis Tallman highlight, "[t]he trust companies in 1907 were like the shadow banks in the financial crisis of 2007–09. Short-term lending during the recent crisis came largely from some shadow banks (hedge funds and money market mutual funds) to fund other shadow banks (investment banks)." *Id.* Similarly, "[b]oth the trusts and the shadow banks faced runs by their depositors and had to withdraw lending in short-term credit markets." *Id.*

[99] JOHNSON & KWAK, *supra* note 8, at 27.

[100] *See* BARR ET AL., *supra* note 9, at 45 (noting that Morgan "personally pledged his own money to prop up the banking system"); JOHNSON & KWAK, *supra* note 8, at 26 ("[Morgan] and his team . . . decided which banks should fail because they were irredeemably insolvent and which should be saved

contributed $25 million to fortify Morgan's efforts, highlighting the government's remarkable trust in the power of a private citizen to remedy a crisis that implicated the nation's financial health.[101] The crisis illuminated the risks posed by the absence of a central bank, a lightly regulated financial sector, and the danger of resting the financial system's fate in the hands of a single wealthy financier.[102]

To remedy these problems, there was renewed consideration of a government-sponsored central bank that could address a financial panic.[103] Nonetheless, many still feared the corrosive power of the central bank to redistribute taxpayers' money to reckless banks.[104] Debate continued from the aftermath of the panic until Wilson became President.[105] Support ultimately emerged for the Federal Reserve Act of 1913, which created a system of private, geographically dispersed banks overseen from Washington by a publicly designated Board

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because they only needed some cash to get them through the panic . . . ."). In addition to providing his own funds, J.P. Morgan famously bullied other bankers into following suit. BARR ET AL., *supra* note 9, at 45 ("Morgan gathered the other financiers in his lavish library and held them there until they agreed to provide the funds necessary to stave off collapse."). Moreover, he even went as far as asking religious leaders in New York City "to preach calm in their Sunday sermons." CHERNOW, THE HOUSE OF MORGAN, *supra* note 95, at 126.

[101] CHERNOW, THE HOUSE OF MORGAN, *supra* note 95, at 123–24.

[102] *See id.* at 122 (highlighting that after Morgan's substantial efforts, "America decided that never again would one man wield such power. The 1907 panic would be the last time that bankers loomed so much larger than regulators in a crisis. Afterward the pendulum would swing decidedly toward government financial management."); JOHNSON & KWAK, *supra* note 8, at 26 (noting that the Panic of 1907 was the sort that a central bank would have prevented). Morgan's efforts effectively saved the financial system from ruin, but his actions at the end of the crisis indicate that he expected a return on his investment. CHERNOW, THE HOUSE OF MORGAN, *supra* note 95, at 127. To rescue the brokerage firm Moore & Schley, he arranged for his company, U.S. Steel, to acquire Tennessee Coal and Iron, one of Moore & Schley's subsidiaries. *Id*. Under normal circumstances this would have drawn antitrust scrutiny because it greatly expanded the power of Morgan's steel trust, but President Roosevelt elected not to assert any objection because of the panic, allowing Morgan to expand his steel empire at a "distress-sale price." *Id.* at 127–28.

[103] *See* JOHNSON & KWAK, *supra* note 8, at 27 (discussing Senator Nelson Aldrich's call for "a central bank that could act as a lender of last resort in a crisis").

[104] *Id.* In response to concerns about the existence of a "Money Trust" and Morgan's pernicious influence "a special subcommittee of the Housing Banking and Currency Committee, chaired by Arsène Pujo of Louisiana, began public hearings on the banking community." UROFSKY, *supra* note 18, at 321. Morgan's power in the financial sector was pervasive: "78 major corporations, including many of the country's most powerful holding companies banked at Morgans. Pierpont and his partners, in turn, held 72 directorships in 112 corporations, spanning the worlds of finance, railroads, transportation, and public utilities. In this era of relationship banking, board seats often meant a monopoly on a company's business." CHERNOW, THE HOUSE OF MORGAN, *supra* note 95, at 152. Although the committee ultimately concluded that there was not clear evidence of a Money Trust, they did, however, find that the banking industry was concentrated to a concerning degree. *Id.* at 155–56 ("[T]he Pujo committee never proved a Money Trust in a strict conspiratorial sense. Rather, it found a 'community of interest' that concentrated 'the control of credit and money in the hands of a few men, of which J.P. Morgan & Co. are the recognized leaders.'").

[105] BARR ET AL., *supra* note 9, at 46.

of Governors.[106] Importantly, the Federal Reserve Act addressed the cycle of restricted lending and asset liquidation that characterized the Financial Panic of 1907.[107]

Yet these safety valves, which undoubtedly limited the harm caused by a financial crisis, had an unintended effect of increasing "moral hazard."[108] The government's power to stem the tide of a crisis inadvertently increased banks' risk-taking propensities.[109] This was exacerbated by the fact that the Federal Reserve Act did not provide adequate regulatory supervision.[110] But, even if the Federal Reserve Act had provided a regulatory framework, the concentrated power of the financial sector raises questions as to how effective regulation could have been.[111]

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[106] *Id.*; *see* Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (1913) (establishing the Federal Reserve Bank). Initially, President Wilson supported a "plan for a decentralized, privately controlled reserve system of not more than twenty independent reserve banks." UROFSKY, *supra* note 18, at 381. Members of the progressive wing of Wilson's own party, however, believed the bill would give banks undue power. *Id.* at 382. Brandeis ultimately played an integral role in convincing Wilson to throw his support behind a more progressive measure that would curb the powerful big banks and give "exclusive government control of the reserve system." *Id.* at 382–83. In the aftermath of their meeting, Wilson abandoned his support for the privately appointed board and proposed the Federal Reserve Act to Congress. *Id.* at 383.

[107] BARR ET AL., *supra* note 9, at 47. First, Federal Reserve Banks were able to issue Federal Reserve notes "to expand the money supply." *Id.* Second, the Federal Reserve Banks could serve as "lender[s] of last resort" by loaning banks money when private lending had otherwise dried up. *Id.* Thus, "Federal Reserve Banks could now . . . inject funds into fundamentally solvent banks experiencing temporary liquidity problems . . . [and] help these banks avoid forced asset sales to meet their obligations and also discourage depositors from running on a bank due to concerns over a bank's liquidity." *Id.*

[108] JOHNSON & KWAK, *supra* note 8, at 29. Moral hazard refers to "the greater tendency of people who are protected from the consequences of risky behavior to engage in such behavior." Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 209 (2008). The term became a common refrain of commentators during the 2008 Financial Crisis after regulators began bailing out banks. *See* BERNANKE, *supra* note 2, at 147, 162, 204, 218 (noting concerns that extending loans to banks and nonbanks and reducing interest rates would exacerbate moral hazard because it would let entities that "misjudged risk off the hook"); *see, e.g.*, Paul A. Volcker, *Moral Hazard and the Crisis*, WALL ST. J. (June 16, 2009), https://www.wsj.com/articles/SB124511733241717573 [https://perma.cc/FZ4J-77GN] ("One unfortunate consequence of the massive public assistance provided both banks and nonbanks in dealing with the present crisis is that moral hazard may, I am afraid, become more deeply embedded."). Nonetheless, as Professor Schwarcz highlights, the phrase was commonly used to describe the behavior of individuals in insurance markets, where the insured individuals had an incentive to cause the insured event to occur, and bankruptcy, where safeguarding creditors and debtors from default increased bankruptcy filings. Schwarcz, *supra*, at 209 n.81.

[109] JOHNSON & KWAK, *supra* note 8, at 29.

[110] *Id.*

[111] *Id.* (noting that power in the banking industry was concentrated in the hands of a few powerful bankers and Brandeis's assertion that "no methods of regulation ever have been or can be devised to remove the menace inherent in private monopoly and overweening commercial power") (internal quotations omitted).

