Article

Banking Deserts, Structural Racism, and Merger Law

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Roughly seventy million Americans cannot access a bank account or traditional financial services. Many of these individuals live in a "banking desert"—a town or community that has neither an independent bank nor a branch office of a larger bank. The United States has over 1,100 banking deserts, with another 1,000 communities at risk of losing their last bank. Banking deserts are generally in low- and moderate-income neighborhoods, which are disproportionately communities of color. Residents of banking deserts lack access to credit, including mortgages and small business loans, as well as savings accounts and other basic financial services. Consolidation in the banking industry is increasing the number of banking deserts as merged banks close their local branches. After banks depart a community, fringe banking (such as payday lenders) and fintech (such as mobile banking) cannot appropriately satisfy the financial needs of people living in a banking desert.

Understanding the phenomenon of banking deserts requires appreciating four separate strands of sociolegal history: bank decision-making, financial racism, bank regulation, and antitrust law. This Article tells each of these stories in turn and weaves these strands together. It then explains how proper interpretation

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and application of antitrust law could help mitigate the problem of banking deserts.

Many banking deserts were created or precipitated by government policies and banking practices that intentionally excluded Black families from the banking system. New Deal agencies like the Federal Housing Administration adopted strict redlining policies that blocked government-backed mortgages for Black families and often required developers to have "whites-only" housing tracts. These policies created Black neighborhoods without banks, locking minority families into cycles of poverty. More recently, banking deregulation and weak merger enforcement have fueled branch closures, especially in poor and minority neighborhoods.

Banking deserts should be treated as an antitrust issue because branch closures reduce output and increase the price of credit, which are quintessential antitrust injuries. Despite these harms, the Department of Justice (DOJ) Antitrust Division has largely abdicated its role in bank merger review, generally deferring to the federal banking agencies (e.g., the Federal Reserve Board). But the banking agencies do not apply antitrust principles properly because they define the relevant geographic market too broadly.

When reviewing proposed bank mergers, federal banking agencies focus exclusively on state and regional banking markets, paying insufficient attention to local markets and how post-merger branch closures can create banking deserts. They fail to appreciate how banking practices in the aftermath of branch closures can replicate the intentional discrimination of the redlining era because banks dramatically reduce lending in neighborhoods where they no longer maintain a physical branch office. Just as it was immoral for government actors to redline minority communities beginning in the 1930s, it is inappropriate for government officials today to define banking markets in ways that ignore the continuing costs of historic redlining.

This Article explains the advantages of resuscitating the DOJ's role in bank merger review. It advocates that the DOJ exercise its leverage during the merger review process to negotiate merger conditions designed to preclude branch closures and to restore financial services to banking deserts. Applying antitrust oversight, the DOJ can mitigate some of the anticompetitive effects and racialized impacts of banking deserts.

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INTRODUCTION

In 1966, the residents of Itta Bena, Mississippi, witnessed history when the Reverend Martin Luther King, Jr., led a civil rights march from Greenwood to Itta Bena.[1] Today, the view from the town's porches is decidedly less inspiring. From his doorstep, Shawn Robinson can see the town's only downtown ATM.[2] When the ATM runs out of money, Robinson observes women openly sobbing and men punching the brick wall, careful to avoid hitting the machine itself, lest they damage the ATM and take it out of commission.[3] Any long-term ATM outage could prove catastrophic for the town's residents: the solitary downtown grocery store only accepts cash.[4] Life can be precarious in Itta Bena. Although its name is derived from the Choctaw phrase for "forest camp," Itta Bena is a desert—though not in the ecological sense.[5] Itta Bena is a banking desert, a community with no full-service bank, whose inhabitants are effectively cut off from the nation's financial system.[6] Its residents exist in a permanent state of financial uncertainty and insecurity.

Itta Bena is not unique. The United States has over 1,100 banking deserts, about 400 in urban neighborhoods and over 700 in rural areas.[7] More than 1,000 additional communities are at high risk of becoming deserts because they have only one bank, creating a precarious position for over 200 urban districts and more than 850 rural regions.[8] Banking deserts are generally in

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1. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 482 (2004).

2. Janell Ross, *A Town with No Bank: How Itta Bena, Mississippi, Became a Banking Desert*, NBC NEWS (June 15, 2019), https://www.nbcnews.com/news/nbcblk/how-itta-benamississippi-became-banking-desert-n1017686 [https://perma.cc/5UE2-M85W]. The town's other four ATMs are further afield and charge between $5.25 and $7.50 per transaction. *Id.*

3. *Id.*

4. *Id.*

5. Assem Al Helou, *Itta Bena, Mississippi*, WORLDATLAS (Mar. 4, 2022), https://www.worldatlas.com/cities/itta-bena-mississippi.html [https://perma.cc/EW5K-H2L8].

6. Ross, *supra* note 2.

7. Drew Dahl & Michelle Franke, *Banking Deserts Become a Concern as Branches Dry Up*, FED. RSRV. BANK OF ST. LOUIS (July 25, 2017), https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/banking-deserts-become-a-concern-as-branches-dry-up [https://perma.cc/45WS-DSUA].

8. *Id.*

low- and moderate-income (LMI) neighborhoods.[9] Indeed, residents in poor neighborhoods are more than twice as likely to live in a banking desert than those who live in higher-income areas.[10] The financial crisis of 2008 worsened the situation.[11]

Trend data is not encouraging. Over the past century, the number of banks in the United States has plummeted from more than 30,000 in the 1920s to fewer than 5,000 in the 2020s.[12] Recent closures of bank branch offices measure in the thousands,[13] a historically high rate.[14] Each year, hundreds of branches have closed.[15] In the five-year period from mid-2012 to mid-2017, several large banks shuttered a significant fraction of their branches, with Capital One slashing 32% of its branches and SunTrust Banks cutting 22% of its network.[16] In addition to nationwide banking behemoths closing branches, community

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9. *See id.* (documenting that median income levels are lower in existing deserts than in nondeserts); Ian M. Dunham, *Landscapes of Financial Exclusion: Alternative Financial Service Providers and the Dual Financial Service Delivery System*, 124 BUS. & SOC'Y REV. 365, 374–75 (2019) (noting that banking deserts typically have a lower median household income than that of a regular census tract).

10. Donald P. Morgan et al., *Banking Deserts, Branch Closings, and Soft Information*, FED. RSRV. BANK OF N.Y.: LIBERTY ST. ECON. BLOG (July 12, 2016), https://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information.html [https://perma.cc/6PQN-7DQT]; Martin Mende et al., *Improving Financial Inclusion Through Communal Financial Orientation: How Financial Service Providers Can Better Engage Consumers in Banking Deserts*, 30 J. CONSUMER PSYCH. 379, 379–80 (2020).

11. Morgan et al., *supra* note 10 (finding that residents of low-income neighborhoods are more likely to live in a banking desert since the 2008 crisis).

12. Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519, 553 (2022).

13. Maddalena Galardo et al., *The Geography of Banking: Evidence from Branch Closings*, 50 ECON. NOTES 1, 2 (2021) ("[B]anks shuttered 4,821 branches between 2009 and 2014, about a 5% decline.").

14. Rachel Louise Ensign et al., *Banks Shutter 1,700 Branches in Fastest Decline on Record*, WALL ST. J. (Feb. 5, 2018), https://www.wsj.com/articles/banks-double-down-on-branch-cutbacks-1517826601 [https://perma.cc/K7PR-MGLA] ("The number of branches in the U.S. shrank by more than 1,700 in the 12 months ended in June 2017, the biggest decline on record, according to a Wall Street Journal analysis of federal data."); Julie Birkenmaier & Qiang John Fu, *Is Bank Staff Interaction Associated with Customer Saving Behavior in Banks?*, J. CONSUMER AFFS. 332, 332–33 (2021) ("The rate of bank branch closures and bank mergers is at the fastest pace in decades in response to less consumer demand for face-to-face interaction." (citation omitted)).

15. *See, e.g.*, Ensign et al., *supra* note 14.

16. *Id.*

banks are also closing in high numbers.[17] These closures can prove devastating because physical banks are critical to residents of LMI communities, where online banking is generally unavailable or impractical.[18]

These waves of bank and branch closures have occurred in every type of county—metropolitan, micropolitan, and rural.[19] But bank and branch closures strike rural America the hardest.[20] Given their geographic isolation, rural banking deserts are uniquely devoid of banks.[21]

Even during periods when the total number of banks and branches nationwide was rising, the aggregate number of offices can disguise the declining number of banks in particular communities. In the decade before the 2008 financial crisis, as merger activity shrank the number of banks nationwide, regulators took solace in the fact that the total number of branch offices was increasing.[22] But branches opened in wealthy areas and closed disproportionately in LMI neighborhoods.[23] Of the 2,000 branches shut down between 2008 and 2013, *93%* "were located in postal codes where the household income is below the national

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17. Joseph R. Harris III et al., *2020 Summary of Deposits Highlights*, 15 FDIC Q. 51, 59 (2020) ("The ongoing office reduction trend has been particularly pronounced for community banks in metropolitan counties, with a decrease of 3,322 in the past five years.").

18. *See* Dunham, *supra* note 9, at 376 (describing the barriers facing the adoption of financial technology among the unbanked).

19. Harris III et al., *supra* note 17, at 59.

20. Tanya Wolfram, *The Last Bank in Town: Branch Closures in Rural Communities*, REINVESTMENT PARTNERS 2 (Oct. 2016), https://reinvestment partners.org/file_download/inline/f6dd7f32-7c21-4dcb-a13b-8127eafd6894 [https://perma.cc/NJP7-2JU9].

21. *Cf.* Russell D. Kashian et al., *Banking the Unbanked: Bank Deserts in the United States*, UNIV. WIS. WHITEWATER 2, http://swfa2015.uno.edu/F_ Banking/paper_90.pdf [https://perma.cc/9AA2-4AV6] (describing the unique challenges of servicing rural populations).

22. *See* Rajdeep Sengupta & Jacob Dice, *Did Local Factors Contribute to the Decline in Bank Branches?*, 2019 FED. RSRV. BANK OF KAN. CITY: ECON. REV. 43, 44 ("The increase in branches during this period [1990s–2000s] helped mitigate concerns about the consequences of bank consolidation." (citation omitted)).

23. Wolfram, *supra* note 20, at 6. In many industrialized countries, bank closures are concentrated in poor neighborhoods. Krzysztof Jackowicz et al., *Which Local Markets Do Banks Desert First? Evidence from Poland*, 38 FIN. RSCH. LETTERS 1, 2 (2021) (citing research from Belgium and Great Britain that most bank closures occurred in lower-income areas).

median."[24] Large banks, in particular, are abandoning LMI neighborhoods.[25] For example, recently, over 80% of JPMorgan Chase's branch closures have been in LMI census tracts.[26] It's not uncommon for upper-income neighborhoods to experience net gains in bank branches at the same time that poor neighborhoods are suffering significant net losses.[27] National financial markets that function properly for wealthy households nonetheless deprive low-income households of access to banking services.[28]

Many banking deserts are caused or reinforced by structural racism, banks' indifference to serving less-wealthy communities, bank deregulation, weak merger enforcement, or a combination of these and other reasons. This Article explains how these factors interact to prevent millions of Americans on the lowest rungs of the economic ladder from ascending any higher. Historically, systemic racism blocked Black families from obtaining mortgages and participating in the banking system more broadly.[29] Federal policies explicitly prohibited government-backed mortgages for Black borrowers and required federally subsidized housing developments to exclude Black buyers and renters.[30] Overtly racist government policies locked Black families into less desirable neighborhoods.[31] Even after federal civil rights laws forbade de jure discrimination, banking practices perpetuated historic patterns of racial segregation.[32] In recent decades, the confluence of bank deregulation and weak antitrust oversight of bank mergers has led to waves of bank and branch

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24. MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 146 (2015) [hereinafter BARADARAN, HOW THE OTHER HALF BANKS].

25. Wolfram, *supra* note 20, at 6.

26. *Id.*

27. *Id.* (noting that upper-income census tracts gained 786 branches overall between July 2015 and July 2016).

28. *See* Claire Célerier & Adrien Matray, *Bank-Branch Supply, Financial Inclusion, and Wealth Accumulation*, 32 REV. FIN. STUD. 4767, 4769 (2019) ("[E]ven in a well-developed financial market, low-income households are partly rationed by the supply of banking services.").

29. *See infra* Part III.A.

30. *See infra* Part III.A.

31. *See infra* Part III.A.

32. *See infra* Part III.A.

closures that have devastated urban neighborhoods and rural communities, locking many of them into cycles of poverty.[33]

Fortunately, more assertive use of antitrust principles during merger review could help alleviate the problem of banking deserts. Part I highlights the harmful effects of banking deserts on individuals, families, and communities. Part II explains the importance of proximity to banks. The distance between a bank and its potential customers has an important causal effect on lending decisions. After banks depart a community, fringe banking (such as payday lenders) and fintech (such as mobile banking) cannot appropriately satisfy the financial needs of people living in banking deserts. Part III demonstrates that many banking deserts arose in the wake of government policies and banking practices that intentionally excluded Black families from having access to mortgages and credit more generally. Part IV explores how failures in banking regulation and merger law have perpetuated the problems of branch closures and banking deserts, especially in poor and minority neighborhoods. Branch closures and banking deserts implicate antitrust law because they reflect failures of the competitive market, resulting in reduced output and increased prices, which are classic antitrust injuries. Part V proposes revitalizing the Department of Justice Antitrust Division's role in bank merger review and reconceptualizing the antitrust analysis of geographic markets to reflect how residents of banking deserts are effectively isolated from the market. This Part recommends using merger conditions to address the twin challenges of banking deserts and branch closures in communities at risk of becoming banking deserts. Given their reliance on government subsidies, insurance, and bail-outs, banks are not strictly private enterprises; they serve a public purpose, and federal officials should use their authority during merger review to ensure that banks fulfill their duties to the public.

I. THE DELETERIOUS EFFECTS OF BANKING DESERTS

Banks are necessary for the proper functioning of economies both national and local.[34] Most individuals need access to banking services to have the tools necessary to climb the economic

33. *See infra* Part III.B.

34. *See* Cassandra Jones Havard, *Doin' Banks*, 5 U. PA. J.L. & PUB. AFFS. 61, 65 (2020) (describing the importance of banks to market economies).

ladder.[35] Neighborhood banks provide access to lending and to mechanisms for savings, often with benefits such as compound interest. Unfortunately, over seven million households are unbanked.[36] For every unbanked household, several more are underbanked,[37] which means borrowers must rely on alternative financial services providers, such as payday lenders, check-cashing services, pawn shops, and other non-bank lenders.[38] Between the unbanked and underbanked, roughly seventy million Americans have access to neither a bank account nor traditional financial services.[39]

Many of these individuals live in a banking desert—a community or area that has neither an independent bank nor a branch office of a larger bank.[40] Unlike a food desert—which is defined as an urban neighborhood without a grocery store within one mile or a rural area without a grocery store within ten miles[41]—there is no universal standard for what constitutes a banking desert.[42] Scholars, however, generally define banking deserts as tracts without any bank branches within a ten mile radius.[43] Unsurprisingly, banking deserts cause people to go unbanked.[44] Residents of banking deserts lack access to credit,

35. *See* Jacob W. Faber, *Cashing in on Distress: The Expansion of Fringe Financial Institutions During the Great Recession*, 54 URB. AFFS. REV. 663, 667 (2018) [hereinafter Faber, *Cashing in on Distress*] ("Without basic services, more sophisticated forms of wealth accumulation, such as investments in financial markets, homeownership, or retirement accounts, are out of reach.").

36. *See* Mark Kutzbach et al., *How America Banks*: *Household Use of Banking and Financial Services: 2019 FDIC Survey*, FDIC 12 (Oct. 2020), https://www.fdic.gov/analysis/household-survey/2019/2019report.pdf [https://perma.cc/JHS4-MD23] ("An estimated 5.4 percent of U.S. households were 'unbanked' in 2019 . . . . [R]epresent[ing] approximately 7.1 million U.S. households.").