These inadequacies became clear when, after a decade of light regulation and irresponsible lending, excessive speculation triggered a stock market crash that catapulted the country into the Great Depression.[112] After the crash, the New York Federal Reserve Bank provided emergency loans to banks, preventing the failure of even one major bank.[113] But these measures failed to address the economy's ultimate undoing; widespread panic overwhelmed smaller banks as people rushed to withdraw their deposits.[114] Even healthy banks experienced runs, and lending dried up throughout the economy, causing a severe economic contraction that left nearly one in four Americans unemployed.[115]

C. Banking After the Crash

The Great Depression stimulated a fundamental revision of the rules governing the American financial sector.[116] This included the passage of the National Banking Act of 1933, commonly referred to as the Glass-Steagall Act.[117] Glass-Steagall divorced investment and commercial banking.[118] Banks could no longer serve the depository needs of individuals and small businesses while engaging in securities trading and underwriting for large corporations.[119] This reduced the clout of financial conglomerates—such as J.P. Morgan & Company, which previously took deposits and engaged in investment banking—by requiring the breakup of their empires.[120] These changes and heightened regulatory oversight gave way to a forty-year period of economic growth, no financial crises, and infrequent bank failures.[121]

This regulatory framework began to erode in the 1970s.[122] A deregulatory mindset took hold as the economy struggled through stagflation—anemic economic growth coupled with rising inflation—and Depression-era restraints appeared increasingly obsolete.[123] Although banks had proven a safe place to store money, depositors flocked to investments yielding higher rates of re-

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[112] BARR ET AL., *supra* note 9, at 49–50.

[113] JOHNSON & KWAK, *supra* note 8, at 32.

[114] BARR ET AL., *supra* note 9, at 50.

[115] *Id.*

[116] JOHNSON & KWAK, *supra* note 8, at 33.

[117] Banking Act of 1933, ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

[118] *See id.* §§ 16, 21 (codified as amended at 12 U.S.C. §§ 24 (Seventh), 378) (prohibiting banks that engage in underwriting activities from accepting deposits); JOHNSON & KWAK, *supra* note 8, at 34 (discussing how "[t]he Glass-Steagall Act's separated commercial banking from investment banking to prevent commercial banks from being 'infected' by the risky activities of investment banks").

[119] JOHNSON & KWAK, *supra* note 8, at 34–35.

[120] *Id.* at 34. Thus, J.P. Morgan & Co.'s investment banking arm became Morgan Stanley while J.P. Morgan & Co. continued to operate as a commercial bank. *Id.*

[121] *Id.* at 36–37.

[122] BARR ET AL., *supra* note 9, at 53–54.

[123] *Id.* at 54.

turn.[124] Banks, however, were prohibited from offering interest on demand deposits and could not compete.[125]

In an effort to allow the banking sector to remain competitive, Congress loosened banks' regulatory restrictions.[126] The banks' expanded powers culminated in the Saving and Loan Crisis.[127] The crisis took hold as inexperienced depository institutions engaged in risky real estate lending; when the market turned, these institutions failed in numbers not seen since the Great Depression.[128] Congress subsequently increased lending standards and capital requirements for thrifts, but the deregulatory mood persisted.[129]

Throughout the 1990s and into the early 2000s, this mood manifested itself in a number of important policy choices.[130] First, the Riegle-Neal Act of 1994 eliminated the restrictions on interstate mergers and branching that had historically prevented banks from opening or acquiring out-of-state branches.[131] Second, the Gramm-Leach-Bliley Act of 1999 largely repealed Glass-

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[124] *Id.*

[125] *Id.*

[126] *Id.* at 54–55 ("Banks and thrifts lost billions in deposits to [money market funds], which grew from $9.5 billion in assets in 1978 to more than $236 billion by the end of 1982."). Specifically, in 1980 President Carter signed into law the Depository Institutions Deregulation and Monetary Control Act, which "phased out deposit interest-rate ceilings, broadened the powers of thrifts, and raised federal deposit insurance coverage from $40,000 to $100,000." *Id.* at 55 (citing 1 FDIC, HISTORY OF THE EIGHTIES—LESSONS FOR THE FUTURE 10 (1997)). *See generally* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.). In 1982, President Reagan signed into law the Garn-St. Germain Act, which further broadened the commercial lending powers of depository institutions. BARR ET AL., *supra* note 9, at 55. *See generally* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified as amended in scattered sections of 12 U.S.C.).

[127] BARR ET AL., *supra* note 9, at 55.

[128] *Id.*

[129] *See id.* at 57 (discussing efforts to "loosen the Glass-Steagall Act's separation of commercial and investment banking" in spite of legislative efforts to increase regulatory requirements for banks and thrifts). A thrift is a financial institution that, like banks, takes deposits and originates loans. *Id.* at 175. Congress increased lending standards through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. *Id.* at 57. *See generally* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989). Additionally, the Federal Deposit Insurance Corporation Improvement Act of 1991 heightened regulatory standards for banks and replenished the depleted Deposit Insurance Fund. BARR ET AL., *supra* note 9, at 57. *See generally* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991).

[130] BARR ET AL., *supra* note 9, at 56–57 (noting the elimination of interstate branching requirements and activities restrictions during the 1990s, which fundamentally changed the nature of the banking industry).

[131] *See* Riegle-Neal Interstate Banking and Branching Efficiency Act §§ 101, 102, Pub. L. No. 103-328, 108 Stat. 2338 (2012) (codified at 12 U.S.C. §§ 1831u, 1842(d)) (allowing banks to branch and merge with other banks across state lines); BARR ET AL., *supra* note 9, at 56 (explaining that "[Riegle-Neal] overturned the McFadden Act's prohibition on interstate branching and permitted [bank holding companies] to acquire banks in any other state").

Steagall—though the act's impact had already been dampened by the Federal Reserve's permissive interpretation of the statute that allowed banks to undertake securities activities.[132] Still, Gramm-Leach-Bliley explicitly permitted depository institutions to affiliate with firms that underwrite securities and insurance.[133]

Federal inaction and preemption were perhaps just as important as legislative efforts to deregulate banking.[134] Congress left derivative contracts and credit default swaps unregulated, while federal regulators determined national banks did not need to comply with state predatory lending laws.[135] The regulatory changes also bifurcated the banking system into local banks, which served individuals and small businesses, and large banking institutions.[136] The large institutions, whose share of the banking sector has risen dramatically since the 1980s, increasingly tailored their operations towards risky, short-term, fee-generating services.[137] When combined with lax bank merger review and tech-

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[132] BARR ET AL., *supra* note 9, at 57–58. Sections 16 and 21 of the Glass-Steagall Act remain in force and prohibit depository institutions—though not their affiliates—from undertaking underwriting activities. *See* 12 U.S.C. § 378 (2012) (prohibiting businesses that receive deposits from engaging in the underwriting, selling, or distributing of stocks, bonds, or other securities); *id.* § 24 (Seventh) (allowing banks to serve as securities brokers but prohibiting them from purchasing or selling securities on their own account).

[133] BARR ET AL., *supra* note 9, at 57–58.

[134] *See id.* at 58–59 (highlighting the role played by unregulated credit-default swaps in instigating the financial crisis); KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 157–66 (2011) (explaining how federal preemption led banks to seek charters with the least intrusive regulators). "Procyclical" financial regulation amplifies economic harm. Patricia A. McCoy, *Countercyclical Regulation and Its Challenges*, 47 ARIZ. ST. L.J. 1181, 1184 (2015) [hereinafter McCoy, *Countercyclical Regulation*]. Regulatory intervention tends to occur as credit tightens, while deregulation often occurs during economic expansion when restraint is most needed—in sum, it both over- and under-regulates. *Id.* at 1185. To correct this inadequacy, Professor McCoy advocates for "countercyclical regulation" where rules "become binding at the top of the business cycle, when financial firms are profitable and catastrophic risks seem small, and by easing regulation at the bottom of the business cycle in order to stimulate the economy." *Id.* Still, there are significant barriers to regulatory action amidst economic growth. *See id.* at 1229 ("[I]n halcyon times, industry capture and lobbying by other affected constituencies can weaken regulators' resolve. It is hard enough to amass support for needed safeguards immediately after a crisis. Doing so when economic conditions are bright can threaten a regulator's career. When memories of disasters grow dim, officials who predict catastrophes based on limited problems are often dismissed as Cassandras. Under those circumstances, many officials take the path of least resistance . . . .").

[135] BARR ET AL., *supra* note 9, at 59 (highlighting how the Commodity Futures Modernization Act of 2000 left credit-default swaps unregulated); ENGEL & MCCOY, *supra* note 134, at 158 (noting that federal regulators "excused national banks and their subsidiaries from having to comply with state consumer protection laws related to mortgage lending").

[136] Arthur E. Wilmarth Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 250–51 [hereinafter Wilmarth, *The Transformation*].

[137] *See* BARR ET AL., *supra* note 9, at 56 (noting that regulatory changes "set off a wave of banking mergers and acquisitions among superregionals and money center banks, leading to the creation of

nological innovation, deregulation, inaction, and preemption set the stage for the 2008 Financial Crisis: American banks were now bigger, more risk prone, and subject to fewer restrictions.[138]

D. The 2008 Financial Crisis

The 2008 Financial Crisis began as homeowners defaulted on their mortgages.[139] Many of these were "subprime" mortgages made to borrowers at a higher risk of being unable to repay.[140] Despite this apparent risk, Wall Street's

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both large regional banks and the megabanks"); Arthur E. Wilmarth Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 975 (2009) ("More than 5,400 mergers took place in the U.S. banking industry from 1990 to 2005, involving more than $5.0 trillion in banking assets."); Wilmarth, *The Transformation*, *supra* note 136, at 251 ("[B]ig banks are pursuing a transaction-based strategy that emphasizes investment banking, derivatives, syndicated loans, securitized consumer loans, and other activities tied to the capital markets. Each of these lines of business presents significant risks to the banking system."); Wilmarth, *Two-Tiered*, *supra* note 15, at 256 ("Between 1984 and 2011, the number of community banks fell by more than one-half, and the share of commercial banking assets held by community banks declined by almost two-thirds. During the same period, the share of banking assets held by the four largest U.S. banks mushroomed from 6.2% to 44.2%.").

[138] *See* FCIC, *supra* note 12, at xvi ("We conclude widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets. . . . More than 30 years of deregulation and reliance on self-regulation by financial institutions . . . stripped away key safeguards, which could have helped avoid catastrophe."); Wilmarth, *Two-Tiered*, *supra* note 15, at 256 (noting the role of "transformative changes in banking technologies"). Professor Paul G. Mahoney has challenged the narrative that regulation was responsible for the period of calm and deregulation catapulted the economy into crisis. Paul G. Mahoney, *Deregulation and the Subprime Crisis*, 104 VA. L. REV. 235, 239 (2018) ("[G]iving regulators the power to separate commercial banking from securities underwriting or to ban OTC trading of derivatives products would likely not have prevented the crisis or significantly reduced its severity."). Instead, he posits that this era of quiet and prosperity should be attributed to "low interest rate risk," which was ended by "[i]nflation and accompanying interest rate volatility." *Id.* at 239. Accordingly, the deregulatory actions taken by Congress did not "permit previously banned activities relevant to the crisis." *Id.* at 254. Professor Kathryn Judge agrees that the period of stability was in part caused by the low interest rate risk and that returning to the policy of previous decades would not solve the financial system's woes. Kathryn Judge, *Regulation and Deregulation: The Baseline Challenge*, 104 VA. L. REV. ONLINE 101, 102–03 (2018), http://virginialawreview.org/volumes/content/regulation-and-deregulation-baseline-challenge [https://perma.cc/X3Z2-MPXV]. Nonetheless, she argues that "[l]aying the demise of the twentieth century Quiet Period entirely at the feet of macroeconomics and market forces without acknowledging the way the law contributed to changes in the competitive playing field could lead to similarly misguided policy prescriptions." *Id.* at 104.

[139] FCIC, *supra* note 12, at 213–21.

[140] *Id.* at 70 (indicating that in 2006 subprime mortgages totaled $600 billion and accounted for an astounding 23.5 percent of mortgages originated); *see also id.* at 217 (detailing the delinquency of subprime versus prime mortgages). These homeowners relied on rising home prices to refinance their loans, but were unable to do so when housing prices began to fall. *See* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1368 (2009) ("As lenders raced to the bottom to gain market share, the problem of potential long-run risk exposure was hidden in the short run by higher housing prices, as the higher prices allowed borrowers to avoid default through mortgage refinancings or sales of homes when mortgage

appetite for these loans was insatiable: in 1990 subprime loans totaled less than $100 billion; by 2005, however, this number had grown to approximately $625 billion.[141] Demand remained high because the risky subprime loans could be pooled into securities with other loans and sold off to investors; this removed the risk from the originator and spread the default risk across numerous investors.[142] Market participants failed to account for the risk of widespread defaults.[143] Subprime lessees' inability to repay their mortgages overwhelmed the financial system.[144]

The crisis worsened concentration in the banking industry.[145] The federal government took dramatic steps to prevent the collapse of large financial institutions, but let small banks fail in droves.[146] For instance, the federal government spent $543 billion and $315 billion, respectively, to stave off the failure of Citigroup and Bank of America.[147] Similarly, the Federal Reserve financially supported Wells Fargo's acquisition of Wachovia and J.P. Morgan Chase's purchase of Washington Mutual and Bear Stearns.[148] It also allowed investment banks Goldman Sachs and Morgan Stanley to change their corporate structure to access emergency loans typically reserved for depository institutions.[149] These unprecedented rescue measures increased large financial institutions' power.[150]

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payments became unsustainable."). As a result, credit rating agencies reduced the ratings of mortgage-backed securities to reflect the increased likelihood of default, significantly eroding the value of the assets. FCIC, *supra* note 12, at 226–27.

[141] FCIC, *supra* note 12, at 70.

[142] *See id.* at 68–71, 89 ("When originators made loans to hold through maturity—an approach known as originate-to-hold—they had a clear incentive to underwrite carefully and consider the risks. However, when they originated mortgages to sell, for securitization or otherwise—known as originate-to-distribute—they no longer risked losses if the loan defaulted."); McCoy et al., *supra* note 140, at 1329–32 ("In the end, many subprime loans had essentially no underwriting. Default risk for subprime mortgages was neither calibrated, reserved for, nor priced.").

[143] *See* FCIC, *supra* note 12, at xxiii–xxiv ("Collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis. . . . When borrowers stopped making mortgage payments, the losses—amplified by derivatives—rushed through the pipeline.").

[144] *See id.*

[145] Wilmarth, *Two-Tiered, supra* note 15, at 256–57.

[146] *See id.* at 254 ("Federal regulators stood by while more than 450 community banks failed between 2008 and 2012. In contrast, regulators allowed only one depository institution larger than $100 billion . . . to fail during that period.").

[147] *Id.* at 257 & n.14 ("The bailout packages for Citigroup and [Bank of America] included direct capital infusions, asset guarantees, emergency short-term loans, debt guarantees and commercial paper funding.").

[148] *Id.* at 258.