37. *See* Havard, *supra* note 34, at 62 (estimating over 18% of Americans are underbanked).

38. *Id.* at 62 n.4.

39. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 139.

40. Morgan et al., *supra* note 10 ("A banking desert is *usually* defined as an area with no banks or branches . . . ." (emphasis added)).

41. *Food Deserts in the United States*, ANNIE E. CASEY FOUND. (Feb. 13, 2021), https://www.aecf.org/blog/exploring-americas-food-deserts [https://perma.cc/UMR3-A2Z9].

42. *See supra* note 40.

43. *See, e.g.*, Morgan et al., *supra* note 10; Havard, *supra* note 34, at 72; Dahl & Franke, *supra* note 7.

44. Scott W. Hegerty, *"Banking Deserts," Bank Branch Losses, and Neighborhood Socioeconomic Characteristics in the City of Chicago: A Spatial and*

including mortgages and small business loans, as well as to savings accounts and other financial services.[45] This limits their ability to build wealth.[46]

Banks shut down branches for various reasons, including claims of reduced demand and the desire to minimize costs by closing offices, firing employees, and shifting to online and mobile banking.[47] But many bank closures are directly attributed to bank merger waves that periodically sweep the country, particularly during eras of weak antitrust enforcement that coincide with economic turmoil such as the Great Depression or the 2008 financial crisis.[48] Banking consolidation is often followed by branch closures.[49]

In many cases, branch closures lead to banking deserts. For example, when PNC Bank closed its branch office in Jeromesville, Ohio, in 2015, it left the area without any bank.[50] Data shows that 20% of branch closings since 2010 created a banking desert.[51] As the banking industry again consolidates through mergers—both mega-mergers and large banks acquiring small banks—branch closures are on the rise.[52] Ultimately, bank

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Statistical Analysis, 72 PRO. GEOGRAPHER 194, 194 (2020) ("Being located far from a physical bank branch—in a 'banking desert'—can therefore lead to more unbanked individuals . . . .").

45. *See* Havard, *supra* note 34, at 72 ("The lack of access to banks also means a lack of access to mainstream financial products, such as mortgages and small business loans, savings accounts and lower-cost credit.").

46. *See* BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 10 (describing the importance of credit to building wealth).

47. *See* Ensign et al., *supra* note 14 (noting that profitability and reduced demand for tellers causes banks to close); Julie L. Stackhouse, *Why Are Banks Shuttering Branches?*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECON. BLOG (Feb. 25, 2018), https://www.stlouisfed.org/on-the-economy/2018/february/why-banks-shuttering-branches [https://perma.cc/QV3W-FCCP] ("Customers increasingly use ATMs, online banking and mobile apps to conduct routine banking business, meaning banks can close less profitable branches without sacrificing market share.").

48. *See* Stackhouse, *supra* note 47 ("Since 2009, the number of commercial bank and thrift branches has shrunk nearly 10 percent, or just over 1 percent per year. The initial wave of closings can be attributed to a wave of mergers and failed bank acquisitions following the financial crisis."); *see also infra* Part IV.B.

49. *See generally* Stackhouse, *supra* note 47 (analyzing this trend post-2008 financial crisis).

50. Ensign et al., *supra* note 14.

51. Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J.: APPLIED ECON. 1, 3 (2019).

52. *See supra* note 48.

closures and consolidations will swell the number of banking deserts in America.[53]

Because residents of banking deserts have less access to credit, renters are less able to secure mortgages that could allow them to become homeowners and entrepreneurs cannot get small business loans to start or grow businesses.[54] Having a physical bank nearby better ensures that credit is both available and affordable.[55] Proximity appears key, as distance to one's bank branch is strongly correlated with one's ability to secure credit.[56] For example, "evidence suggests that access to bank credit, particularly for small businesses, declines as the distance between the bank and borrower grows."[57] Moreover, even when a small business can secure a loan, banks charge higher interest rates to small businesses that are farther from the bank.[58] A similar effect is seen in residential mortgages.[59] Ultimately, as the distance to the next closest bank increases, so do loan interest rates.[60]

Even without the barrenness of a banking desert, those who live in neighborhoods with fewer banks face similar challenges because banks extend less credit in concentrated banking markets than in competitive ones.[61] Micro-changes can have macro-

53. *See generally* Havard, *supra* note 34, at 72–73 (describing the presence of banking deserts and their potential expansion due to likely future branch closures).

54. *Id.* at 73–74 (highlighting that the presence of banks is a favorable indicator for the entrepreneurship of a community); Hegerty, *supra* note 44, at 195 ("[M]ortgage originations increase and interest rate spreads decrease if a bank branch is located nearby.").

55. *See* Hegerty, *supra* note 44, at 194–95.

56. Kress, *supra* note 12, at 566 ("[T]he farther a business is located from the bank's branch office, the less likely the bank is to offer credit.").

57. Morgan et al., *supra* note 10.

58. *Id.*

59. *See* Kress, *supra* note 12, at 566 (discussing research that shows distance is negatively correlated with mortgage approval ratings).

60. Anna Tranfaglia, *Shrinking Networks: A Spatial Analysis of Bank Branch Closures* 2 (Fed. Rsrv. Bank of Phila., Working Paper No. 18-12, 2018), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2018/wp18-12.pdf [https://perma.cc/WE8K-MLM5] ("[P]revious research has found that loan rates increase with the distance between the firm (borrower) and the next competing bank." (citation omitted)).

61. Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437, 441 (2006).

effects, as "[t]he mere closing of a branch—even if other branches remain in the same area—can reduce the supply of mortgages and small business credit."[62] Without a truly competitive market for credit, borrowers are denied the benefits of lenders vying for business by offering lower interest rates and other pro-consumer terms.[63]

Access to credit is critical for low-income households.[64] Credit facilitates poor people investing in productive assets, including themselves.[65] Whether through education loans, mortgages, or small-business loans, ascending the economic ladder generally requires access to capital at affordable interest rates.[66] Constrained access to affordable credit locks people into poverty.[67] Moreover, to the extent that employers use credit records when making hiring decisions, access to credit can be critical in obtaining gainful employment.[68] Meaningful access to credit is thus important for many reasons, and being in the vicinity of a bank is often necessary to gain such access.[69]

Being in the vicinity of a bank is important for reasons beyond access to credit. Proximity to a bank improves savings behavior, which can increase resilience to negative income

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62. Morgan et al., *supra* note 10.

63. *See* Cetorelli & Strahan, *supra* note 61, at 441.

64. Ozgur Emre Ergungor, *Bank Branch Presence and Access to Credit in Low- to Moderate-Income Neighborhoods*, 42 J. MONEY, CREDIT & BANKING 1321, 1321 (2010). See BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 138, for a discussion regarding the hardship lower-income individuals face for lacking credit and using cash or other prepaid cards.

65. *See* Ergungor, *supra* note 64, at 1321 ("Access to credit has been found to be crucial for the low-income population because the ability to invest in productive assets and the associated rise in wealth encourage investment in human capital, increase productivity, and quality of life." (citation omitted)).

66. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 10 ("Reasonable credit not only serves as a bridge over financial trouble, but for millions of Americans, credit provides the only means to build assets, start a business, or get an education. . . . Without this access to credit, most of us cannot take advantage of the American dream . . . .").

67. *See* Ergungor, *supra* note 64, at 1321. Professor Mehrsa Baradaran has also explained that "[t]he high cost of credit exacerbates the already-strained lives of the poor and makes it even more difficult for them to escape poverty." BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 9.

68. *See generally* Editorial, *Millions Need Not Apply*, N.Y. TIMES, May 30, 2011, at A18 (discussing the impact of damaged credit on job prospects).

69. *See* Kress, *supra* note 12, at 566 (describing the importance of geographic proximity in securing credit).

shocks,[70] reduce the risk of bankruptcy,[71] and enhance long-term financial wellbeing.[72] Studies have found that "an increase in branch density fosters the take-up of bank accounts by households, which results in higher household asset accumulation."[73] In short, proximity to banks fuels savings.

Living close to a physical bank improves individuals' savings behavior in three distinct but related ways. First, some people with bank accounts are more likely to save their money because their cash is not kept at hand.[74] Many individuals engage in mental accounting in which money kept in a savings account is distinct, not to be used for immediate consumption.[75]

Second, in-person banking improves financial literacy as individuals develop relationships with banking professionals. Face-to-face banking facilitates trust-building interpersonal relationships that make consumers more receptive to financial advice: "Through their interaction with customers, bank tellers can make customers feel noticed, appreciated, and valued, which can be an important consideration about the degree to which customers are open to saving suggestions from a bank staff member. Providing a satisfying and trusted relationship can affect long-term savings rates."[76] Branch proximity is often necessary to have these face-to-face interactions that improve savings

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70. *See* Célerier & Matray, *supra* note 28, at 4770 (finding that households with a bank account are less likely to face financial strain when they experience a negative income shock and are also less likely to default on their rent).

71. *See* Ergungor, *supra* note 64, at 1321 ("Credit buffers individuals against liquidity shocks, prevents unnecessary liquidation of illiquid investments, and channels savings from unproductive liquid assets toward investments in productive capital." (citation omitted)).

72. Birkenmaier & Fu, *supra* note 14, at 333 ("[C]onsumer savings are being highlighted as key to consumer financial wellbeing because savings provide an ability to absorb unexpected expenses." (citation omitted)).

73. Célerier & Matray, *supra* note 28, at 4772.

74. *Id.* at 4794.

75. *Id.* ("This higher propensity to save liquid assets held in a bank account would result from . . . 'mental accounting,' that is, households' propensity to compartmentalize their money for different uses depending on how it is mentally labeled. The access to an account clearly labeled 'saving,' in addition to the checking account, can hence be particularly valuable as households would tend to mentally label the money on these accounts as money that should not be used immediately for consumption.").

76. Birkenmaier & Fu, *supra* note 14, at 335 (citations omitted).

behavior.[77] Bank-based savings advice is particularly important for lower-income individuals, who have less access to accurate, trustworthy financial guidance and recommendations.[78]

Third, through exposure and normalization, growing up in a neighborhood with banks makes children more likely to use banks to their advantage as adults.[79] These individuals are more likely to use credit appropriately, for example, to manage their households or to start a business.[80] Growing up near a bank also enhances trust in financial institutions.[81] By increasing their trust and financial literacy, "the financial markets individuals encounter at a young age have a large, persistent impact on how they build and manage credit over their lifetime."[82] These effects are independent of income.[83] The link appears causal, not merely correlated.[84] Ultimately, not only do residents of bank-filled neighborhoods have "better direct access to local bank loans," but their "formative exposure to financial markets improves financial literacy, trust in financial institutions, and has a positive impact on the way consumers build and manage credit."[85] In contrast, banking deserts are hostile financial environments that deprive residents of the opportunity to develop sound habits that facilitate long-term financial health.[86] Children who grow up in

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77. *Id.* (highlighting the importance of proximity in using the face-to-face method).

78. *See id.* (discussing that the importance of advice from bank staff may differ according to income because it is one of the few free sources of financial advice).

79. James R. Brown et al., *Growing Up Without Finance*, 134 J. FIN. ECON. 591, 593 (2019) ("[G]rowing up near banks affects bank-centric financial literacy and trust in financial institutions . . . .").

80. *Cf. id.* ("[I]ndividuals who grow up without finance have less understanding of credit market information.").

81. *Id.* ("Controlling for individual-specific levels of income and education, survey respondents who grew up near a bank have better bank-related financial literacy (e.g., understanding compound interest) and more trust in financial institutions.").

82. *Id.* at 592.

83. *Id.* at 594.

84. *Id.* at 593. Brown's paper is one of the first to present causal evidence "linking the local provision of finance across institutional environments with consumer financial health." *Id.*

85. *Id.*

86. Terri Friedline & Mathieu Despard, *Life in a Banking Desert*, ATLANTIC (Mar. 13, 2016), https://www.theatlantic.com/business/archive/2016/03/banking

banking deserts face worse financial prospects than their peers who grow up near banks.[87]

Because proximity to banks is often essential to saving money, residents of banking deserts have less ability to build wealth.[88] They lack access to savings accounts and are denied money multipliers like compound interest.[89] Savings accounts lead to increased investment in durable goods, including appreciating assets, like housing.[90] Access to banking services is critical to wealth accumulation.[91] LMI households could benefit the most from a savings account but are the least likely to have one.[92]

The lack of a bank account operates as an additional tax on poor households, which lose up to 10% of their take-home wages through check cashing and other related fees.[93] This makes

-desert-ny-fed/473436 [https://perma.cc/TW5N-HL6G] ("In the same way that convenient access to grocery stores that sell affordable and nutritious food helps us maintain a healthy diet, convenient access to safe and affordable financial products and services helps us establish and maintain good financial health. When this is not the case for lower-income communities and communities of color, economic growth suffers and households are left to struggle financially.").

87. *See* Tranfaglia, *supra* note 60, at 2 ("Evidence suggests that consumers who had poor exposure to banks as children experience worse financial health than their peers later in life." (citation omitted)).

88. *See* Birkenmaier & Fu, *supra* note 14, at 333 (noting that bank branch location is associated with consumer financial well-being, which is largely dependent on consumer savings).

89. *See* Célerier & Matray, *supra* note 28, at 4794 (highlighting how compound interest can only be accessed through interest-bearing accounts).

90. *Id.* at 4799 (showing that banked households invest more in durable goods than their counterparts without a bank account).

91. Jacob William Faber, *Segregation and the Cost of Money: Race, Poverty, and the Prevalence of Alternative Financial Institutions*, 98 SOC. FORCES 817, 819 (2019) [hereinafter Faber, *Segregation and the Cost of Money*] ("Basic financial service provision (i.e., consumer banking and credit) is necessary for wealth accumulation and transacting in a marketplace progressively reliant on electronic transfers." (citation omitted)).

92. *See* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REGUL. 121, 123 (2004) ("Low-income families, particularly those without bank accounts, often lack any regular means to save. These families, often lacking alternative forms of financial resources, *need* to save, however, as a cushion against short-term crises, such as injury or job loss, as well as for longer-term goals, including buying a home, sending their children to college, or retirement.").

93. MICHAEL S. BARR, NO SLACK: THE FINANCIAL LIVES OF LOW-INCOME AMERICANS 4 (2012) ("High fees for tax preparation and filing, check cashing, and refund anticipation loans can reduce the value of earned-income tax credits by over 10 percent." (citation omitted)).

saving for the future even harder.[94] Operating in a cash economy is expensive, as low-income households must often use costly money orders to pay their bills.[95] Professor Mehrsa Baradaran explains that "the average unbanked family with an annual income of around $25,000 spends about $2,400 per year, *almost 10 percent of its income*, on financial transactions. This is more money than these families spend on food."[96] This tax on the unbanked hinders LMI households from saving and puts them at a significant risk of bankruptcy.[97]

Beyond the effects on individual households, the loss of banks and the creation of banking deserts can devastate towns and counties. One study from the New York Federal Reserve Bank showed that "residents lose access to small business loans and mortgages when bank branches close, hindering the investment and entrepreneurship needed to drive local economic growth."[98] When a small town loses its bank, the ripple effect can dismantle the economic safety net for the entire community.[99] Farms may be foreclosed, homes repossessed, businesses shuttered, and local construction diminished.[100] Ordinary residents may soon find themselves with less access to food, housing, or the basic necessities of life that households in banked communities take for granted.[101]

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94. Michael S. Barr, *An Inclusive, Progressive National Savings and Financial Services Policy*, 1 HARV. L. & POL'Y REV. 161, 161 (2007) ("The lack of longer-term savings may undermine their ability to invest in human capital, purchase a home, and build assets.").

95. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 138.

96. *Id.* at 139.

97. *Id.*

98. Friedline & Despard, *supra* note 86.

99. *See* Jackowicz et al., *supra* note 23, at 1 (documenting the devastating effects of branch closures).