[149] Michael J. de la Merced et al., *As Goldman and Morgan Shift, a Wall St. Era Ends*, N.Y. TIMES: DEALBOOK (Sept. 21, 2008), https://dealbook.nytimes.com/2008/09/21/goldman-morgan-to-become-bank-holding-companies/ [https://perma.cc/VR5H-68Q8] ("Being a bank holding company would also give the two banks access to the discount window of the Federal Reserve. While they have

Smaller banks were not so fortunate.[151] The treasury shuttered the Small Business Lending Fund, a component of the 2010 Jobs Act, after investing just $4.2 billion of the $30 billion it was allowed to disperse to community banks.[152] This is particularly troubling because large, not small, financial institutions were the most culpable.[153] Smaller banks were not active participants in subprime lending, mortgage securitization, or derivatives markets, three of the Financial Crisis's most important ingredients.[154] Like their predecessors during the Great Depression, small banks were collateral damage; it was not until the crisis-caused recession led to the closure of retail stores and business, resulting in defaults in the community real estate market where community banks were most active, that small banks began to fail.[155]

II. BREAKUP OPTIONS

The banking industry has become increasingly concentrated over the past half-century, but federal regulators can address this problem.[156] This Part begins in Section A by discussing the regulatory framework established by Dodd-Frank to solve the "too big to fail" problem.[157] Section B then examines options federal regulators have to break up banks.[158] In particular, it discusses provisions of Dodd-Frank that provide financial regulators the power to break up banks.[159] Finally, Section C explores a component of Riegle-Neal that prevents the Federal Reserve from approving certain mergers.[160]

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had access to Fed lending facilities in recent months, regulators had planned to take away discount window access in January.").

150 Wilmarth, *Two-Tiered*, *supra* note 15, at 263–64.

151 *Id.* at 268.

152 *Id.*

153 *Id.* at 277–78 (explaining that unlike large banks, "community banks had very little involvement in subprime lending or other forms of securitized lending").

154 Tanya D. Marsh, *Reforming the Regulation of Community Banks After Dodd-Frank*, 90 IND. L.J. 191, 202–08 (2015). This was reflected in the lower default rate experienced by small banks. Wilmarth, *Two-Tiered*, *supra* note 15, at 278–79.

155 Wilmarth, *Two-Tiered*, *supra* note 15, at 279–80. The concentration of power in the banking sector has been intensified by the fact that the small banks that did survive have struggled to manage compliance costs imposed by Dodd-Frank. *Id.* at 282–83.

156 *See id.* at 256 (highlighting "far-reaching consolidation" in the U.S. banking industry since 1984).

157 *See infra* notes 161–194 and accompanying text.

158 *See infra* notes 195–208 and accompanying text.

159 *See infra* notes 195–208 and accompanying text.

160 *See infra* notes 209–219 and accompanying text.

A. Dodd-Frank Regulatory Changes

To prevent another financial crisis and bailouts of "too big to fail" banks, the Dodd-Frank Act changed numerous aspects of banking regulation.[161] Notably, Dodd-Frank increased capital and liquidity requirements, limited proprietary trading and investments in hedge and private equity funds, enhanced consumer protection by establishing the Consumer Financial Protection Bureau (CFPB), and provided regulators authority to mitigate systemic risk.[162]

In the context of banking, capital refers to the amount of money a bank can lose while still meeting its obligations.[163] To assure that banks can weather losses without failing, modern financial regulation has required banks to hold an amount of capital proportional to the riskiness of their assets.[164] During the 2008 Financial Crisis, many banks did not have enough capital to withstand asset losses—highlighting the insufficiency of existing capital quantity and quality regulations.[165] Accordingly, in the aftermath of the crisis, financial regulators increased the amount and quality of capital that banks are required to hold.[166] Additionally, regulators imposed stress tests and required that a portion of a bank's assets remain liquid.[167] Doing so allowed regulators to supervise preparedness for a hypothetical crisis and ensured that a bank could easily sell off its assets to withstand financial difficulties.[168]

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[161] *See* pmbl. H.R. 4173, 111th Cong. (2010) (stating that the purpose of the Dodd-Frank Act is "to end 'too big to fail'" and "protect the American taxpayers by ending bailouts"); Wilmarth, *Dodd-Frank*, *supra* note 14, at 986 (noting that government bailouts reallocated "wealth from taxpayers to shareholders and creditors of the largest [U.S. financial institutions]").

[162] *See supra* note 9 and accompanying text.

[163] BARR ET AL., *supra* note 9, at 265 ("In functional and simplified terms, capital measures the amount of losses that an institution can suffer without impairing its obligations to creditors and other claimants.").

[164] *See id.* at 278–79 (noting that modern capital requirements are risk-weighted). Capital requirements have long been a component of banking regulation. *Id.* at 267. Prior to the twentieth century, banks were often required to hold minimum level of capital, regardless of size. *Id.* Subsequently, many states shifted to a capital-to-deposits ratio, where a bank's deposits dictated the amount of capital it should hold. *Id.* These capital-to-deposit ratios, however, were voluntary and fleeting. *Id.* New Deal reforms replaced the capital-to-deposits ratio with a capital-to-assets ratio, reflecting a lesson from the 1929 Stock Market Crash: assets, not deposits, posed a greater risk of loss. *See id.* (discussing the movement to a capital-to-asset ratio because banks suffer greater losses on their assets, not deposits). Still, an explicit minimum requirement was not set until the International Lending Supervision Act of 1983 was passed, giving banking regulators the power to mandate specific capital levels. *See* 12 U.S.C. § 3907(a) (2012) (authorizing federal banking agencies to set capital levels); BARR ET AL., *supra* note 9, at 268–69 (noting the expansion of regulatory authority in the aftermath of "[l]osses on major money center bank loans to Latin American borrowers" in the early 1980s).

[165] BARR ET AL., *supra* note 9, at 309, 313.

[166] *Id.* at 322–26 (detailing heightened capital regulation employed by financial regulators to adhere to Basel III).

[167] *Id.* at 314–17.

[168] *Id.* at 327–28.

Many question whether capital requirements can prevent a crisis.[169] Historically they have failed because they are "lagging indicators" that a bank is unhealthy and are vulnerable to both arbitrage and erosion.[170] Separately, the Federal Reserve has proposed altering their stress-testing model, weakening its potential effectiveness.[171] The change would provide more information about the model to banks and impose the tests biannually, rather than annually, on banks with asset levels between $100 and $250 billion.[172]

In addition to taking steps to increase the likelihood that a bank can withstand a financial shock, Dodd-Frank also sought to prevent the next crisis.[173] An example of this is the Volcker Rule.[174] The Volcker Rule prohibits banks from engaging in proprietary trading and significantly limits their ability to invest in hedge and private equity funds.[175] These activities are inherently risky, making it improper for banks to engage in them while safeguarded by a taxpayer-funded "safety net."[176] Nonetheless, delayed implementation and the inclusion of numerous regulatory exemptions and safe harbors have limited the Volcker Rule's effectiveness.[177]

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[169] *See* Wilmarth, *Dodd-Frank*, *supra* note 14, at 1009–10.

[170] *Id.* at 1010–11. In banking, capital levels are considered "lagging indicators" because they tend to change in aftermath, rather than lead-up, to a crisis. *See id.* at 1010 (highlighting that this occurs "because 'many assets held by banks . . . are not traded on any organized market and, therefore, are very difficult for regulators and outside investors to value,' and (2) bank managers 'have strong incentives to postpone any recognition of asset depreciation and capital losses' until their banks have already suffered serious damage").

[171] Greg Gelzenis, *5 Regulatory Questions for Federal Reserve Chairman Jay Powell*, CTR. FOR AM. PROGRESS (Feb. 26, 2019), https://www.americanprogress.org/issues/economy/news/2019/02/26/466615/5-regulatory-questions-federal-reserve-chairman-jay-powell/ [https://perma.cc/NW4L-3G63] (decrying the Federal Reserve Board's decision to relax stress-testing requirements despite their importance).

[172] *Id.*

[173] BARR ET AL., *supra* note 9, at 704–05.

[174] *Id.* ("Volcker himself acknowledged that the proposed provisions bearing his name would not have prevented the Financial Crisis . . . . His view was that the Volcker Rule would not be part of an effort to address the problems that might contribute to the next crisis.").

[175] *See* 12 U.S.C. § 1851(a)(1) (2012) ("Unless otherwise provided under this section, a banking entity shall not—(A) engage in proprietary trading; (B) or acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund.").

[176] Wilmarth, *Dodd-Frank*, *supra* note 14, at 1026 (highlighting the finding of the Senate Banking Committee that it is against public policy and an "inappropriate transfer of economic subsidies" for taxpayers to support "proprietary and speculative activities" undertaken by banks). Banks' "safety net" includes federal deposit insurance and access to the Federal Reserve's discount window loans. *Id.*

[177] *See* 12 U.S.C. § 1851(d)(1) (providing a carve-out for proprietary trading that is engaged in through underwriting or market making, for a customer, or to hedge a risk, and allowing banks to have an interest in funds that cannot be sold in the United States); Wilmarth, *Turning a Blind Eye*, *supra* note 20, at 1302–03 (noting the inclusion of safe harbors at the urging of the financial industry and delayed implementation).

Dodd-Frank also sought to prevent future financial harm through the CFPB.[178] The proliferation of dangerous consumer credit products, particularly subprime home mortgages, played an important role in the financial crisis.[179] Prior to the crisis, the enforcement of consumer financial protection statutes was spread across numerous agencies where it was not a priority, resulting in the insufficient regulation of banking practices.[180] To address this vulnerability, Congress tasked a single agency with consumer protection.[181] The CFPB was granted power over all consumer financial protection statutes and given additional authority to address practices it deemed "unfair, deceptive, or abusive."[182] Just as it fought the Volcker Rule, the financial services industry has staunchly opposed the CFPB, attacking it in court and lobbying for its overhaul in Congress, which has significantly limited its influence.[183]

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[178] *See* BARR ET AL., *supra* note 9, at 64 (noting the creation of the CFPB to address consumer financial protection concerns after the 2008 Financial Crisis).

[179] *See* FCIC, *supra* note 12, at 104–05, 213–21 (highlighting the expansion of abusive lending practices in home mortgages and subsequent default crisis).

[180] *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 329–34 (2013) (noting problems with the regulatory structure of consumer protection).

[181] *Id.* In particular, this addressed concerns that "consumer protection [was] an orphan mission that tended to 'fall between the cracks' because no agency had an exclusive role of consumer protection in financial services." *Id.* at 330.

[182] *See* 12 U.S.C. § 5511 (empowering the CFPB to prohibit "unfair, deceptive, or abusive acts or practices"); Levitin, *supra* note 180, at 322 ("The CFPB has a wide regulatory ambit with rulemaking, supervision, and enforcement authority over nearly all firms involved in consumer financial services, irrespective of their particular legal form.").

[183] *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (proposing that the CFPB be supplanted by an executive agency with a director who is removable at-will); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 110 (D.C. Cir. 2018) (en banc) (determining that the CFPB was constitutionally structured because its unitary director with for-cause removal protection does not impinge on the President's duties under Article II); Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (disagreeing with the en banc holding of the D.C. Circuit in *PHH Corp.* and instead deeming the CFPB wholly invalid because its unitary director violates separation of powers principles); Glenn Thrush & Allan Rappeport, *'Like a Mosquito in a Nudist Colony': How Mick Mulvaney Found Plenty to Target at Consumer Bureau*, N.Y. TIMES (May 7, 2018), https://www.nytimes.com/2018/05/07/us/mick-mulvaney-budget-director-consumer-bureau.html [https://perma.cc/L4QY-C2AK] (indicating that while acting as the interim director of the CFPB, acting White House Chief of Staff, Mick Mulvaney had "halted all new investigations, frozen hiring, stopped data collection and proposed cutting off public access to a database of consumer complaints[,] . . . dropped most cases against payday lenders[, and] . . . tried hard to persuade Congress to take away funding authority for the bureau from the Federal Reserve"). *See generally* Logan Hovie, Comment, *A Tragedy of Novelty: Is For-Cause Removal Protection for the Consumer Financial Protection Bureau's Single Director a Fatal Flaw?*, 60 B.C. L. REV. E. SUPP. II.-100 (2019), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3749&context=bclr [https://perma.cc/V554-XWLW] (highlighting constitutional challenges to the CFPB).

Finally, Dodd-Frank provides heightened prudential regulation and supervision based on a bank's total assets.[184] This power is intended to address the systemic risk posed by the failure of large and interconnected banks.[185] The framework imposes increasingly stringent regulation as banks grow larger, with the country's largest banks, dubbed global systemically important banks (G-SIBs), facing the highest requirements.[186] This includes maintaining a higher ratio of capital-to-assets, meeting a more demanding leverage ratio, and submitting an orderly resolution plan.[187] In short, these provisions, which largely heighten existing expectations for large banks under Dodd-Frank, are an attempt to address the "too big to fail" problem.[188]

Like many other components of the Dodd-Frank Act, these regulatory requirements have been delayed and weakened.[189] From the start G-SIBs fought enhanced prudential requirements; decrying any connection between a bank's size and systemic risk, a number of bank CEOs personally pressured then Federal Reserve Board Governor Daniel Tarullo to relax the requirements.[190] The banks succeeded.[191] Moreover, the rules that survived the initial onslaught are

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[184] *See* 12 U.S.C. § 5365(a)(1) (2012) (providing the Federal Reserve Board the power to implement enhanced regulations for banks whose size threatens the financial system).

[185] BARR ET AL., *supra* note 9, at 756.

[186] *Id.* at 756–59.

[187] *Id.* at 748, 758.

[188] *See id.* at 756–58 (noting that the enhanced prudential framework for large banks is intended to address systemic risk).

[189] *See* Wilmarth, *Turning a Blind Eye*, *supra* note 19, at 1299 ("The financial industry's opposition has also bogged down the [Federal Reserve Board's] efforts to establish enhanced prudential requirements for both nonbank [systemically important financial institutions] and bank SIFIs (banking organizations with assets over $50 billion), as required by Section 165 and 166 of Dodd Frank.").

[190] *See id.* at 1299–1301, 1301 n.50 (noting a meeting between Daniel Tarullo and the heads of "JPMorgan, [Bank of America], Goldman, Morgan Stanley, U.S. Bancorp, and State Street," where the banks criticized the Federal Reserve Board's efforts to implement the Volcker Rule and enhanced prudential regulation).