100. *See id.* ("Moreover, the withdrawals of banks from local markets, increasing the distance between lenders and borrowers, stiffen financial constraints, or negatively affect the terms of lending for small firms." (citations omitted)). *See generally* Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495 (2006) (discussing the effects of branch closures on a wide variety of social outcomes).

101. *See* Wolfram, *supra* note 20, at 7 (highlighting the lack of options many have when the last bank in their area closes). In theory, credit unions could step up and serve those communities and customers abandoned by traditional banks, but credit unions have largely not filled this role. *See* BARADARAN, HOW THE

These effects can be particularly harsh in rural communities, where banks provide a foundation for both businesses and civic engagement.[102] Tanya Wolfram has explained how "bank branch closures result in a vacant building, causing a spatial impact on rural communities in which the bank branch had been an anchor in downtown areas. A vacant building can hurt the local economy and diminish community confidence."[103] In contrast, an active bank building on Main Street sends an important message: This town is open for business.[104]

Without a local bank, it can be exceedingly difficult for new businesses to open and for existing businesses to remain afloat.[105] Because many employees need a physical bank to cash their paychecks, entrepreneurs are reluctant to operate in towns without banks.[106] The business owners, too, need to be close to their banks.[107] Three months after one major bank closed its branch office in a North Carolina town, "Tommy Davis closed his Nationwide Insurance office there. Losing the bank branch meant he had to drive 25 minutes each way daily to make deposits. And he lost foot traffic from people who once dropped by on their way to and from the bank."[108] Banks serve the needs of business owners and customers; they create traffic flows that prop up nearby stores. Conversely, the loss of its last bank is "really like a death sentence for a small town because the bank is the center of all activity."[109]

OTHER HALF BANKS, *supra* note 24, at 75–77 (noting that credit unions have largely failed to fulfill their mission in serving the underserved).

102. *See* Wolfram, *supra* note 20, at 8.

103. *Id.*

104. *See, e.g.*, Hegerty, *supra* note 44, at 195 ("Besides expenditure on physical capital, employees, and the branch location itself, the presence or absence of a bank sends an important signal to local residents and others in the community.").

105. *See, e.g.*, Wolfram, *supra* note 20, at 7 (discussing the adverse effects of branch closures on small businesses).

106. Ruth Simon & Coulter Jones, *Goodbye, George Bailey: Decline of Rural Lending Crimps Small-Town Business*, WALL ST. J. (Dec. 25, 2017), https://www.wsj.com/articles/goodbye-george-bailey-decline-of-rural-lending-crimps-small-town-business-1514219515 [https://perma.cc/TU79-Q3N7] ("'It's hard to get a business to come in' when there is no bank to cash workers' paychecks . . . .").

107. *Id.*

108. *Id.*

109. *Id.* (quoting Tommy Davis, a local businessman in a banking desert).

The departure of banks also suppresses employment in the abandoned neighborhoods. By stifling economic growth and the development of new businesses, bank branch closures cause reductions in employment rates.[110] Even if a bank merger does not cause a banking desert when the merged entity starts closing branches, bank mergers lead to fewer small business loans, and consequently, less employment in the abandoned communities.[111] Nguyen shows that after a merger between two large banks, "the decline in local credit supply leads to a 2 percentage point reduction in employment growth rates."[112] This, in turn, can cause increased property crimes in affected neighborhoods.[113]

Banking deserts also impose inefficiency in the form of wasted time. Especially in rural areas, residents of banking deserts must travel vast distances for banking services.[114] For example, when Rich Square, North Carolina, lost its last bank branch in 2016, residents had to drive approximately forty-five minutes to do basic banking.[115] The vast majority of the bank's customers—71%—had used that branch at least once a week.[116] These long commutes are particularly burdensome on rural businesses that need easy access to their banks to deposit the day's take or to make change.[117]

In addition to the wasted time, everyone in a banking desert who desires traditional banking services will have to pay

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110. Jackowicz et al., *supra* note 23, at 1 (noting that the ongoing presence of banks spurs local economic growth and employment).

111. Nguyen, *supra* note 51, at 40 (documenting the effect closures can have on local credit supplies).

112. *Id.* at 29.

113. Ryan M. Goodstein & Sherrie L.W. Rhine, *The Effects of Bank and Nonbank Provider Locations on Household Use of Financial Transaction Services*, 78 J. BANKING & FIN. 91, 92 n.5 (2017) ("For example, crime rates are lower in neighborhoods with higher rates of bank account ownership, and higher in neighborhoods with a greater concentration of AFS providers." (citation omitted)); Jackowicz et al., *supra* note 23, at 1–2 ("In contrast, bank branch closures lead to poorer local economic performance, reductions in employment and even higher crime rates." (citation omitted)).

114. Wolfram, *supra* note 20, at 2.

115. *Id.*

116. *Id.* at 7.

117. *See* Simon & Jones, *supra* note 106 (recounting how a businesswoman in a banking desert "must drive 19 miles every afternoon to make cash deposits or get change for her cash register," and how "aggravating on a day-to-day basis" this is).

transportation costs.[118] Banks externalize these costs to the households that the bank has abandoned. The hundreds—or thousands—of clients of a rural bank, for example, could easily do their banking whenever they were in town.[119] Now every one of them must drive separately to the nearest bank—ten, twenty, sometimes fifty miles away—to perform in-person bank transactions or else choose to be unbanked or underbanked. For many elderly customers—who, for example, comprised almost 30% of Rich Square's population[120]—there is no choice: they would become unbanked after their bank closed, and the next nearest bank was located prohibitively far away.

II. THE POWER OF PROXIMITY IN BANKING

The distance between consumers and their nearest bank is critical to whether individuals are banked or unbanked. The expanse between a household and a bank branch affects the probability of that household having a bank account.[121] A household without any bank branches in a five-mile radius is less likely to have a bank account than a comparable household with at least one bank branch in that same radius.[122] The effect is particularly strong for LMI neighborhoods.[123] At the community level, increasing the distance between a town and the nearest bank reduces the number of new firms formed in that town.[124]

This raises the question of why proximity is so important in banking markets. From the consumer perspective, proximity helps determine ease of use. It is more convenient to transact business at a close bank than a distant one—especially if one

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118. *See* Wolfram, *supra* note 20, at 7 ("When the last bank leaves town, residents will have to travel farther and spend more time and money (for transportation) to access financial services.").

119. *See id.*

120. *Id.*

121. Goodstein & Rhine, *supra* note 113, at 98 ("The results indicate that having at least one bank branch in the local area has a statistically significant effect on the probability of bank account ownership.").

122. *Id.*

123. Tranfaglia, *supra* note 60, at 2 ("Additionally, the distance to a bank does not affect household behavior equally: Low- and moderate-income (LMI) households with access to a nearby bank branch experience larger increases in the likelihood of owning a bank account than non-LMI households." (citation omitted)).

124. Galardo et al., *supra* note 13, at 4 (noting that increased distance to a bank branch leads to lower levels of new firm formation).

uses bank services regularly.[125] Individuals who cash checks routinely and small businesses that make daily (or nightly) deposits value proximity.[126] According to one 2013 survey, "44% of U.S. consumers cite branch locations as the most important reason for choosing the institution that provides their checking account, by far the most cited reason."[127] Ultimately, if the nearest bank is "too far away"—a distance that each consumer determines for themselves—then the consumer will go unbanked, as millions do.[128]

While consumer convenience offers a partial explanation, proximity also predicts access to credit and other banking services in large part based on how banks categorize and use information when making lending decisions. Banks must assess the creditworthiness of loan applicants.[129] Before he became chairman of the Federal Reserve, Ben Bernanke observed that "the real service performed by the banking system is the differentiation between good and bad borrowers."[130] Before lending money, banks engage in due diligence, collecting and analyzing relevant information to determine whether the loan applicant is a good credit risk.[131] Depending on the borrower, the quantity and quality of information varies considerably. This Part explains the importance of relationships and proximity in modern banking.

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125. *See supra* note 116 and accompanying text.

126. *See* Hans Degryse & Steven Ongena, *The Impact of Technology and Regulation on the Geographical Scope of Banking*, 20 OXFORD REV. ECON. POL'Y 571, 577 (2004) (highlighting that borrowers often mention bank branch proximity as a major concern); *cf.* Goodstein & Rhine, *supra* note 113, at 98–99 (noting the importance proximity plays in whether individuals go unbanked).

127. Goodstein & Rhine, *supra* note 113, at 92 (citing Survey of Consumer Finances).

128. *See generally id.* at 96–106 (describing the statistical significance geographic proximity has in determining whether individuals have a bank account).

129. *See* Ben S. Bernanke, *Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression*, 73 AM. ECON. REV. 257, 263 (1983) (defining the "costs" that banks bear as part of a "competitive banking system").

130. *Id.*

131. *See, e.g.*, Ergungor, *supra* note 64, at 1323 (introducing ways banks have gathered information about potential borrowers).

A THE IMPORTANCE OF RELATIONSHIP LENDING

Banks generally distinguish between hard and soft information.[132] Hard information includes credit ratings, financial statements, and other information that is relatively objective, available, and verifiable.[133] However, hard information excludes many relevant details, such as the borrower's repayment of loans that do not show up on a credit report.[134] Soft information is less quantifiable and includes the "[b]ranch managers' personal knowledge of borrowers' intangible traits (character, competence, work ethic, and so forth) and local business conditions."[135]

Broadly, a bank's lending practices can be categorized as transaction-based lending or relationship lending.[136] Traditional transaction-based lending is based on hard data about the borrower.[137] Because large banks rely on hard information, they emphasize transactional lending and, consequently, treat transparent firms (those that have hard information) differently than opaque firms (those that do not).[138] At one extreme, a firm is most transparent when it is publicly traded and must satisfy disclosure and audit requirements.[139] On the other hand, most

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132. *See, e.g.*, Ragnhild Grønn Johannessen & Frida Lobenz Skarstein, *Proximity in Bank-Borrower Relationships: Are Small and Newly Established Firms Hit Harder by Bank Branch Closures?* 14 (Ctr. for Applied Rsch. At NHH, Working Paper No. 04/18, 2018), https://openaccess.nhh.no/nhh-xmlui/bitstream/handle/11250/2574285/A04_18.pdf [https://perma.cc/6LWU-2MCK] ("When banks assess a customer to determine whether to grant them financing, they seek information about the customer. Related literature on the subject often distinguishes between two types of information, soft and hard.").

133. *Id.*; Morgan et al., *supra* note 10.

134. Ergungor, *supra* note 64, at 1324 n.4 ("For example, a borrower's credit history will not reflect whether or not he is making timely payments to a payday lender. Downpayments cannot be used as a screening mechanism because savings and downpayments are low in LMI communities.").

135. Morgan et al., *supra* note 10.

136. *See* Johannessen & Skarstein, *supra* note 132, at 13 ("The difference is often made between transaction-based lending, which is based on hard quantifiable information about the lender, and relationship lending, where banks pursue their role as delegated monitors producing soft information in the context of relationship building." (citation omitted)).

137. *Id.* at 14.

138. *See id.* (discussing large banks' preference for transaction-based lending).

139. *Id.* at 13 (noting that most transparent firms are publicly traded).

small businesses are opaque, lacking a public record that is easily digested from standardized reports, such as SEC filings.[140]

In contrast, relationship lending is based on soft information.[141] Relationship lending evolves over time as lenders better understand a borrower's business model, work ethic, and trustworthiness.[142] Borrowers lacking hard information may be excellent, low-risk candidates for credit when one considers their soft information.

Many small- and medium-sized enterprises rely on relationship lending.[143] Relationship lending generally benefits small businesses because, once a relationship is established, the bank is less likely to require collateral.[144] Research shows that over time, relationship lending is "likely to result in higher credit volumes and lower interest rates."[145] This is particularly true in rural environments where "[s]mall town or rural lending has traditionally focused on relationship lending, with an emphasis on trust and community reputation."[146] Whatever the setting, loan decisions based on personal information and rapport require more of an investment by the lender in terms of both time and resources.[147] Looking at an applicant's credit score is a relatively low-cost way to assess risk, but such scores are incomplete (at best) and are often systematically skewed.[148] Relationship lending gives small entrepreneurs the ability to prove that they are more than the sum of their hard data.

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140. *See id.* at 14 ("Since small firms have less obligations regarding financial reporting, banks to a bigger extent rely on soft information and internal customer history. To this date, there is no public debt registry, which means that information about repayment, interest and success is kept within the bank-borrower relationship.").

141. *Id.* at 13.

142. *See id.* at 16 ("An important part of relationship lending is collecting soft information through learning over the duration of the relationship.").

143. *E.g.*, *id.* at 5.

144. *Id.* at 16 (showing that a long-term relationship enables a bank to efficiently tax and subsidize a borrower through time to reduce the use of collateral).

145. *Id.*

146. Wolfram, *supra* note 20, at 7–8.

147. *See* Ergungor, *supra* note 64, at 1323 (describing the "costly" process of relationship lending).

148. *See id.* at 1324 (noting the decreased effectiveness of credit scores in low-income areas).

Small banks are more likely to engage in relationship lending.[149] Small banks have a competitive advantage in relationship lending, as they are better able to cultivate relationships with small businesses.[150] Speaking in broad brushstrokes, "[a] stylized fact has emerged that small banks rely on soft information to construct enduring bank-borrower relationships, while large banks tend to rely more on hard information to write loans that are securitizable or otherwise saleable in secondary markets."[151] In contrast to large institutional banks, "the organizational structure of small, decentralized banks is well suited to loan decisions based on 'soft' information, such as trust and reputation, which is critical in lending to small firms."[152] A bank that understands local conditions can make more informed decisions, which may allow the lender to offer lower interest rates to those local entrepreneurs whose soft information warrants it.[153] In short, borrowers whose information is soft and/or opaque rely substantially on relationship lending from small, local banks.[154]

Large banks lend less to small businesses because large banks have a systematic advantage in processing hard information and making loans to large (transparent) firms.[155] Studies show that "large banks, and especially merging banks, allocate a lower proportion of their assets to small business loans

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149. *E.g.*, Jason Karceski et al., *The Impact of Bank Consolidation on Commercial Borrower Welfare*, 60 J. FIN. 2043, 2048 n.3 (2005) ("[S]mall banks are more likely than large banks to make loans to borrowers without formal financial records and . . . small banks lend over shorter distances and interact on a more personal basis with their borrowers.").

150. *See* Johannessen & Skarstein, *supra* note 132, at 14 (discussing the advantage small banks have over large banks in relationship lending).

151. Robert DeYoung et al., *Mergers and Acquisitions of Financial Institutions: A Review of the Post-2000 Literature*, J. FIN. SERVS. RSCH. 87, 101 (2009) (citation omitted).

152. Karceski et al., *supra* note 149, at 2047–48.

153. *See* Hegerty, *supra* note 44, at 195 (noting how interest rates can decrease due to improved knowledge of local conditions). Of course, small banks also use hard information, like audited financial statements. *See* DeYoung et al., *supra* note 151, at 101. But they often supplement this with soft information. *Id.*

154. Erik P. Gilje et al., *Exporting Liquidity: Branch Banking and Financial Integration*, 71 J. FIN. 1159, 1162 (2016) (highlighting that more opaque borrowers tend to establish enduring relationships with their local small banks).

155. *See* Karceski et al., *supra* note 149, at 2047–48 (discussing the organizational structures of both large and small banks and how this relates to their preferences and advantages for lending).

compared to small banks."[156] In the past, this reduction in large-bank lending could be offset by small, incumbent banks filling some of that void.[157] But as the number of small banks decreases—and especially as more urban neighborhoods and rural areas become banking deserts—this market response will likely be muted.[158] Bank closures hurt these vulnerable neighborhoods even when other banks are present; lending to an abandoned bank's old clients remains low because these borrowers do not yet have the relationship with the new bank—and its loan officers—that is necessary for relationship lending.[159]

Relationship lending is often a function of the physical distance between that business and its bank.[160] A shorter distance between borrower and lender allows soft information to be shared more easily, and it facilitates the personal relationships that can help convert reliable soft information into a line of credit at a reasonable rate.[161] Proximity allows banks to better assess risk and make better-informed lending decisions, which increases access to affordable credit for many LMI households.[162]

The combination of relationship lending and proximity can also help ensure loan performance.[163] Closeness reduces the

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156. DeYoung et al., *supra* note 151, at 101.