[191] *See id.* at 1301–02 (indicating that the Federal Reserve Board had been slow to implement rules regarding enhancing prudential standards). The financial industry's ability to beat back Dodd-Frank reforms was not confined to the implementation of prudential requirements. *See* DAVIS POLK, DODD-FRANK PROGRESS REPORT 2 (July 18, 2014), https://www.davispolk.com/files/July2014_Dodd.Frank_.Progress.Report_0.PDF [https://perma.cc/9G8X-L9MF]. Four years after the bill's passage, regulators had failed to meet 45.4 percent of rulemaking deadlines and implemented just over half of the bill's total rulemaking requirements. *Id.* The fourth anniversary of the Dodd-Frank Act's passage marked the deadline for the implementation of the 280 rules with established deadlines. *Id.* By July 18, 2014, 127 of these deadlines had passed without action. *Id.* In total, just 208 of Dodd-Frank's 392 required rules had been passed. *Id.* These numbers gradually improved over the next two years. DAVIS POLK, DODD-FRANK PROGRESS REPORT: SIX-YEAR ANNIVERSARY REPORT 2 (July 19, 2016), https://www.davispolk.com/files/2016-dodd-frank-six-year-anniversary-report.pdf [https://perma.cc/3WKR-WP5F] (tallying rulemaking implementation as of July 2016). Still, as of July 19, 2016, banking regulators had successfully instituted only 274 of the 390 rules. *Id.*

beginning to erode.[192] The Federal Reserve Board recently advanced a rulemaking proposal that would reduce the amount of capital that G-SIBs must hold.[193] Although proponents argue that the change will minimally impact the amount of capital held by banks, critics argue large banks' subsidiaries will hold less capital—increasing risk.[194]

B. Dodd-Frank Hard Breakup Options

Although not the focus of the regulatory overhaul, two Dodd-Frank provisions authorize federal banking regulators to break up banks.[195] The first, referred to as the Kanjorski Amendment, empowers the Federal Reserve Board to break up banks with over $250 billion in assets if the bank is a "grave threat" to the stability of the United States.[196] This determination, however, must also attain a two-thirds majority vote from the Financial Stability Oversight Council (FSOC), which has ten voting members, consisting largely of the heads of federal financial regulators.[197] The statute leaves undefined what con-

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[192] *See* Letter from Federal Reserve Staff to the Federal Reserve Board of Governors (Apr. 5, 2018), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180411a1.pdf [https://perma.cc/9BMF-CAYZ] [hereinafter Federal Reserve Letter] (proposing GSIB surcharge reductions).

[193] *See id.* (advancing a proposal to alter the enhanced supplementary leverage ratio (eSLR); Jeff Stein, *Fed Advances Plan to Weaken Post-Financial-Crisis Rule for Biggest Banks*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/24/fed-advances-plan-to-weaken-post-financial-crisis-rule-for-biggest-banks/ [https://perma.cc/XK76-THA3] (indicating that the Federal Reserve's put forward changes would lessen capital holding requirements for eight banks that "received taxpayer-funded bailouts after the 2008 crash").

[194] *Compare* Federal Reserve Letter, *supra* note 192, at 2 (arguing that the change would minimally impact G-SIB's capital holdings), *with* Letter from Sir Paul Tucker, Chair, Systemic Risk Council, to The Honorable Jerome H. Powell, Chair, Board of Governors of the Federal Reserve System, and Comptroller Joseph M. Otting (Aug. 8, 2018), https://www.systemicriskcouncil.org/2018/08/systemic-risk-council-opposes-federal-reserve-and-occ-proposals-to-reform-leverage-ratio-and-volcker-rule/ [https://perma.cc/2DYJ-PM2L] (follow "Read the full letter here" hyperlink) (arguing the leverage ratio reduction makes banks more risky because "there would be a material reduction in equity requirements for operating bank subsidiaries").

[195] BARR ET AL., *supra* note 9, at 764; *see* 12 U.S.C. § 5331(a)(5) (2012) (providing regulators the power to force banks to sell or transfer assets when necessary to mitigate the grave risk they pose to the United States); *id.* § 5365(d)(5)(B) (providing regulators the power to sell or transfer assets when they have failed to submit an adequate living will).

[196] *See* 12 U.S.C. § 5331 (providing the Federal Reserve Board regulatory enforcement options where a "a bank holding company with total consolidated assets of $50,000,000,000 or more, or a nonbank financial company supervised by the Board of Governors, poses a grave threat to the financial stability of the United States"). An amendment to this section raising the asset requirement from $50 billion to $250 billion goes into effect November 24, 2019. The Amendment's name reflects its sponsor, Representative Paul Kanjorski. *See* Wilmarth, *Dodd-Frank*, *supra* note 14, at 1024. The Pennsylvania Democrat, who was a member of the House Financial Services Committee, was defeated in the 2010 election. *Id.* at 1024 n.309.

[197] 12 U.S.C. §§ 5321(b)(1), 5331(b). The ten voting members include: the Secretary of the Treasury who chairs the council, the Chairman of the Federal Reserve, the Comptroller of the Currency, the Director of the CFPB, the Chairman of the U.S. Securities and Exchange Commission, the

stitutes a "grave threat," nor is "grave threat" a term of art in banking law.[198] If the Federal Reserve Board and FSOC find that a financial institution posed a "grave threat" to the United States, they are authorized under section 5331(a)(5) to break up the bank after a hearing.[199] Nonetheless, this action would first require a finding that other remedies provided in subsection (a) would not redress the grave threat; these remedies include limiting future mergers and acquisitions, restricting product offerings, requiring termination of certain activities, or imposing conditions on the bank holding company's conduct.[200] Regulators have yet to use this provision, and, notably, when the Dodd-Frank Act was passed the asset threshold for a bank to be subject to the Kanjorski Amendment was set at a $50 billion.[201] In 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act raised the threshold to $250 billion, a move that lessened the number of banks potentially subject to breakup.[202]

The second breakup provision is provided by section 165(d) of Dodd-Frank.[203] This provision allows the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC) to together determine that a bank with greater than $250 billion in assets has failed to adhere to the statutory requirements for providing an "orderly resolution plan."[204] Under Dodd-Frank, large banks are required to prepare "living wills" such that they could be efficiently

Chairman of the Federal Deposit Insurance Corporation, the Chairman of the Commodities Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member with insurance expertise appointed by the president. *Id.* § 5321(b)(1).

[198] *See* BARR ET AL., *supra* note 9, at 764 ("No definition of grave threat was discussed or given and the concept was not one that existed previously in banking law.").

[199] *See* 12 U.S.C. § 5331(a)(5) ("[I]f the Board of Governors determines that the actions described in paragraphs (1) through (4) are inadequate to mitigate a threat to the financial stability of the United States in its recommendation, [it shall] require the company to sell or otherwise transfer assets or off-balance-sheet items to unaffiliated entities."); *id.* § 5331(b) (requiring notice and a hearing before actions are taken against a bank holding company under subsection (a)).

[200] *Id.* § 5331(a)(1)–(5) (listing "mitigatory actions" to be taken before effecting a breakup).

[201] *Id.* § 5331(a)(5) (permitting action "[i]f the Board of Governors determines that a bank holding company with total consolidated assets of $ 50,000,000,000 or more . . . poses a grave threat to the financial stability of the United States"), *amended by* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401(c)(1)(C), 132 Stat. 1296 (2018) ("striking '$50,000,000,000' and inserting '250,000,000,000'").

[202] *See* Economic Growth, Regulatory Relief, and Consumer Protection Act § 401(a)(1)(A).

[203] *See* 12 U.S.C. § 5365(d)(5)(B) ("The Board of Governors and the Corporation, in consultation with the Council, may jointly direct a nonbank financial company supervised by the Board of Governors or a bank holding company described in subsection (a), by order, to divest certain assets or operations identified by the Board of Governors and the Corporation . . . .").

[204] *See id.* § 5365(d) (requiring companies to provide federal regulators resolution plans and providing the Federal Reserve Board and FDIC powers to ensure the compliance).

wound down should they fail.[205] If a bank whose living will has previously been rejected fails to resubmit an adequate plan within two years of the rejection, and other remedies are exhausted, the Federal Reserve Board and the FDIC may, after consultation with the FSOC, break up the bank.[206] Like the Kanjorski Amendment, this provision has not yet been used to break up a bank and the Economic Growth, Regulatory Relief, and Consumer Protection Act raised the threshold from $50 billion to $250 billion, reducing the number of banks that must adhere to it.[207] Moreover, federal regulators have indicated that they plan to reduce the frequency of the annual living will submissions.[208]

C. Riegle-Neal Depository Cap

Riegle-Neal does not expressly provide banking regulators the power to break up banks; however, it sets a concentration cap that serves a similar, but more limited, function.[209] Specifically, section 1842(d) bars the Federal Reserve Board from approving a merger where the surviving bank holds more than ten percent of total domestic insured deposits, or thirty percent in any

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[205] *See id.* § 5365(d)(1) ("The Board of Governors shall require each nonbank financial company supervised by the Board of Governors and bank holding companies described in subsection (a) to report periodically to the Board of Governors, the Council, and the [FDIC] the plan of such company for rapid and orderly resolution in the event of material financial distress or failure . . . .").