157. *Id.*

158. *See* Karceski et al., *supra* note 149, at 2048 (arguing that small borrowers may be hurt as banks become larger and more complex).

159. *See* Nguyen, *supra* note 51, at 5 ("[N]egative effects of closings are most severe in cases where we would expect credit allocation to be more heavily contingent on soft information about the borrower . . . . These results suggest that distance matters because technology has yet to supplant the role of geographic proximity in facilitating the transfer of soft information.").

160. Degryse & Ongena, *supra* note 126, at 574–76; *see* Nguyen, *supra* note 51, at 3 (noting that a local bank branch increases credit supply and that loan rates tend to decline with the distance between borrower and lender).

161. Degryse & Ongena, *supra* note 126, at 576; Nguyen, *supra* note 51, at 5.

162. *See* Scott W. Hegerty, *Commercial Bank Locations and "Banking Deserts": A Statistical Analysis of Milwaukee and Buffalo*, 56 ANNALS REG'L SCI. 253, 254 (2016) (showing that a bank's proximity helps with "information gathering" and leads to cheaper credit); *see also* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 613 (2005) ("Most small businesses rely on lenders with a local presence for credit. This is consistent with a theory of informational advantage for local creditors in assessing highly opaque small business assets and other data." (footnotes omitted)).

163. Havard, *supra* note 34, at 73.

lender's monitoring costs,[164] for example, by facilitating in-person communication and onsite inspections while minimizing transportation costs.[165] This dynamic means that "loan applicants close to their lenders are more likely to be approved and less likely to default."[166] Proximity may be particularly important for monitoring during times of economic distress when the borrower may need guidance to avoid default.[167] Overall, borrowers who rely on a nearby bank appear more likely to keep their commitments to repay on time, thus ensuring that both the bank and borrower benefit from the relationship.[168]

Like small business lending, mortgage lending in some communities, especially LMI neighborhoods, depends on soft information.[169] Evidence suggests "the presence of a bank branch in a low-income community will improve the access to mortgage loans in the area by reducing the distance-related frictions in the information gathering process."[170] Local lenders can offer better terms on mortgages because they can better evaluate risk based on available soft information.[171] Such soft information includes "rent and utility payment histories in lieu of more traditional measures of credit quality."[172] Local banks can also "work with community groups to organize pre- and postlending education and counseling programs, and they can seek those groups' help in identifying who the qualified borrowers are."[173] Proximity is the key in building these relationships.[174] In sum, shorter distances to banks increase mortgage lending, generally at better interest rates for borrowers.[175]

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164. *See* Hegerty, *supra* note 44, at 195; Ergungor, *supra* note 64, at 1324; Gilje et al., *supra* note 154, at 1162; Degryse & Ongena, *supra* note 126, at 575.

165. Hans Degryse & Steven Ongena, *Distance, Lending Relationships, and Competition*, 60 J. FIN. 231, 235 (2005).

166. Ergungor, *supra* note 64, at 1324 (citation omitted).

167. *See* Gilje et al., *supra* note 154, at 1171 ("Mortgage lenders with branches near their borrowers also have an advantage in monitoring borrowers that may experience distress.").

168. Hegerty, *supra* note 44, at 195.

169. Ergungor, *supra* note 64, at 1324.

170. *Id.* at 1346.

171. Gilje et al., *supra* note 154, at 1162.

172. Ergungor, *supra* note 64, at 1324.

173. *Id.*

174. *Id.* at 1325.

175. Hegerty, *supra* note 162, at 254.

B. The Effect of Bank Mergers and Branch Closures on Relationship Lending

Bank mergers can dry up lending to small businesses and individuals regardless of whether the acquired bank is small or large. When large banks acquire small banks, transactional lending replaces relationship lending to the detriment of small businesses.[176] The large bank may impose its institutional reliance on hard information onto its acquired subsidiary,[177] which dislodges banking relationships based on soft information. LMI communities are especially hurt by acquisitions of small banks "when the acquiring bank is large and headquartered out-of-state."[178] When the merged bank imposes the transactional-lending business model, its presence in LMI neighborhoods seems no longer profitable.[179]

Similarly, when one large bank acquires another large bank, the merged entity often closes small branch offices, leaving customers with access only to more distant branches.[180] Because a more distant lender cannot easily acquire and analyze soft information or monitor the borrower's behavior, such branch closures hurt soft-information borrowers the most,[181] as "the uninformed (transactional) lender charges a higher loan rate to remote borrowers in order to compensate for the adverse-selection problem."[182] Unlike transactional lending, relationship lending is generally bank-specific. Post-merger branch closures, consequently, reduce the amount of credit available to—and extended to—small borrowers.[183] For small business owners who rely on relationship lending, the closure of the local branch may

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176. *See generally* Johannessen & Skarstein, *supra* note 132, at 14 ("Large bank corporations can take advantage of economies of scale, and thereby to a bigger extent rely on hard information. Smaller banks on the other hand, may be more reliant on soft information and personal relationships.").

177. Nguyen, *supra* note 51, at 23.

178. Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 460 (2020).

179. Barr, *supra* note 162, at 516 ("[I]nformation externalities, which prevent lenders from fully recapturing the costs of gathering information and developing expertise in lending to low-income borrowers, may have impeded the formation or full development of credit markets in low-income communities."); s*ee infra* Part IV.B.

180. Nguyen, *supra* note 51, at 24.

181. *Id.*

182. Degryse & Ongena, *supra* note 126, at 576.

183. DeYoung et al., *supra* note 151, at 101.

eliminate their only viable lender because other banks will not extend credit.[184] Again, rural communities are hit particularly hard, as "[a]ccess to capital for rural small business owners and entrepreneurs becomes more difficult when bank branches close."[185] In many cases, the closure of a town's last bank branch can effectively eliminate the population's access to credit on fair terms.[186]

Finally, even when the acquirer is a relatively small bank, branch closures resulting from the acquisition disrupt relationships and reduce lending to small businesses that had been clients of the acquired bank.[187] Independent of banking deserts being created, branch closures lead to less lending because of the loss of relationships and soft information.[188] Even if there is another bank available, branch closures worsen the terms for community residents because the loss of the bank terminates the borrower's relationship with an institution that understands that borrower's soft information.[189]

While mergers that create banking deserts inflict the most harm, mergers that cause branch closures also harm consumers even if they don't cause a desert. In contrast to food deserts, banking deserts affect not only accessibility but also foundational relationships. A food desert is harmful because when the nearest supermarket or full-service grocery store is more than one mile away, consumers generally cannot access fresh produce. If consumers could get to the grocery stores regularly, they could purchase the same healthy food as households next door to that supermarket. Banking is different. Unlike sales of commodities, such as groceries, lending is often based on relationships.[190] Once an acquired bank closes its branch, those relationships are severed, and the credit supply to local small businesses

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184. *Id.*

185. Wolfram, *supra* note 20, at 7–8.

186. *See* Tranfaglia, *supra* note 60, at 2 (discussing the correlation between an increase in loan rates and the borrower's distance to a bank).

187. Nguyen, *supra* note 51, at 3–5.

188. *Id.* at 5.

189. *See* Diana Bonfim et al., *"Sorry, We're Closed" Bank Branch Closures, Loan Pricing, and Information Asymmetries*, 25 REV. FIN. 1211, 1215 (2021) ("We show that branch closures also affect loan pricing through the loss of information privately held by the branches that close.").

190. Nguyen, *supra* note 51, at 5.

plunges.[191] Professor Nguyen explains that "merger-induced branch closings have large effects on credit supply to local small businesses. Annual small business loan originations decline by $453,000 after a closing, off a baseline of $4.7 million. Over the six years following a closing, this amounts to $2.7 million in forgone loans."[192] The effect is particularly strong during periods of contraction in which local banks rely most on soft information and relationships.[193] And even when loans are extended, mergers of close-proximity banks lead to more branch closures and an increase in interest rates for borrowers.[194]

C. THE UNSUCCESSFUL SUBSTITUTES TO BRICK-AND-MORTAR BANKING

Proximity to traditional banks may seem unnecessary given the emergence and growth of nonbank lending and new financial technologies. This Section explains why the former is part of the problem and the latter is an incomplete solution.

1. At the Fringe: Alternative Financial Services

The unbanked and underbanked often rely on alternative financial services (AFS), also known as fringe banking, when they need to borrow or transfer money. While payday lenders and check-cashing outlets (CCOs) are perhaps the most common forms of AFS, the term encompasses pawn shops, automobile title lenders, rent-to-own establishments, money transfer services, and tax refund anticipation lenders, among others.[195] CCOs allow customers to cash checks for a fee based on a percentage of the check's face value, typically between 1.5 and 3.5%.[196] Because most of the checks are paychecks or government-issued, they entail virtually no risk to the CCO that they will bounce.[197] Some CCOs accept personal checks for a higher

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191. *Id.* at 21.

192. *Id.* at 28.

193. *Id.* at 28–29.

194. David Benson et al., *Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers* (June 2023), https://dx.doi.org/10.2139/ssrn.3873502; *see infra* Part V.A.

195. Dunham, *supra* note 9, at 368–69; Faber, *Segregation and the Cost of Money*, *supra* note 91, at 819–20.

196. Robin A. Prager, *Determinants of the Locations of Alternative Financial Service Providers*, 45 REV. INDUS. ORG. 21, 24 (2014).

197. *Id.*

percentage payment as a risk premium.[198] CCOs have existed for almost a century but became widespread more recently.[199]

A payday loan refers to an unsecured, short-term loan that the borrower receives by giving the lender a personal check (for the loan amount plus the finance charge), which the lender will not cash until the agreed-upon date, typically between seven and thirty days—in theory tied to the borrower's payday from their job.[200] The finance fee on a two week loan is typically in the range of 260% to 520% APR.[201] For these short-term, low-dollar payday loans (averaging between $300 and $400 per loan), the average borrower pays over $500 a year in interest.[202] Lender profits are high, and profitability breeds proliferation. Although only 2,000 payday lender stores were in business in 1996, that figure had duodecupled to 24,000 by 2007 after several states exempted payday lenders from usury laws.[203]

Although AFS providers allow borrowers to meet their short-term financial needs, they undermine the borrowers' long-term financial health.[204] AFS are significantly more expensive than traditional bank products. Workers who use CCOs instead of banks for cashing their paychecks could spend $40,000 during their working years for a service that a bank provides for free.[205] CCOs effectively slash the value of government checks, completely undermining the very programs designed to keep LMI households afloat and to provide a path to greater economic prosperity.[206] Because their products are short-term and high-cost, AFS offerings are low-quality products that deny customers any way to accumulate wealth.[207] AFS providers neither finance

198. *Id.*

199. *Id.*

200. *E.g.*, *id.* at 24–25.

201. *Id.* at 25.

202. Friedline & Despard, *supra* note 86.

203. Prager, *supra* note 196, at 25.

204. *Id.* at 22; BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 138.

205. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 820.

206. *Id.*; Christopher S. Fowler et al., *The Geography of Fringe Banking*, 54 J. REG'L SCI. 688, 689 (2014).

207. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 819–20; Havard, *supra* note 34, at 63–65; Terri Friedline & Nancy Kepple, *Does Community Access to Alternative Financial Services Relate to Individuals' Use of These Services? Beyond Individual Explanations*, 40 J. CONSUMER POL'Y 51, 71 (2017); Friedline & Despard, *supra* note 86.

residential mortgages nor supply small business loans—lending that would build up the local economy.[208] Instead, they take advantage of people who are in short-term crisis. Consequently, for many borrowers, reliance on AFS ultimately creates a cycle of poverty.[209] Whereas banks provide an opportunity for their customers to build wealth, AFS providers extract wealth from the community.[210]

Despite AFS costing much more than traditional banks for similar services, approximately 20% of U.S. households use fringe banking.[211] What explains the rise of AFS? The conventional wisdom is that fringe banking fills the void created by the departure of banks from LMI neighborhoods. This is known as the spatial void hypothesis (SVH), which posits that AFS providers locate in areas that have been forsaken by traditional banks.[212] Empirical research has documented the SVH in a variety of states.[213] Other studies have found the SVH unpersuasive in their examined locations.[214] While some researchers describe the evidence as mixed,[215] it is probably most accurate to conclude that the SVH is true in some communities but not others. The SVH seems particularly persuasive, for instance, in rural areas with low bank densities.[216] Ultimately, whatever the reason, considerable evidence shows AFS providers gravitate towards areas vacated by traditional banks[217] and are overrepresented in neighborhoods without banks.[218]

In many areas of the country, bank closures increase dependence on AFS. Closures driven by bank mergers fuel the problem of AFS, as studies have found that "the lack of mainstream options in poor, minority neighborhoods—due in part to

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208. Morgan et al., *supra* note 10.

209. Dunham, *supra* note 9, at 370.

210. Faber, *Cashing in on Distress*, *supra* note 35, at 667.

211. Kashian et al., *supra* note 21, at 2.

212. Hegerty, *supra* note 44, at 195.

213. *E.g.*, *id.* at 196 (noting evidence of a "spatial void" in Philadelphia); Dunham, *supra* note 9, at 370 (listing studies that find support for the spatial void hypothesis in Pennsylvania, New Jersey and Delaware).

214. *E.g.*, Dunham, *supra* note 9, at 370 (listing various studies that find no evidence for the spatial void hypothesis).

215. *E.g.*, *id.* ("[Various] studies show mixed results and therefore present an opportunity for further study on the spatial void hypothesis.").

216. Prager, *supra* note 196, at 37.

217. Friedline & Kepple, *supra* note 207, at 54.

218. Tranfaglia, *supra* note 60, at 3.

consolidation in the banking industry—may create a 'spatial void' in which fringe service providers thrive."[219] Because bank mergers are often followed by branch closures, "[h]igh-fee check-cashing companies and other predatory financial service providers tend to proliferate in LMI areas affected by bank mergers."[220]

Lack of access to traditional banking leads many consumers to rely on AFS.[221] Availability of AFS results in increased usage of AFS,[222] especially in banking deserts.[223] The scarcity of banks can lead—in some cases, compel—individuals who need short-term cash to borrow from an AFS provider, despite the harsh terms.[224] Indeed, the existence of a single bank within five miles of a household increases the likelihood that the household will use only a bank, and not an AFS provider, by almost two percentage points.[225] Although this result may seem modest, it is a statistically significant finding that "households with reasonable geographic access to bank branches are more likely to have a bank account and are less likely to use nonbank financial transaction products."[226] Moreover, the negative relationship between bank proximity and AFS usage is larger for lower-income households, the ones most harmed by fringe banking.[227]

Although the absence of banks attracts AFS providers to some areas and encourages their use, the presence of banks can protect people from using over-priced AFS because having a checking account at a traditional bank makes individuals at every income level less likely to turn to AFS.[228] Individuals are less likely to use AFS when both banks and AFS storefronts are nearby.[229] But the residents of banking deserts, denied the

219. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 821 (citations omitted).

220. Kress, *supra* note 178, at 459.

221. Friedline & Kepple, *supra* note 207, at 53.

222. *Id.* at 55.

223. Mende et al., *supra* note 10, at 380.

224. Goodstein & Rhine, *supra* note 113, at 92.

225. *Id.* at 98.

226. *Id.* at 103.