[206] *See id.* § 5365(d)(4)–(5) (setting forth notice of deficiencies and enforcement options for the Federal Reserve Board and the FDIC should the plan be inadequate during the initial or subsequent submissions).

[207] *See id.* § 5365(a)(1) ("[T]he Board of Governors shall . . . establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than $50,000,000,000."), *amended by* Economic Growth, Regulatory Relief, and Consumer Protection Act § 401(a)(1)(A) ("striking '$50,000,000,000' and inserting '250,000,000,000'"); Gina Chon, *U.S. Banks Make Progress on Their Living Wills*, N.Y. TIMES: DEALBOOK (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/dealbook/banks-living-wills.html [https://perma.cc/ZGL3-SJR3] (noting that although five of the banks failed their living will assessments and were forced to submit improved plans in 2016, only four needed improvement and eight passed in 2017). Although a firm has not been broken up after failing the living will requirement, Wells Fargo faced activities restrictions after it failed to submit an adequate living will in 2016. Michael Corkery, *Wells Fargo 'Living Will' Plan Is Rejected Again by Regulators*, N.Y. TIMES: DEALBOOK (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/business/dealbook/wells-fargo-regulators.html [https://perma.cc/CML5-7JCF] (noting that Wells Fargo was "prohibit[ed] from establishing new international units or acquiring a subsidiary that is not a bank" until its living will resubmission was approved in March 2017).

[208] Lalita Clozel, *Banks to Get Slimmed Down 'Living Will' Requirements*, WALL ST. J. (Nov. 28, 2018), https://www.wsj.com/articles/banks-to-get-slimmed-down-living-will-requirements-1543438728 [https://perma.cc/9GS6-Y6ND] ("Federal Deposit Insurance Corp. Chairman Jelena McWilliams, in a speech to a banking industry group, said her agency and the Federal Reserve are reviewing how to make the [living will plans] less burdensome on the nation's largest banks and regional firms.").

[209] *See* 12 U.S.C. § 1842(d)(2) (2012) (setting concentration limits on the proportion of nationwide and single-state deposits).

state, though states may alter this cap.[210] Importantly, this cap only limits merger approvals and cannot be applied when a bank has acquired more deposits through natural business expansion.[211]

After the crisis, Congress bolstered this provision.[212] Section 622 of Dodd-Frank prohibits the Federal Reserve Board from approving mergers where the surviving bank would hold more than ten percent of all banks' combined liabilities.[213] Moreover, Dodd-Frank clarified that the ten and thirty percent deposit caps governs all banks that are FDIC-insured.[214] This was a response to actions taken by the Federal Reserve Board during the 2008 Financial Crisis.[215] When Bank of America was attempting an emergency takeover of Merrill Lynch in 2008, Bank of America held 11.9 percent of total deposits, which would have prohibited the merger's approval.[216] The Federal Reserve Board, however, determined that the rule was inapplicable.[217] Under its creative interpretation of the statute, the calculation of the depository cap did not include deposits held in thrifts and industrial banks.[218] This strained reading reflected the belief that the dangers of financial concentration paled in comparison to the harm that would arise from the failure of large financial institutions.[219]

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[210] *See id.* § 1842(d)(2)(A) ("The Board may not approve an application pursuant to paragraph (1)(A) if the applicant (including all insured depository institutions which are affiliates of the applicant) controls, or upon consummation of the acquisition for which such application is filed would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States."); *id.* § 1842(d)(2)(B)–(C) (setting the state cap at thirty percent, but providing in subsection (C) that "[n]o provision of this subsection shall be construed as affecting the authority of any State to limit, by statute, regulation, or order, the percentage of the total amount of deposits of insured depository institutions in the State which may be held or controlled by any bank or bank holding company").

[211] BARR ET AL., *supra* note 9, at 728.

[212] *See id.* at 729 (discussing Dodd-Frank's changes to Riegle-Neal's depository caps).

[213] *See* 12 U.S.C. § 1852(b) ("[A] financial company may not merge or consolidate with, acquire all or substantially all of the assets of, or otherwise acquire control of, another company, if the total consolidated liabilities of the acquiring financial company . . . would exceed 10 percent of the aggregate consolidated liabilities of all financial companies . . . .").

[214] *Id.* § 1852(a)(2)(A) (defining a financial company to include any insured depository institution); BARR ET AL., *supra* note 9, at 729 (noting that the Dodd-Frank explicitly established that the Riegle-Neal deposit caps apply to all "FDIC-insured depository institution[s]").

[215] BARR ET AL., *supra* note 9, at 728–29.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *See Actions by the New York Fed in Response to Liquidity Pressures in Financial Markets: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. (2008) (statement of Timothy Geithner, President of the Federal Reserve Bank of New York), https://www.newyorkfed.org/newsevents/speeches/2008/gei080403.html [https://perma.cc/8EPE-G22R] (referring to J.P. Morgan's emergency acquisition of Bear Stearns, stating that "the risks are modest in comparison to the substantial damage to the economy and economic well-being that potentially would have

III. THE CURRENT BREAKUP OPTIONS ARE INADEQUATE AND NEW LEGISLATION IS REQUIRED TO REMEDY THE "TOO BIG TO FAIL" PROBLEM

Having provided an overview of the Dodd-Frank and Riegle-Neal breakup provisions, this Note proceeds in this Part by discussing the provisions' viability and the likelihood that they could be used by their respective enforcers.[220] Section A highlights the limitations of the Riegle-Neal and Dodd-Frank breakup provisions and the broader problem of relying on banking regulators to institute this breakup.[221] Section B argues that an adequate regulatory framework would provide for the nondiscretionary systematic divestiture of banks that achieve a specific size, but that these reform efforts would face significant obstacles.[222]

A. The Breakup Options Provided by Riegle-Neal and Dodd-Frank Are Unlikely to Be Used

The breakup options provided to federal regulators under Riegle-Neal and Dodd-Frank are unlikely to be used and inadequately address the "too big to fail" problem.[223] Riegle-Neal's hard cap on deposits and liabilities, the latter of which is particularly well-suited to big banks, offers perhaps the best regulatory option because it is automatic.[224] Still, it is inherently limited because it can only be employed to prevent a prospective merger, rather than to affect a post-hoc breakup.[225] Moreover, the provision contains significant loopholes.[226] The

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accompanied Bear's insolvency"). Importantly, section 1852 provides that the Federal Reserve Board may ignore the concentration limit in cases like Bank of America's emergency acquisition of Merrill Lynch during the financial crisis. *See* 12 U.S.C. § 1852(c)(1) ("With the prior written consent of the Board, the concentration limit under subsection (b) shall not apply to an acquisition . . . of a bank in default or in danger of default . . . .").

[220] *See infra* notes 220–245 and accompanying text.

[221] *See infra* notes 223–235 and accompanying text.

[222] *See infra* notes 236–245 and accompanying text.

[223] *See* Wilmarth, *Turning a Blind Eye*, *supra* note 19, at 1288–94 (2013) (noting the extent to which Dodd-Frank has been weakened by Wall Street influence and regulatory laxity); Wilmarth, *Dodd-Frank*, *supra* note 14, at 988–92, 1024–25 (detailing the deficiencies of the Riegle-Neal caps and Kanjorski Amendment).