227. *Id.*

228. Friedline & Kepple, *supra* note 207, at 73.

229. Dunham, *supra* note 9, at 371.

option of traditional banking, are more vulnerable to AFS providers.[230]

Fringe banking is not true banking. Payday lenders cannot fill the role that local banks play in financing small businesses to revitalize downtown neighborhoods. Although a multitude of sellers often indicates a vibrant, competitive market, the ubiquity of payday loan stores evidences the failure of the free market. AFS providers charge supracompetitive rates that are several times higher than the rates charged to suburban and middle-class borrowers who use banks. One might argue that these higher rates reflect the risk associated with lending to low-income individuals, but CCOs cash government checks with no risk of nonpayment. For many consumers of AFS, they pay exorbitant rates not because they are high-risk borrowers, but because they have no other options for securing short-term funds. In short, payday loan centers, CCOs, and other AFS providers aren't the solution; they're part of the problem.

Bank closures harm communities by encouraging the entry of AFS providers, such as payday loan centers and CCOs.[231] Several studies suggest that the entry of AFS providers is associated with increased crime and diminished health.[232] While causation may be difficult to prove, the correlation seems well established.[233] And a credible causation story exists: The high fees charged by AFS providers depress economic growth while shifting millions of dollars out of already economically disadvantaged neighborhoods.[234] Not only does this diversion of wealth stunt economic growth, it makes the local community less resilient to negative economic downturns, thereby making the neighborhood even more vulnerable to financial shocks.[235] In contrast, by offering financial "products [that] help local residents to weather economic downturns and contribute to economic expansions,"[236] banks provide an economic resilience that AFS cannot.[237]

230. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 260 (2017) [hereinafter BARADARAN, THE COLOR OF MONEY].

231. Goodstein & Rhine, *supra* note 113, at 92.

232. Dunham, *supra* note 9, at 371.

233. Hegerty, *supra* note 44, at 195.

234. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 821.

235. Faber, *Cashing in on Distress*, *supra* note 35, at 665.

236. Goodstein & Rhine, *supra* note 113, at 91–92.

237. *Id.* at 91.

Whatever the reason people use AFS providers as a source of loans, AFS are not a boon for the unbanked.

2. Fintech to the Rescue?

"Fintech" is an umbrella term that encompasses an array of financial technologies, including online and mobile banking.[238] Consumers with access to high-speed internet or smartphone applications can conduct many transactions that decades earlier required a teller, such as depositing paychecks and paying bills.[239] Banks have invested in fintech to change the model of retail banking.[240] Fintech holds great promise to reduce costs and improve convenience for many banking customers.[241] For many customers, smartphones are seen as a worthy replacement for in-person transactions with a bank teller or loan officer.[242]

With the rise of fintech, scholars have proclaimed the "death of distance" as a barrier to banking.[243] Banks assert that branch offices are no longer necessary in light of mobile banking.[244] For some banks, fintech is a justification for closing branches.[245] Consequently, many banks are closing brick-and-mortar branches while simultaneously promoting fintech.[246] Some observers argue that consumers prefer online banking and mobile apps, thus allowing "banks [to] close less profitable branches without sacrificing market share."[247] Ultimately, many commentators assert that fintech renders bank proximity less relevant—and perhaps eventually irrelevant—in the modern world.[248] To some, fintech is the solution to banking deserts.[249]

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238. Terri Friedline & Zibei Chen, *Digital Redlining and the Fintech Marketplace: Evidence from U.S. Zip Codes*, 55 J. CONSUMER AFFS. (SPECIAL ISSUE) 366, 372 (2021).

239. *Id.*

240. Sengupta & Dice, *supra* note 22, at 46.

241. Dunham, *supra* note 9, at 368.

242. *Id.*

243. Hegerty, *supra* note 162, at 253.

244. Nguyen, *supra* note 51, at 2; Wolfram, *supra* note 20, at 4.

245. Ensign et al., *supra* note 14.

246. Friedline & Chen, *supra* note 238, at 381.

247. Stackhouse, *supra* note 47.

248. Sengupta & Dice, *supra* note 22, at 46.

249. *See, e.g.*, Dunham, *supra* note 9, at 376 ("[T]here is potential for fintech solutions to mitigate some of the negative effects that communities experience due to the lack of financial services.").

Fintech, unfortunately, is not a panacea for banking deserts. Fintech cannot solve the problem of banking the unbanked because the unbanked have less access to the internet.[250] One-third of American households don't have access to high-speed internet.[251] Only slightly more than one-third of residents in poor communities have smartphones, and just 7% use mobile banking.[252] In rural areas in particular, high-speed home internet and smartphones are relatively rare, making any wholesale shift to fintech untenable.[253] Indeed, many rural areas don't even have ATMs.[254]

Banking deserts are often in neighborhoods with the least access to banking technology. In the banking deserts of Baltimore, for example, a 2020 report "found that 41% of Baltimore City households do not have wireline internet access, which forces many of them to seek brick and mortar branches to deposit checks or apply for loans."[255] Given the costs of high-speed internet and unlimited data plans, coercing a transition to fintech drains money from poor households.[256] Worse yet, making LMI households dependent on fintech risks poor households losing access to their money "when their phone or internet service is disconnected—something that affects 41% of black households per year and 14% of lower-income households."[257] Ultimately, as Professor Jeremy Kress explains, "[f]intech does not neutralize the anticompetitive effects of bank consolidation . . . [because] digital financial services do not penetrate many LMI and minority communities where the adverse consequences of consolidation are most severe."[258] Even if the wealthy and technologically sophisticated can transition to fintech, "those on the

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250. *See id.*

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

252. Friedline & Chen, *supra* note 238, at 381.

253. Kutzbach et al., *supra* note 36, at 11.

254. Simon & Jones, *supra* note 106.

255. Christine Hansen, *Virus Deepens Concerns About Banking 'Deserts' in Maryland*, MD. DAILY REC. (Oct. 4, 2021), https://thedailyrecord.com/2021/10/04/virus-deepens-concerns-about-banking-deserts-in-maryland [https://perma.cc/5Z3V-YJLP].

256. Friedline & Chen, *supra* note 238, at 370.

257. *Id.* (citation omitted).

258. Kress, *supra* note 12, at 577.

wrong side of the 'digital divide'" will require brick-and-mortar banks to access credit and to save for their futures.[259]

Online and mobile banking are reasonable alternatives to in-person banking for tech-savvy people but provide cold comfort to those who are not conversant in mobile technology. Forging a bond between technological literacy and financial wellbeing condemns the technologically less sophisticated to a life of being unbanked or underbanked.[260] Those who do not like or understand fintech will be forced to traverse great distances or go without traditional banking altogether—both options that will hurt their bottom line in the long run.[261] The shift to technology can help lock poor neighborhoods into cycles of poverty, forced into dependence on payday loans and other AFS.[262]

Despite claims of fintech as salvation, many customers prefer in-person banking. Even with access to fintech, most consumers—both as individuals and as small business owners—prefer to visit their local bank instead of transacting business over their smartphones or computers.[263] This is particularly true for low-income households and racial minorities.[264] Fintech does not function well for people paid or tipped in cash because no one can deposit cash over the phone. The preference for in-person banking makes sense because physical banks "offer consumers a variety of services that may be limited or unavailable electronically, such as the ability to open or close an account, and to resolve account problems or disputes."[265] Because even online customers still use in-person banking, "unanticipated branch closings can lead to 'a sharp and persistent decline in credit supply to local small businesses.'"[266]

259. Hegerty, *supra* note 162, at 267.

260. *See* Dunham, *supra* note 9, at 376.

261. *See* Ensign et al., *supra* note 14 (illustrating stories of former customers of now-closed bank branches who have been forced to bank further away or not bank at all).

262. *See* Hegerty, *supra* note 162, at 254.

263. Kress, *supra* note 12, at 575 (describing consumers' commitment to local banks despite the emergence of fintech).

264. *Id.* at 577–79.

265. Goodstein & Rhine, *supra* note 113, at 92; *see also* Kutzbach et al., *supra* note 36, at 4.

266. Sengupta & Dice, *supra* note 22, at 46 (quoting Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J. APPLIED ECON. 1, 3 (2019)).

From a societal perspective, in-person banking is also superior to online or mobile banking for several reasons. First, in-person banking increases saving behavior over online banking and ATMs.[267] Furthermore, fintech does not facilitate relationship lending,[268] which is often critical for borrowers in LMI communities. Despite the rise of online banking increasing opportunities for nonlocal lenders to support distant small businesses, the fact is "geographical proximity to customers remains relevant to banking."[269] Finally, any wholesale shift to fintech can hurt LMI neighborhoods in the long run by reducing exposure to financial institutions, which depresses residents'—especially youngsters'—financial literacy and lifetime wellbeing.[270]

Although a digital divide exists, bank customers cannot be neatly categorized as either in-person patrons or online clients because the latter still routinely visit their local bank for in-person transactions.[271] When given a choice between visiting a local bank or reaching for one's smartphone, most individuals opt for bricks and mortar over megabytes.[272] Even as banking becomes more impersonal with apps and ATMs, consumers still desire interactions with tellers, and "visiting a bank branch remains common, as 86% of banked U.S. households visited a bank branch within the past 12 months, and 35% visited 10 or more times."[273] Even younger customers rely on in-person banking for many transactions. Wells Fargo, for example, reported in 2016 that 63% of millennials use bank branches, using in-person services an average of six times a quarter, only slightly less than Gen Xers and Baby Boomers.[274] For many consumers, banking services cannot exist without brick-and-mortar banks.[275]

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267. Birkenmaier & Fu, *supra* note 14, at 340.

268. *See* Nguyen, *supra* note 51, at 5 ("[T]echnology has yet to supplant the role of geographic proximity in facilitating the transfer of soft information.").

269. Sengupta & Dice, *supra* note 22, at 46.

270. *See* Brown et al., *supra* note 79, at 615 ("[O]ur work . . . suggests that traditional banking institutions matter through an underappreciated channel—early life exposure to financial markets, which enhances financial literacy and trust in financial institutions.").

271. *See* Kress, *supra* note 12, at 575.

272. Friedline & Chen, *supra* note 238, at 382.

273. Birkenmaier & Fu, *supra* note 14, at 335 (citation omitted); *see also* Kutzbach et al., *supra* note 36, at 5.

274. Wolfram, *supra* note 20, at 4–5.

275. Hegerty, *supra* note 44, at 203 (finding that physical branches are necessary for those who lack mobility, technological fluency, or computer access).

Ultimately, for wide swaths of American society, online and mobile banking cannot replace physical branches.

III. BANKING DESERTS IN THE SHADOW OF STRUCTURAL RACISM

All the negative consequences of banking deserts and branch closures are magnified in communities of color. Banking deserts are more likely to be in communities with larger numbers of racial minorities.[276] In both urban and rural banking deserts, Black and Hispanic residents are overrepresented.[277] Neighborhoods with LMI households and large racial minority populations are disproportionately likely to be banking deserts.[278] While communities with high numbers of Hispanic and Native American residents generally have fewer banks, even compared to other racial minorities, Black neighborhoods are significantly more likely to have no financial services at all, including AFS.[279] Of course, not all banking deserts are racialized,[280] but a disproportionate number are. Studies show that "almost one third (32.7 percent) of predominantly black neighborhoods have no financial services at all, compared to approximately one-quarter of other neighborhoods."[281]

Black neighborhoods both have fewer banks[282] and are more likely to be in banking deserts.[283] Studies in several states demonstrate that having a higher proportion of Black residents in an area significantly reduces the number of banks.[284] In one Pennsylvania study, although ordinary census tracts had an average of 22.9% Black residents, census tracts that were banking

276. *See* Dunham, *supra* note 9, at 367 ("The results of the comparison of census tracts identified as those where check cashing outlets are more prevalent than banks with census tracts in the entire region reveal that banking desert neighborhoods have comparatively higher population density, lower median household income, a higher percentage of Black and Latinx residents, a lower percentage of Asian residents and residents age 65 or older, lower levels of educational attainment measured by high school diploma, and lower percentages of mortgage application denial and subprime mortgage lending.").

277. Kashian et al., *supra* note 21, at 10–11.

278. Birkenmaier & Fu, *supra* note 14, at 333.

279. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 818.

280. Hegerty, *supra* note 44, at 196.

281. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 828.

282. Hegerty, *supra* note 162, at 266.

283. *Id.* at 256.

284. *Id.*

deserts had an average Black population of 64.1%.[285] Another study found that compared to areas without African American households, locations with a 30% Black population are significantly more likely to be banking deserts, especially in rural areas.[286] And when areas become minority majority, the probability of bank desertification increases substantially.[287]

This is not accidental. Banks target their branch closures in minority neighborhoods, especially poor ones[288] and those inhabited by Black residents.[289] These bank closures in communities of color often cause banking deserts.[290]

Consequently, minority households are disproportionately unbanked. Although the rates had been improving before the global COVID-19 pandemic, the FDIC still reported on that time that Black and Hispanic households had significantly higher rates of being unbanked compared to white households.[291] Only 2.5% of white households were unbanked, compared to 13.8% of Black households.[292] White households are far more likely to have used bank credit compared to most racial minorities,[293] who are far less likely to have checking accounts.[294] Other research shows that 60% of America's Black population is unbanked or underbanked, compared to only 20% of white individuals.[295] While some of this may be the results of income effects, research shows racial disparities even when controlling for income.[296]

A. THE HISTORY OF RACIAL DISCRIMINATION IN AMERICAN BANKING

The racialization of banking deserts did not happen by accident. It was the inevitable outcome of decades of economic

285. Dunham, *supra* note 9, at 374–75.

286. Kashian et al., *supra* note 21, at 12.

287. *Id.* at 11–12.

288. Goodstein & Rhine, *supra* note 113, at 92; Friedline & Chen, *supra* note 238, at 368.

289. Rachel Atkins et al., *Discrimination in Lending? Evidence from the Paycheck Protection Program*, 58 SMALL BUS. ECON. 843, 847–49 (2022).

290. Friedline & Despard, *supra* note 86.

291. Kutzbach et al., *supra* note 36, at 2.

292. *Id.*

293. *Id.* at 8–9.

294. Fowler et al., *supra* note 206, at 689.

295. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 8.

296. Hegerty, *supra* note 44, at 203–04.

discrimination against Black Americans. This discrimination, in turn, has created a vein of distrust towards banks that runs deep in some African American households and communities. Though well-grounded in history, the current distrust of banks harms Black families. This Section provides an overview of how the American banking system has treated—and mistreated—Black households.

American history provides good reasons for African Americans not to trust banks. In 1865, President Lincoln signed federal legislation that created the Freedmen's Savings Bank and Trust Company, one of only three banks ever chartered by Congress.[297] In advertising and promotions that featured the likenesses of revered figures like President Lincoln and General Grant, freed slaves were told to put their money in the bank in order to save up to purchase land.[298] And they did; after its first decade of existence, freedmen and women had deposited the modern equivalent of $1.5 billion of their hard-earned money into the bank.[299] The bank's managers did not invest that money in the Black community; instead, they speculated with it and engaged in self-dealing, eventually losing most of the Black depositors' money.[300] Professor Baradaran has explained that "[m]ore than half of accumulated black wealth disappeared through the mismanagement of the Freedmen's Savings Bank."[301] The white misfeasors were not held accountable, as they placed the blame on the market.[302]

The episode shook Black confidence in both financial institutions and the federal government. Many believed that they had been "deliberately swindled by the United States government."[303] The corruption and collapse had lingering effects. "The bank caused financial ruin for many [Black people] who had been diligently saving their money to purchase a home, and those that were not ruined internalized a warning about banking."[304]

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297. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 23 (noting the others were the First and Second Bank of the United States).

298. *Id.* at 24.

299. *Id.* at 25.

300. *Id.* at 26–29.

301. *Id.* at 30.

302. *Id.*

303. JOHN SEDER & BERKELEY G. BURRELL, GETTING IT TOGETHER: BLACK BUSINESSMEN IN AMERICA 19 (1971).

304. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 31.

Banking is built on trust, and the distrust many Black families harbored for banks was passed down through generations like an heirloom in the form of a warning. W.E.B. Du Bois opined that "[n]ot even ten additional years of slavery could have done so much to throttle the thrift of the freedmen as the mismanagement and bankruptcy of the series of savings banks chartered by the Nation for their special aid."[305] Banks had failed the Black community, and the community remembered.

In theory, Black banks were the solution to Black households' distrust of white-owned and operated banks. And during the first third of the twentieth century, approximately 130 Black banks were formed.[306] But Black banks were dependent on Black customers; thus, whenever racism depressed the wages of Black workers, Black banks suffered.[307] As Professor Baradaran explains, Black banks were particularly vulnerable because they "were created by the same forces that worked against them at every turn—a segregated economy held the seeds of its own destruction."[308]

Even during this era, not every major city with a significant Black population hosted a Black bank. In contrast to Chicago's vibrant Black business community, New York City "had no black-owned banks during the entire golden era of black banking" despite having 40,000 more Black residents than Chicago.[309] Harlem was rich in Black-owned cultural institutions, but not banks. Although white-owned banks existed in Harlem—and the neighborhood was not technically a banking desert then—the Black press exposed how white-owned banks took deposits from Harlem's Black residents but would not lend money to Black entrepreneurs.[310] In other words, Black money was worth taking, but Black businesses were not worth supporting. The lack of Black banks in New York also stemmed in part from the state's banking superintendent exercising his discretion to deny charters to Black banks in order to protect white-owned banks from Black competition.[311] Thus, in Harlem, the white-

305. *Id.* (quoting W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 39 (Mod. Libr. ed. 2003) (1903)).

306. *Id.* at 70.

307. *Id.*

308. *Id.* at 71.

309. *Id.* at 75.

310. *Id.* at 76.

311. *Id.* at 76–77.

owned Chelsea Exchange Bank used its influence over regulators to block the chartering of a proposed Black-owned bank, allowing Chelsea to retain a "near monopoly on black depositors in Harlem."[312] As in other Black neighborhoods, Chelsea took Black deposits but did not loan money or extend credit to Harlem businesses.[313] One white Chelsea teller explained that "all" of the money deposited by the bank's Black customers "is transferred downtown to the home office where it is loaned to white customers."[314]

White banks converting Black deposits into white credit straddled the line between capitalism and colonialism. The situation reflected some of the worst aspects of both systems. Richard Wright Sr., founder of the National Negro Bankers Association, noted the indignity of the money of Black Americans being funneled "to build up businesses for people who discriminate against Negroes."[315] The Great Depression wiped out most of the early members of the National Negro Bankers Association just as the organization was securing its footing.[316] Black banks, even well-managed and highly capitalized ones, could not survive the 1929 stock market crash, in part because racists argued against using government funds to save (in their words) "a little n****r bank that does not mean anything."[317] Unable to access their savings, Black elites and the growing Black middle class were devastated by the failure of Black banks.[318] While the Great Depression affected businesses across the spectrum, anti-Black racism nonetheless played an important role in the devastation of Black banks. The system again failed Black families, and they knew it.

After the Great Depression, racial segregation and structural racism ensured an unlevel playing field for Black banks. Because Black consumers had less wealth than their white counterparts, their deposits were smaller and they were more likely to need to withdraw their money from their bank accounts to pay

312. *Id.* at 77.

313. *Id.*

314. *Id.* at 78.

315. *See id.* at 83.

316. *Id.* at 87.

317. *Id.* at 73 (quoting John A. Carroll, *The Great American Bubble*, REAL AM. MAG., April 1935, at 16–20).

318. *Id.*

bills or unexpected expenditures.[319] As a result, Black banks had to keep more cash on hand and had less money to loan out to Black entrepreneurs.[320] Because they had to keep relatively more of their cash as reserves, Black banks were also consequently less profitable than white banks.[321] Yet, even when Black banks made commercial loans to Black businesses, segregation and structural racism could make it harder for these clients to repay their loans.[322] Furthermore, because they focused primarily on Black neighborhoods, Black banks could not maintain the more financially diversified portfolios of white banks.

Segregation threatened the viability of Black banks in myriad ways. Because most of the loans made by Black banks were for homes, not businesses, residential segregation devastated the banks' assets. When Black middle-class and upper-class families purchased expensive homes, the value of those homes could tumble on move-in day as neighborhoods erupted in racial violence and white flight turned once-respectable communities into neighborhoods that became labeled as "ghettos."[323] Home values plummeted "due entirely to racial prejudice."[324]

In response to the housing foreclosures brought on by the Great Depression, Congress created the Home Owners Loan Corporation (HOLC), which was tasked with helping homeowners avoid foreclosure by refinancing their mortgages.[325] To determine which homeowners to assist, the HOLC "developed residential security maps that rated the economic value of communities from most to least desirable: A–green to D–red. 'Greenlined' communities were predominantly white, while communities 'redlined' as hazardous were predominantly black and brown."[326] This was not a coincidence; HOLC based its redlining

319. *Id.* at 88.

320. *Id.* at 88–89.

321. *Id.* at 89.

322. *Id.*

323. *Id.* at 90–91. White flight is the phenomenon of white people leaving areas that are becoming more ethnically diverse. *See id.*

324. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO: THE RELATIONSHIP OF THE GROWTH OF CHICAGO TO THE RISE IN ITS LAND VALUES, 1830–1933, at 314 (1933).

325. Friedline & Chen, *supra* note 238, at 367.

326. *Id.*

decisions on race.[327] These redlining maps would have long-term, devastating consequences because banks and other lenders refused to originate loans in redlined neighborhoods.[328]

The federal government created other New Deal programs to ease Americans out of the Great Depression. New agencies like the Federal Housing Administration (FHA) were tasked with building and stabilizing America's middle class while providing safety nets for the LMI communities. In theory, the FHA should have assisted Black banks and Black families wishing to purchase homes. But the FHA evolved into a weapon of segregation, not a tool for wealth building for Black households.

After Congress created the FHA in 1934, the new agency embraced HOLC's maps and adopted its own strict redlining policies, applying them to over 200 American cities.[329] The FHA often required developers to have "whites-only" housing tracts.[330] Its practices were explicitly racist, with financial decisions based on race instead of creditworthiness.[331] Other federal officials were more concerned about protecting the value of white homes than allowing Black families to similarly build wealth through residential real estate. During the era of white flight, "FDIC chairman Erle Cocke asserted that it was appropriate for banks under his supervision to deny loans to African Americans because whites' property values might fall if they had black neighbors."[332]

The FHA simultaneously made it more difficult for Black lenders to provide FHA-approved home loans by denying Black banks the necessary accreditation and discouraging them from even seeking charters.[333] Because mortgage lending is the foundation of traditional banking, obstacles to making home loans

327. PAIGE GLOTZER, HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890–1960, at 156 (2020).

328. Friedline & Chen, *supra* note 238, at 367 ("Since banks and lenders would not originate new loans in redlined communities, black and brown borrowers were excluded from the mortgage market and from the benefits of accumulating wealth via home equity.").

329. *Id.*

330. *Id.* at 368.

331. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 111.

332. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 108 (2017).

333. Edward Irons, *Black Banking—Problems and Prospects*, 26 J. FIN. 407, 424 (1971).

constrained the number of Black banks established between 1940 and 1965 to single digits.[334]

Congress also established the Federal Deposit Insurance Corporation (FDIC) in the 1933 Banking Act.[335] With bank runs causing thousands of banks to fail, Congress sought to restore trust in America's banks by assuring customers that their savings were protected. This was one of the many New Deal era banking reforms that shifted the locus of regulation from state to federal governance, which provided new restrictions but granted banks "access to federal networks of deposit insurance, loan guarantees, and other buffers and protections."[336] FDIC insurance was a boon for depositors and banks, but only for those banks that qualified for the protection. Most Black banks could not obtain FDIC charters because they lacked sufficient capital reserves—an effect of Black depositors having less wealth than white depositors.[337] This became an important barrier to entry for Black banks because consumers preferred to keep their money in banks that were federally insured. Thus began a chicken-and-egg problem: Black banks could not convince consumers to deposit their money in a bank without an FDIC charter, but these banks could not get the FDIC charter without having sufficient deposits on hand. In essence, Black banks, businesses, and consumers were excised from the New Deal and the class-jumping prosperity that it allowed white Americans.[338]

With the Civil Rights Act of 1964,[339] most de jure segregation ceased, but de facto segregation continued—in housing, education, job markets, and access to credit.[340] Postwar economic prosperity rained down on the white lower classes, affording them safe passage to the middle class, and many middle-class

334. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 122.

335. Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933).

336. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 123.

337. *Id.*

338. *See id.* at 124–25 (detailing how New Deal banking reforms negatively affected Black banking and communities).

339. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

340. *Cf.* BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 137–46 (discussing the difficulties facing Black Americans after the Civil Rights Act of 1964 was passed).

whites moved up a rung to the upper middle class or higher.[341] The rising tide did not raise all boats, as the boats of many Black families had segregation-sized holes, and most Black families had no boat at all.

Civil rights leaders of the 1960s recognized the critical role that racial discrimination in banking and access to credit had in preventing social, economic, and political equality for nonwhite Americans. Many of the federal civil rights laws of the decade between the mid-1960s and mid-1970s—such as the Fair Housing Act of 1968[342] and the Equal Credit Opportunity Act of 1974[343]—were designed to address racism in the banking sector.[344] In particular, the Community Reinvestment Act of 1977[345] encouraged banks to increase lending in impoverished neighborhoods.[346]

Despite these legislative victories, banks did not seriously commit to the inner cities or minority neighborhoods. Not long after the remedial federal acts became law, banks began closing their branches in minority neighborhoods as a cost-cutting measure.[347] Banks became one cog in the vicious cycle of white flight of the 1970s and 1980s. Professor Baradaran explains: "Businesses left, people lost jobs, banks continued to close, and crime increased, accelerating the downward spiral. Many of these communities have yet to recover from the exodus of businesses caused by the bank departures during that era."[348] Structural racism made it difficult for Black communities to replicate white financial institutions.

A chicken-and-egg problem persisted: Black entrepreneurs could not build large factories without capital that was inaccessible because white banks discriminated and Black banks were too small, but Black banks could not achieve the scale of white

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341. *Cf. id.* at 141 ("By the 1960s, black poverty was deeply entrenched, but more importantly, it was marked by its stark contrast to the white middle class's prosperity.").

342. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968).

343. Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1500 (1974).

344. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 49.

345. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (1977).

346. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 50.

347. *Id.*

348. *Id.*

banks without large customers such as mega-factories and railroads that supported white banks.[349] Jim Crow–era Black businesses had trouble reaching scale because segregation prevented many Black businesses from serving white customers.[350] White businesses could sell to everyone, but their Black competitors were limited to serving Black customers.

Discriminatory lending practices exercised over half a century ago explain much of today's race-based wealth inequality. When banks and federal agencies, such as the Veterans Administration, denied Black families the same preferential lending terms as similarly situated white families, the property ladder became racialized.[351] White families built equity that could be used to finance their children's education and provide collateral for business loans. Much white wealth comes from the appreciation of their parents', grandparents', and other ancestors' real estate, often in the form of a family home.

As a result of both public and private racial discrimination that prevented Black families from accumulating wealth, their progeny continued to be discriminated against by banks, this time based on the justification that poor neighborhoods do not make for profitable banking. The poverty of many communities of color is a vestige of prior discrimination. Thus, when banks abandon towns and neighborhoods because the residents are LMI, banks are essentially reifying the disreputable racist policies and practices of the past.

B. THE CONTINUING CONSEQUENCES

Mortgage discrimination played a major role in creating and maintaining racial segregation in America. Government policies and bank lending practices prevented Black households from moving to the suburbs. The FHA refused to provide mortgages to Black families seeking a better life in the suburbs.[352] Indeed, government officials affirmatively blocked lending to nonwhite

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349. *See id.* (noting that discriminatory barriers cut off access to credit for a portion of the population).

350. *Id.* at 53.

351. ROTHSTEIN, *supra* note 332, at xi.

352. Matthew Jerzyk, *Gentrification's Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. & POL'Y REV. 413, 414 (2009).

borrowers seeking housing loans for homes in white neighborhoods.[353]

Today, racialized banking deserts are a vestige of this historical racism. When white residents fled the inner cities, banks and supermarkets followed them to the suburbs.[354] Poor neighborhoods are dominated by fast-food franchises and payday lenders instead of grocery stores and traditional banks. The banking and financial industry funded and encouraged white flight. The FHA, in particular, made it a mission to extend credit to white families to finance their exodus to white suburbs.[355]

In addition, mortgage discrimination through redlining prevented Black families from building wealth through home equity.[356] As a result, Black neighborhoods are, generally speaking, less prosperous than white neighborhoods, largely because of the negative impact that race-based policies such as redlining had on wealth accumulation. One of the continuing consequences of suppressing the prosperity of Black neighborhoods is reducing the amount of lending by banks in those neighborhoods, since banks lend less in poor neighborhoods because banks maximize their profits servicing the wealthy.[357]

Another legacy of mortgage discrimination is that even when Black families could obtain mortgages in segregated neighborhoods, their houses were worth less, which reduced the total amount of capital in Black neighborhoods that could be used for financing projects and growth.[358] Historical discrimination in lending and mortgage markets created a significant racial wealth gap that banks would later use as justification for closing branches in minority communities. Today, discrimination in banking, credit, and financial services perpetuates and solidifies the wealth gap between the races.[359] Ever declining access to banks furthers this century-old problem.[360]

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353. Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 363–64 (2014).

354. Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717, 1717 (2022).

355. Jerzyk, *supra* note 352, at 414.

356. Friedline & Chen, *supra* note 238, at 367.

357. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 8.

358. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 5.

359. *Id.* at 8.

360. *Id.*

Antidiscrimination legislation did not solve the problem. After the Fair Housing Act of 1968 officially prohibited redlining, banks offered inferior credit terms to Black borrowers.[361] And after Congress enacted the 1970 Fair Credit Reporting Act (FRCA) and the 1974 Equal Credit Opportunity Act (ECOA) to prevent credit discrimination based on race, lenders simply used zip codes—which were highly correlated with race—to imitate redlining without the old maps.[362]

C. Replicating Redlining

By leaving some minority communities without full access to financial services, banking practices in the aftermath of branch closures can replicate the intentional discrimination of the redlining era.[363] And whether it is intentional or not,[364] banking deserts create de facto redlining when banks reduce business loans in neighborhoods where they no longer maintain a physical branch office.[365] Bank mergers exacerbate the problem.[366]

As banks merge and grow larger and require hard information while minimizing relationship lending, Black households and businesses will suffer. When relationship lending evaporates because bank branches have closed, Black small business owners suffer disproportionately because they often rely on soft information to secure loans.[367] Hard information can reflect racial bias because credit scores often represent low-quality information when applied broadly to LMI neighborhoods.[368] When based on inaccurate or incomplete information, or when they incorporate proxies for race like zip codes or even names, supposedly objective lending algorithms often replicate racial discrimination.[369]

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361. Friedline & Chen, *supra* note 238, at 368.

362. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 149–50.

363. Havard, *supra* note 34, at 77.

364. *Id.*

365. This prolongs a long history of banks denying communities of color access to credit and other financial services.

366. Peter B. Meyer & Christopher W. Reaves, *Brownlining Banks: The Bank Merger Movement and Urban Redevelopment*, 31 J. ECON. ISSUES 393, 398–99 (1997).