[224] *See* Wilmarth, *Dodd-Frank*, *supra* note 14, at 991–92 (explaining that the liabilities cap is particularly effective because "large financial companies (e.g. Citigroup, Goldman, and Morgan Stanley) . . . rely mainly on funding from the capital markets instead of deposits"); Wilmarth, *Turning a Blind Eye*, *supra* note 19, at 1390 ("Large financial institutions have skillfully employed arbitrage and capture techniques to weaken the effectiveness of regulation. Both before and during the financial crisis, leading banks exploited flawed incentives and governance structures in regulatory agencies to encourage regulators to cater to their interests.").

[225] *See* 12 U.S.C. § 1842 (prohibiting the approval of mergers if the 10- or 30-percent depository cap is reached); *id.* § 1852 (prohibiting the approval of mergers if the 10-percent liabilities cap is reached).

state and nationwide depository cap can be evaded.[227] Additionally, the "failing bank exception" provides regulators tremendous latitude to ignore the cap.[228]

Dodd-Frank's Kanjorski Amendment, which empowers regulators to break up banks that pose a "grave threat" to the United States, and section 165(d), which allows for divestiture for failure to adhere to the living will requirements, are similarly unlikely to be able to eliminate the "too big to fail" problem.[229] Both include breakups as a last resort.[230] Section 165(d) can only be used if a bank holding company successively fails to provide a document to the regulators regarding how the company can be effectively wound down; this section addresses only the most incompetent banks and can hardly be the basis for the systemic deconcentration of the banking industry.[231] Likewise, under the Kanjorski Amendment, divestiture may only occur after the failure of a lesser remedial measure, a finding of a "grave threat" to the stability of the United States, and an approval of two-thirds of FSOC's voting members.[232] These procedural hurdles are substantial and make it unlikely that the authority could be used with any widespread effect.[233]

The inadequacy of these breakup options underscores that Congress and financial regulators have been unable to adequately address the ills of the 2008 Financial Crisis.[234] Scholars attribute this to the excessive influence of the financial industry, pointing to outsized campaign contributions, regulatory capture, and a growing deregulatory mindset.[235]

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[226] *See* Wilmarth, *Dodd-Frank*, *supra* note 14, at 988–92.

[227] *See id.* at 990 ("[The deposit cap] does not apply the nationwide deposit cap to intrastate acquisitions or mergers . . . [and] does not apply the statewide deposit cap to interstate transactions.").

[228] *See* 12 U.S.C. § 1852(c)(1) ("With the prior written consent of the Board, the concentration limit under subsection (b) shall not apply to an acquisition . . . of a bank in default or in danger of default . . . ."); Wilmarth, *Dodd-Frank, supra* note 14, at 988–89 (noting the "failing bank exception").

[229] *See* Wilmarth, *Dodd-Frank*, *supra* note 14, 1024–25.

[230] *See* 12 U.S.C. § 5365(d)(4)–(5) (2012) (indicating that the Federal Reserve Board and the FDIC may require a divestiture after attempting to "impose more stringent capital, leverage, or liquidity requirements, or restrictions on the growth, activities, or operations of the company, or any subsidiary thereof"); *id.* § 5331(a)(5) (2012) (highlighting that the Federal Reserve can break up a bank if the other measures provided by the statute "are inadequate"); *id.* § 5331(b) (2012) (requiring notice and a hearing before actions are taken against a bank holding company under subsection (a)).

[231] *See id.* § 5365(d)(4)–(5) (setting forth notice of deficiencies and enforcement options for the Federal Reserve Board and the FDIC should the plan be inadequate during the initial or subsequent submissions).

[232] *Id.* § 5331(a).

[233] Wilmarth, *Dodd-Frank, supra* note 14, at 1024–25 (arguing that the Kanjorski Amendment's "procedural and substantive constraints" make it unlikely to be used to break up a bank).

[234] *See id.* at 956 ("Dodd-Frank does not solve the [too big to fail] problem.").

[235] *See* Wilmarth, *Turning a Blind Eye*, *supra* note 19, at 1293 ("While the industry could not prevent Dodd-Frank's passage, it did succeed in weakening several of Dodd-Frank's key provisions and in subsequently obstructing the statute's implementation.").

B. Avenues Forward

In particular, an adequate regulatory framework would provide less discretion to federal banking regulators.[236] This is essential because regulators are least likely to take action when the market is strong.[237] Like other aspects of financial regulation, bank breakups are also unlikely to occur in the immediate aftermath of a crisis because it would unsteady an already shaken market.[238] The Riegle-Neal depository cap provides a strong foundation from which a new law could be built.[239] But, instead of applying the law solely to mergers, the law should apply more broadly and prevent firms from attaining a set percentage of deposits or liabilities, whether through merger or natural expansion.[240] Under a piecemeal breakup approach there will always be a biggest bank; however, because a cap applies to all banks it eliminates the arbitrariness of a regulator effectively choosing this institution through its breakup decisions.[241]

Growing concentration in the banking sector and the inadequacy of current breakup options warrants the imposition of new legislation and regulations.[242] Nonetheless, the period of relative economic prosperity that has followed the crisis makes it all the more unlikely federal regulators would attempt to use their discretion to exert greater influence.[243] History suggests that new legislation is unlikely to result absent a new crisis.[244] And, even then, our expe-

[236] *See* McCoy, *Countercyclical Regulation*, *supra* note 134, at 1230 ("The most effective way to overcome regulators' propensity toward inertia at the top of the business cycle is to tie their hands in advance through rules that automatically kick in when markets heat up.").

[237] *Id.* at 1229.

[238] *See* BARR ET AL., *supra* note 9, at 729 (noting the extraordinary statutory interpretation undertaken by the Federal Reserve to allow for the emergency acquisition of Merrill Lynch by Bank of America).

[239] *See* 12 U.S.C. § 1842(d)(2) (prohibiting the approval of mergers where the resulting firm would exceed the depository cap).

[240] *See* JOHNSON & KWAK, *supra* note 8, at 214 (suggesting a hard cap be imposed to limit the size of "too big to fail" institutions).

[241] *See id.* at 215 ("[A]ll banks, including risk-seeking ones, should be limited to a size where they do not threaten the stability of the financial system.").

[242] BERNANKE, *supra* note 2, at 441 ("I agreed with the administration view that breaking up large firms was likely not the best way to solve the too-big-to-fail problem, at least not until other, more incremental options had been tried and found wanting."); JOHNSON & KWAK, *supra* note 8, at 208 ("Not only does the 'better regulation' approach ignore the impact of politics, but it fails to solve the underlying problem—the existence of [too big to fail] institutions.").

[243] *See* McCoy, *Countercyclical Regulation*, *supra* note 134, at 1229 ("It is hard enough to amass support for needed safeguards immediately after a crisis. Doing so when economic conditions are bright can threaten a regulator's career.").

[244] Coffee, *supra* note 31, at 1020.

rience after the 2008 Financial Crisis calls into question whether that would provide a sufficient impetus.[245]

CONCLUSION

The breakup options provided by the Dodd-Frank and Riegle-Neal Acts are inadequate and unlikely to be used to remedy the growing concentration of power in the banking industry. Americans have waged battles over the appropriate size of banks since the country's founding. Undoubtedly, banks have provided benefits that have increased Americans' well-being and brought widespread prosperity. At the same time, Americans have demonstrated a willingness to reject potential efficiency gains out of concern for the potential economic, political, and social harms that can be wrought by a financial industry with outsized influence. If Americans hope to truly combat the "too big to fail" problem, it will require the passage of new legislation.

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[245] *Id.* (noting the difficulty in implementing financial reform even after the 2008 financial crisis).