367. Atkins et al., *supra* note 289, at 849.

368. Ergungor, *supra* note 64, at 1324.

369. William Magnuson, *A Unified Theory of Data*, 58 HARV. J. ON LEGIS. 23, 46 (2021) ("Banks might, for example, use a credit-scoring algorithm that

This replicated redlining perpetuates the racial wealth gap. The financial environment in predominantly non-white neighborhoods creates a lock-in effect in which suboptimal financial decision-making becomes self-perpetuating within a community.[370] When raised in environments without access to banking, communities of color are less likely to develop financial habits that lead to long-term prosperity.[371]

D. FRINGE BANKING AS A RACIAL PHENOMENON

Denied access to traditional banking, many racial minorities are forced into fringe banking.[372] AFS storefronts are highest in neighborhoods with large Black and minority populations.[373] A county's higher proportion of Black population is associated with

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makes mortgage decisions based on factors that they know to be correlated with race, such as ZIP Code or first name."); David Brancaccio & Ruth Conlon, *How Mortgage Algorithms Perpetuate Racial Disparity in Home Lending*, MARKETPLACE (Aug. 25, 2021), https://www.marketplace.org/2021/08/25/housing-mortgage-algorithms-racial-disparities-bias-home-lending [https://perma.cc/8VJ9-ZP3G] ("Racial bias was present [in mortgage lending] even after reporters controlled for factors like income and neighborhood, as well as factors that lenders previously said would explain the disparities: debt-to-income ratio and combined loan-to-value ratio."); Michelle Singletary, *Credit Scores Are Supposed to be Race-Neutral. That's Impossible.*, WASH. POST (Oct. 16, 2020), https://www.washingtonpost.com/business/2020/10/16/how-race-affects-your-credit-score [https://perma.cc/78F4-CNXN] ("[F]actors that are included or excluded in the algorithms used to create a credit score can have the same effect as lending decisions made by prejudiced White loan officers."); *Mortgage Algorithms Perpetuate Racial Bias in Lending, Study Finds*, BERKELY NEWS (Nov. 13, 2018), https://news.berkeley.edu/2018/11/13/mortgage-algorithms-perpetuate-racial-bias-in-lending-study-finds [https://perma.cc/ER3S-GA32] ("Even if the people writing the algorithms intend to create a fair system, their programming is having a disparate impact on minority borrowers — in other words, discriminating under the law." (quoting Adair Morse, finance professor at Haas School of Business)); *see also* Winnie F. Taylor, *Fintech and Race-Based Inequality in the Home Mortgage and Auto Financing Markets*, 33 LOY. CONSUMER L. REV. 366, 367 (2021) ("By using algorithmic mechanisms and data analytics to make their lending decisions, fintech innovations are poised to amplify the racial wealth gap."); Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 25–29 (2018) (analyzing how "human bias bleed[s] into algorithmic decision-making processes").

370. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 840.

371. Friedline & Despard, *supra* note 86.

372. *See supra* Part III.B (discussing the problems of AFS and fringe banking).

373. Prager, *supra* note 196, at 37; Dunham, *supra* note 9, at 369.

higher numbers of payday lenders per capita.[374] When banks close branches in minority neighborhoods, payday lenders and other AFS providers rush in to satisfy unmet demand.[375] In many (but not all) cases, AFS providers set up shop in minority neighborhoods that traditional banks have abandoned.[376] Applying the spatial void hypothesis to minority neighborhoods, "[f]ringe providers exploit the market niche that has been vacated (or left vacant) by traditional banks—a market niche that primarily serves poor and minority communities."[377] Consequently, a higher proportion of Black residents in a zip code correlates with both fewer banks and more payday lenders in that zip code.[378] In other words, payday loans and other AFS become racialized precisely because banks have vacated communities of color.[379] Not surprisingly, not only are Black neighborhoods more likely to have AFS providers, but Black households are more likely to use them.[380] In 2015, for example, over 42% of Black households reported using AFS, more than any other racial group, while white households had the lowest rate of usage at 17%.[381]

This means that Black borrowers also pay higher servicing fees than their white counterparts.[382] Because check-cashing is generally free for bank customers but costly for AFS users, "[t]he segregation of financial services means that the very cost of using one's own money varies (i.e., through exposure to fees) across neighborhoods defined by race and income."[383] This makes Black borrowers more vulnerable to default and debt collection, another component of the financial system that is racialized. Professor Baradaran reports that "debt collectors extract as much as *five times more* judgments against black neighborhoods than

374. Friedline & Chen, *supra* note 238, at 369.

375. *Id.* at 368.

376. Dunham, *supra* note 9, at 376; Friedline & Chen, *supra* note 238, at 369; Fowler et al., *supra* note 206, at 690.

377. Fowler et al., *supra* note 206, at 690 ("According to this theory, fringe banks cluster in areas where the poor and minorities are more prevalent and banks are absent.").

378. Hegerty, *supra* note 44, at 196.

379. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 828.

380. *Id.* at 820.

381. *Id.*

382. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 8.

383. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 819.

white ones."[384] When bank mergers lead to branch closures that reduce access to traditional banking, debt collection activity and evictions rise.[385]

Although banks often justify closing bank branches by pointing to the availability of mobile banking, fintech is not generally available to Black households, especially those in banking deserts.[386] Studies have shown that "[e]very percentage increase in a community's black population was associated with an 18% decrease in their rate of highspeed internet access, 1% decrease in smartphone ownership, 12% decrease in online banking, and 3% decrease in mobile banking."[387] This lack of access reflects business decisions to exclude Black households from the market. Like the banking industry had done for decades prior, "internet service providers decide where, how, and under what conditions to make high-speed internet available, often choosing to limit their services in black and brown communities."[388] In other words, banking and telecom executives have coalesced on a strategy that effectively blocks many Black households from accessing financial services through any medium. Similar to the redlining on the HOLC's maps that prohibited mortgages and other lending in minority neighborhoods, "digital redlining can occur when banks decide to close branches in black and brown communities concurrently with internet service providers' decision to limit high-speed internet access in those same communities."[389]

Moreover, even when digital resources are available, many LMI and minority borrowers are naturally reluctant to use fintech because of the industry's history of discrimination and misuse of personal information.[390] Such concerns are, regrettably, justifiable. Fintech lenders have been shown to discriminate based on race, for example, by charging higher interest rates on education loans to students attending Historically Black Colleges and Universities and Hispanic-Serving Institutions.[391] In

384. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 261.

385. Kress, *supra* note 178, at 459–60.

386. Kress, *supra* note 12, at 574 ("Further, financial technology does not penetrate many LMI and minority communities, where the adverse effects of bank consolidation are felt most acutely.").

387. Friedline & Chen, *supra* note 238, at 366.

388. *Id.* at 368 (citation omitted).

389. *Id.* at 370.

390. Kress, *supra* note 12, at 578.

391. Friedline & Chen, *supra* note 238, at 370.

short, the racist policies of the past are sometimes reflected and reinforced in current practices.

IV. BANKING DESERTS AND BRANCH CLOSURES IN THE SHADOW OF MERGER AND BANKING LAW

The problems of banking deserts and unbanked/underbanked Americans are sometimes influenced by banking policy, especially bank mergers. This Part provides a brief overview of the origins of the American banking system and its evolution since the nation's founding. Banking regulations used to encourage competition, local control, and decentralization. Over time, however, the system has transformed into a consolidated system where big banks grow bigger, largely through mergers, and the number of community banks has diminished. Through it all, federal officials tasked with bank merger review have variously stepped up to the plate or languished in the dugout, depending on the prevailing political theory of the day. As of late, America has been in a period lacking meaningful enforcement of laws designed to prevent bank mergers that are either anticompetitive or otherwise not in the public interest. This Part sets the stage for Part V's call to bring the players—namely, the DOJ's Antitrust Division—back onto the field.

A. AMERICAN BANKING: FOUNDATIONS, REGULATIONS, AND CONSOLIDATIONS

In the early days of the Republic, Alexander Hamilton and Thomas Jefferson debated the banking model for the new nation, with Hamilton championing a single national bank in contrast to Jefferson's ideal of several decentralized banks, each focused on serving their local community.[392] Hamilton's national bank would have served both the government and its citizenry to the exclusion of all other banks, public and private.[393] Jefferson saw this for what it was: a monopoly.[394] He wrote, "The monopoly of a single bank is certainly an evil."[395] Hamilton seemingly won the battle when Congress chartered the First Bank of the United

392. Kress, *supra* note 12, at 523.

393. BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 47–48 (1957).

394. Kress, *supra* note 12, at 531.

395. *Id.* (quoting Letter from Thomas Jefferson, President, to Albert Gallatin, Sec'y of the Treasury (June 19, 1802), https://www.loc.gov/resource/mtj1.026_0603_0603/?st=text [https://perma.cc/T5XB-VUUT]).

States in 1791.[396] But Jefferson eventually won the war—albeit more than three decades after Hamilton's death—when President Andrew Jackson vetoed the renewal of the charter of the Second Bank of the United States in 1836.[397]

During the mid-1800s, America embraced Jefferson's vision of plentiful banking as thousands of banks popped up across the country, facilitated in part by the National Bank Act of 1863,[398] which "authorized the comptroller of the currency to issue a federal charter to any bank that satisfied minimum financial criteria."[399] As both states and the Comptroller approved new banking charters with unprecedented alacrity, there was no limit to the number of banks during this period known as "free banking."[400] The Comptroller of the Currency John Jay Knox observed that these were "the halcyon days when there was a bank at every cross roads."[401] And he wasn't far off. Between 1828 and 1890—the year in which Congress enacted the Sherman Antitrust Act[402]—the number of banks blossomed from 550 to 10,000,[403] a figure that would have been unimaginable to Jefferson and intolerable to Hamilton.

With the proliferation of banks came a movement to protect small banks from larger banks. For example, states sought to protect community banks through anti-branch laws, which "prohibited banks from establishing branches beyond their home office, as policymakers feared that branching 'would result in building up a money power which would crush the small banks out of existence.'"[404] In the battle between large banks and small banks, states championed the latter.[405] These measures did not completely stifle competition in retail banking, as small banks

396. *Id.* (citing JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 89–90, 134–36 (2002)).

397. *Id.*

398. National Bank Act of 1863, Pub. L. No. 37-58, 12 Stat. 665 (1863).

399. Kress, *supra* note 12, at 532.

400. HAMMOND, *supra* note 393, at 573.

401. Kress, *supra* note 12, at 532 (quoting JOHN JAY KNOX, A HISTORY OF BANKING IN THE UNITED STATES 532 (1903)).

402. Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (1890).

403. MARKHAM, *supra* note 396, at 168.

404. Kress, *supra* note 12, at 532 (quoting BENJAMIN J. KLEBANER, COMMERCIAL BANKING IN THE UNITED STATES 133 (1974)).

405. *Id.*

routinely competed against each other for local businesses.[406] As a result, consumers benefitted from active competition between small banks, while small banks benefitted from protection from competition (at least from large banks). Many states had home office protection (HOP) laws that prohibited a rival bank from establishing a new branch in a town or city where another bank maintained its home office.[407] HOP laws were justified as protecting local full-service banks against "'excessive' competition of low-cost, limited-service branches of 'outside' banks."[408] The laws stifled banking competition within local markets.[409]

Through most of the nineteenth century and early twentieth century, legislators did not embrace branch banking. When issuing banking charters, most states prohibited banks from having branches, with the exception of those Southern states that permitted intrastate affiliates to manage cotton operations, which included harvesting, distribution, and export.[410] States resisted both interstate banking and networks of bank branches in order to prevent banks from growing so large as to acquire economic power.[411] Restricting branch banking was "meant to force banks to stay tied to one community and serve just that community's credit needs."[412] In other words, for most of the nineteenth century, states regulated banks to ensure that they would concentrate their resources to serve their local communities.

In 1927, Congress federalized state prohibitions against interstate banking by passing the McFadden Act,[413] which explicitly precluded banks from maintaining branches outside of their chartering state.[414] The state and federal governments were now officially aligned in their preference for decentralized community banks. The American banking system seemed on firm ground. It wasn't.

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406. *Id.*

407. Donald T. Savage, Note, *Bank Home Office Protection Laws and Intercity Branching in Statewide Branch Banking States*, 11 J. MONEY, CREDIT & BANKING 500, 500 (1979).

408. *Id.* at 501.

409. *Id.*

410. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 144.

411. *Id.* at 33.

412. *Id.*

413. McFadden Act, Pub. L. No. 69-639, 44 Stat. 1224 (1927).

414. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 144.

The stock market crash of 1929 and the ensuing Great Depression prompted calls for greater regulation and oversight of banks. While some leading figures, such as Louis Brandeis, advocated treating private banks as public utilities, that was a bridge too far.[415] Instead, the federal government struck a balance whereby it "would provide a banking safety net, or deposit insurance, contingent on federal oversight and certain restrictions."[416] This solution did not embrace branch banking because politically powerful farmers and others opposed such changes.[417]

The American banking system experienced periods of merger waves followed by public or legislative reactions designed to ebb, or at least manage, the steady consolidation in the banking industry. By World War I in the late 1910s, America was home to 30,000 banks.[418] But beginning in the 1920s through the worst years of the Great Depression, half of these banks would fail.[419] Watching their rival banks collapse all around them, the remaining banks sought safety in smaller numbers and began consolidating. The aftermath of the Great Depression ushered in a new wave of bank mergers that would extend through World War II.[420]

In theory, the DOJ should have challenged and blocked bank mergers that its Antitrust Division found to be anticompetitive as violating the Sherman Act (which prohibits unreasonable restraints of trade and monopolization)[421] and Section 7 of the Clayton Act (which prohibits mergers and acquisitions that substantially lessen competition).[422] Despite these statutes, doubts about their reach hampered the DOJ from aggressively challenging bank mergers. First, because antitrust laws were focused on "commerce," many officials believed that they did not reach banking activity, which was not considered to be

415. *Id.* at 44.

416. *Id.*

417. *Id.* at 45.

418. Kress, *supra* note 12, at 532.

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

420. Kress, *supra* note 12, at 533.

421. Sherman Antitrust Act of 1890, Pub. L. No. 51-647, 26 Stat. 209 (1890).

422. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, § 7, 38 Stat. 730, 731–32 (1914).

"commerce" as such.[423] Consequently, "[e]arly twentieth century policymakers regarded banks as exempt from the Clayton and Sherman Antitrust Acts."[424]

With the DOJ out of the bank merger game, thousands of bank mergers transpired in the 1950s.[425] The 1950s' bank merger wave meant that "[m]ore than 10 percent of all banks were merged out of existence."[426] Chase National and National City—two of the three largest banks—used mergers to acquire behemoth status.[427]

With banks merging at a dizzying velocity and the DOJ seemingly sidelined, Congress enacted the Bank Holding Company Act of 1956[428] (BHC Act) and the Bank Merger Act of 1960[429] to explicitly authorize the existing federal banking agencies to police bank mergers.[430] The federal government maintained an array of banking agencies, each charged with managing a different tier of financial institutions. The bank merger statutes followed these organizational charts and required that a bank seeking to acquire another bank "must obtain approval from its primary federal regulator—the [Office of the Comptroller of the Currency] for national banks, the FDIC for state non-member banks, and the Federal Reserve for state member banks and BHCs."[431] The statutes "direct[ed] the federal banking agencies to consider four main factors when evaluating a proposed merger: (1) the proposal's potential anticompetitive effects, (2) possible risks to financial stability, (3) the transaction's probable effect on the public interest, and (4) the companies' financial and managerial resources."[432] Thus, unlike antitrust statutes, the bank merger statutes looked beyond anticompetitive effects.

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423. *Id.*

424. Kress, *supra* note 178, at 444.

425. *Id.*

426. Kress, *supra* note 12, at 533.

427. Kress, *supra* note 178, at 444.

428. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133.

429. Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129.

430. Kress, *supra* note 12, at 534. The Bank Holding Company Act of 1956 also shored up the 1927 McFadden Act's prohibition on interstate banking by allowing states to prevent banks from using holding companies to operate banking subsidiaries in different states, a loophole that some banks had exploited. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 145.

431. Kress, *supra* note 12, at 534.

432. Kress, *supra* note 178, at 437. The second prong was added to the bank merger statute as part of the Dodd-Frank Act. Kress, *supra* note 12, at 571–72.

After Congress enacted the Bank Merger Act, despite the conventional wisdom that antitrust laws did not reach bank mergers, the DOJ began to challenge M&A activity in the banking industry.[433] The Supreme Court unexpectedly held that the DOJ enjoyed the authority to challenge bank mergers.[434] The DOJ was officially in the bank merger review game. A turf battle of sorts broke out between the DOJ and the banking agencies,[435] leading to the DOJ and banking agencies maintaining more-or-less simultaneous authority, which sometimes led to the DOJ suing to a block merger that the banking agencies had affirmatively approved.[436]

In 1966, Congress sought to resolve the turf war by amending the bank merger statutes to provide for better coordination among enforcers. Before approving a bank merger, the banking agencies were to "request a report on the competitive factors involved from the Attorney General of the United States."[437] The DOJ's report would give the banking agency some guidance on whether to challenge the proposed merger based on competitive considerations and would provide a heads up whether the DOJ was likely to sue to block the merger if the banking agency approved it. These compelled communications were intended to better inform the decision-making of both sets of actors and reduce the chance of contradictory reactions to a proposed bank merger.[438] Nonetheless, the DOJ could still challenge a bank merger that the relevant banking agency had approved. While recognizing the DOJ's authority to challenge bank mergers, Congress limited this authority to a thirty-day window after the appropriate banking agency had approved the merger.[439] After the

433. Kress, *supra* note 178, at 445.

434. United States v. Phila. Nat'l Bank, 374 U.S. 321, 335–49 (1963) (discussing Section 7 of the Clayton Act); United States v. First Nat'l Bank & Tr. Co. of Lexington, 376 U.S. 655, 672–73 (1964) (applying Section 1 of the Sherman Act).

435. Kress, *supra* note 12, at 534–35.

436. *Id.*

437. 12 U.S.C. § 1828(c)(4).

438. Kress, *supra* note 178, at 446–47.

439. Kress, *supra* note 12, at 536.

thirty days are up, the DOJ cannot challenge a bank merger.[440] The new system explicitly provided for dual enforcement.[441]

The system seemed to work, as the Federal Reserve often denied merger applications as anticompetitive in the early years.[442] During the 1960s and 1970s, the DOJ and federal banking regulators regularly challenged bank mergers and maintained a winning scorecard.[443] The DOJ, in particular, focused its attention and energy on bank mergers, with over one-third of its merger challenges directed at banks.[444] The Supreme Court consistently interpreted antitrust law to block bank mergers.[445]

In 1977, Congress added another consideration in bank merger review when it adopted the Community Reinvestment Act (CRA).[446] Based on the congressional finding that "regulated financial institutions have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered,"[447] the CRA "require[s] each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound

440. Kress, *supra* note 178, at 446–47. This makes bank mergers unique, as non-bank mergers can be challenged even after consummation.

441. Congress also brought antitrust considerations more explicitly into the bank merger statutes by "prohibit[ing] the banking agencies from approving a transaction 'which would result in a monopoly . . . in any part of the United States.'" Kress, *supra* note 12, at 535 (quoting 12 U.S.C. §§ 1828(c)(5)(A), 1842(c)(1)(A)). The agencies could approve a merger substantially lessened competition so long as the agency found that the anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. § 1828(c)(5)(B). Professor Kress notes that, "[t]his carve-out was generally understood to apply to transactions involving failing banks." Kress, *supra* note 12, at 535 (citing John S. Watson, Comment, *Bank Mergers: A New Standard of Evaluation?*, 46 TEX. L. REV. 81, 101 (1967)). This is similar to the failing firm defense that exists in merger law more broadly.

442. Kress, *supra* note 12, at 538 ("[T]he Federal Reserve denied sixty-three merger applications as anticompetitive within a decade.").

443. *Id.* ("The Supreme Court decided seven bank merger cases between 1963 and 1974, siding emphatically in favor of antitrust enforcement.").

444. *Id.* at 524 n.16.

445. *Id.* at 524–25.

446. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (1977).

447. 12 U.S.C. § 2901(a)(3).

operation of such institutions."[448] Because courts have ruled that "the CRA does not create a private right of action,"[449] LMI communities must rely on federal banking agencies to effectuate the law's purpose. In theory, the CRA demands "the appropriate Federal financial supervisory agency" to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."[450] But the CRA does not authorize the agencies to affirmatively require banks to serve specific areas or customers.[451] Instead, the law seems to rely on the agencies' temporary power that exists when reviewing proposed bank mergers.[452] At this moment, the agencies can reject a merger if the banks have not satisfied the mission of the CRA.[453]

Meanwhile during the 1970s, the legislative opposition to branch banking began to break down at every level of government. Some states started allowing interstate banking, thus creating the possibility of greater competition.[454] In 1994, a watershed event fundamentally changed the competitive landscape of American banking. Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act[455] (the Riegle-Neal Act), which repealed the McFadden Act and permitted banks to open branches in other states.[456] The Riegle-Neal Act unleashed a

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448. 12 U.S.C. § 2901(b).

449. Powell v. Am. Gen. Fin., Inc., 310 F. Supp. 2d 481, 485–86 (N.D.N.Y. 2004).

450. 12 U.S.C. § 2903(a)(1).

451. *See* 12 U.S.C. §§ 2901–08 (not including an affirmative duty to require banks to serve specific areas).

452. Kress, *supra* note 178, at 447 (describing the regulatory structure put forth by the CRA).

453. 12 U.S.C. § 2903(c)(1) (allowing agencies to reject a merger if the banks have not "achieved a rating of 'satisfactory record of meeting community credit needs', or better").

454. Kress, *supra* note 178, at 451 ("In the 1970s . . . some states eased [their] geographic restrictions, permitting banks to branch and merge across state lines.").

455. Riegle-Neal Act, Pub. L. No. 103-328, 108 Stat. 2338 (1994).

456. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 145 ("The official repeal of . . . the geographic restrictions . . . came in 1994 through the passage of the [Riegle-Neal Act], which allowed banks to open branches across state lines."); DeYoung et al., *supra* note 151, at 97 ("The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 repealed the McFadden Act of 1927 (which had long prohibited nationwide branching in the U.S.) . . . .").

wave of pent-up demand for out-of-state branches precipitating another national merger wave, this one causing "the highest-ever five-year run of bank mergers in the country's history, measured in both the number and the value of the banks acquired."[457] This merger wave laid the groundwork for dramatic changes in community banking.

B. BANK MERGERS PRECIPITATE BRANCH CLOSURES

After passage of the Riegle-Neal Act, large banks began to build interstate banking networks comprised of branches across state lines. States could still impose barriers to out-of-state banks, but states modified their laws in the wake of the Riegle-Neal Act, allowing out-of-state banks to serve the state's residents.[458] Almost all states soon allowed interstate branching.[459] The number of bank branches increased in the short run, including in LMI communities.[460]

This period of expansion, however, was quickly followed by a more extreme contraction as mergers led to branch closures.[461] In the two decades before the 2008 financial crisis, mergers and acquisitions in the banking industry spurred the closing of bank branches.[462] During the 1980s and 1990s, for example, bank mergers led to closures, causing fewer branches per capita in affected zip codes.[463] This was true whether a large bank was acquiring another large bank, a smaller community bank, or regional bank system.

457. DeYoung et al., *supra* note 151, at 97–98.

458. Célerier & Matray, *supra* note 28, at 4768–69 ("The [Riegle-Neal Act] made bank branching across states legal, but gave states the right to erect barriers to the entry of interstate branches. States lifted these barriers the following years in a staggered way.").

459. Stackhouse, *supra* note 47 ("Almost all states opted in to a provision in the [Riegle-Neal Act] permitting interstate branching . . . .").

460. Célerier & Matray, *supra* note 28, at 4768 ("[I]nterstate branching deregulation triggered an exogenous increase in . . . the density of bank branches in low-income counties . . . .").

461. Kress, *supra* note 178, at 440 ("[M]erging banks typically close branches . . . .").

462. Sengupta & Dice, *supra* note 22, at 44.

463. Robert B. Avery et al., *Consolidation and Bank Branching Patterns*, 23 J. BANKING & FIN. 497, 497 (1999).

When large banks acquire a rival large bank, the merged bank generally closes branches that are deemed redundant.[464] During this process, however, merged banks will often abandon some towns and neighborhoods entirely. The new ability to operate banking networks led some "banks to pivot from primarily serving local communities to serving larger and more profitable geographic regions. Banks withdrew from local communities, closing their less-profitable branches that were often in lower-income communities and communities of color."[465] When big banks merge, they often clean house by closing their less profitable branches, abandoning neighborhoods and customers, sending them to an ATM or a website.[466] For example, when BB&T and SunTrust Bank merged in 2019 to become the nation's sixth largest bank,[467] they quickly made plans to close 800 branch offices, 28% of the merged bank's total.[468] Merged banks targeted their branch closures in LMI neighborhoods.[469] Affected communities are unlikely to be on notice during the merger process because merging banks generally do not disclose their plans to close branches.[470]

Similarly, sometimes mega-banks acquire smaller community banking systems and then shutter many branch offices in

464. Nguyen, *supra* note 51, at 2 ("Bank mergers are often followed by a period of retrenchment in which branches are closed in neighborhoods where the two previously separate buyer and target branch networks overlap.").

465. Friedline & Despard, *supra* note 86.

466. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 146 ("As the largest banks merge with each other, they cut down branches in less profitable areas and replace them with online services or ATM machines . . . .").

467. Aparajita Saxena et al., *BB&T to Buy SunTrust in Biggest U.S. Bank Deal in a Decade*, REUTERS (Feb. 7, 2019), https://www.reuters.com/article/us-suntrust-banks-m-a-bb-and-t/bbt-to-buy-suntrust-in-biggest-u-s-bank-deal-in-a-decade-idUSKCN1PW156 [https://perma.cc/ZY2M-AYBM].

468. Kress, *supra* note 12, at 565 ("BB&T and SunTrust Bank announced plans to close 800 of their 2887 branches, or nearly 28 percent of their offices, when the banks merged in 2019." (citing Lauren Seay & Ali Shayan Sikander, *Majority of BB&T, SunTrust Branch Closures Still to Come*, S&P GLOB. MKT. INTEL. (Oct. 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261 [https://perma.cc/T9P4-5PMC])).

469. *Id.* ("[B]ranch closures following bank mergers are typically concentrated in LMI areas, further disadvantaging vulnerable populations.").

470. *See infra* note 604 and accompanying text.

the name of efficiency.[471] For example, during the first two decades of the 2000s, large banks in North Carolina started acquiring smaller community banks, and then those large banks merged and began closing their branches, sometimes leaving entire counties with only one bank.[472] Consumers may find themselves inconvenienced or without access to a bank entirely.[473] This phenomenon of national banks acquiring smaller regional and community banks and then closing branches is particularly common and problematic in rural communities.[474] Ultimately, a large bank's acquisition of a community bank hurts competition and consumers more than acquiring another multi-market bank.[475]

This raises the question of why these acquiring banks close the branches of acquired banks. Some banks justify post-merger branch closures as a way to reduce real estate costs.[476] But real estate costs are significantly less in the LMI neighborhoods that post-merger banks abandon. Of course, banks may be closing branches in poor neighborhoods because these branches are less

471. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 147 ("Each bank that Bank of America purchased originally started as a small community bank before being turned into a megabank branch or closed in the name of efficiency and replaced by an ATM machine.").

472. Wolfram, *supra* note 20, at 3–4 ("In 2016, PNC announced that it would close an additional 6 branches in North Carolina, including the branch in Rich Square, leaving the county with one remaining bank.").

473. Kress, *supra* note 12, at 527 ("[B]ank mergers have led to widespread branch closures, inconveniencing customers who previously benefited from proximity to bank offices.").

474. *See* Wolfram, *supra* note 20, at 3 ("Rural areas tend to be hit the hardest by bank branch closures . . . .").

475. Andrew M. Cohen & Michael J. Mazzeo, *Market Structure and Competition Among Retail Depository Institutions*, 89 REV. ECON. & STAT. 60, 73 (2007) ("For example, if a multimarket bank were to enter a local market by purchasing one of two single-market banks currently operating, competition would likely be reduced—as compared to a scenario in which a different multimarket bank were purchased.").

476. Lydia DePillis, *The Internet Didn't Kill Bank Branches. Bank Mergers Did.*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did [https://perma.cc/6L6A-3BJE] (noting that merged banks close branches to save real estate costs and observing that "a number of large banks in the same markets have merged—like Wachovia and Wells Fargo, or BB&T and Colonial—and decided to save on real estate costs by closing down branches").

profitable.[477] But causation issues arise: Do banking deserts lead to poverty or does poverty lead to banking deserts? Observational data suggests that causation flows from mergers to deserts because branch closures follow mergers. If poverty and profitability explained branch closures, banks would not wait until merger events to close unprofitable branches.

Part of the explanation may be that larger banks—and mergers create larger banks—care less about smaller borrowers. After a merger, bank employees may be less likely to chase smaller loans because larger banks emphasize—and reward—the initiation of larger loans with larger clients.[478] Because they eschew relationship lending, larger banks may also "underinvest (from a social perspective) in branches or in training loan officers in how to make loans in underserved, minority neighborhoods."[479] As banks grow larger through mergers and acquisitions, their organizational complexity may render servicing small customers unprofitable.[480]

But small banks have expertise and informational advantages in evaluating the creditworthiness of local residents and small businesses.[481] When a bank merger eliminates this stored value, it changes the economics of local lending. Community banks can provide profitable relationship lending.[482]

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477. *See* Nguyen, *supra* note 51, at 2 ("Banks are likely to close branches in areas where actual or expected profitability is low . . . .").

478. *Cf.* Barr, *supra* note 162, at 551 ("Other factors may reinforce credit market discrimination. Firms adopt reward structures for loan officers that favor larger loans, which are easier to make in high-income areas that typically have higher concentrations of white borrowers."); Simon & Jones, *supra* note 106 ("Bigger banks have been swallowing community banks and gravitating toward the business of making larger loans.").

479. Barr, *supra* note 162, at 551.

480. Allen N. Berger et al., *The Consolidation of the Financial Services Industry: Causes, Consequences, and Implications for the Future*, 23 J. BANKING & FIN. 135, 167 (1999) ("A financial institution's organizational complexity may also make it costly to provide locally-based services to small customers.").

481. Barr, *supra* note 162, at 613 (first citing David A. Carter et al., *Do Small Banks Have an Advantage in Lending? An Examination of Risk-Adjusted Yields on Business Loans at Large and Small Banks*, 25 J. FIN. SERVS. RSCH. 233, 234 (2004); and then citing Jonathan A. Scott, *Small Business and the Value of Community Financial Institutions*, 25 J. FIN. SERVS. RSCH. 207, 208 (2004)).

482. Barr, *supra* note 162, at 613 ("Still, there are some reasons to favor local lending, in the sense of having some local presence from which banks gain expertise and use their superior knowledge to find creditworthy borrowers and make profitable loans.").

Because small banks may find local lending profitable in ways that large banks do not, a large bank's acquisition of a small bank can render a profitable business model unprofitable and lead to branch closures. If the acquiring bank stops relationship lending, the local branch loses its competitive advantage and is no longer worth keeping open. Conversely, if that same lending unit had remained unacquired, it may have remained profitable and open to serve the neighborhood's residents and entrepreneurs.

Overall, despite the ebbs and flows during certain periods, the aggregate number of banks has decreased significantly since the mid-1980s—from 17,811 in 1984 to 5,004 in 2020—largely due to bank merger activity.[483] In theory, the DOJ and banking agencies should have been monitoring this extreme market concentration and blunting it when possible by opposing proposed bank mergers that would concentrate markets even more. For the most part, that did not happen, as the following discussion explains.

C. The Problem of Weak Merger Enforcement

Despite Congress providing for the banking agencies and the DOJ to challenge bank mergers, merger enforcement against even large-scale bank mergers has broken down. Both sets of actors have failed. The banking agencies are tasked with ensuring that a proposed bank merger will serve the public interest.[484] This inquiry is largely wrapped up in the language of "convenience and needs."[485] Although anticompetitive mergers can violate the Sherman Act and the Clayton Act, the Supreme Court interpreted the Bank Merger Act as providing a new defense to a claim that a bank merger was anticompetitive if the merging banks could prove that the merger was justified by "the convenience and needs of the community to be served."[486] The merging parties bore the burden of proof.[487]

483. Kress, *supra* note 12, at 552–53 fig.1.

484. *See* United States v. Third Nat'l Bank, 390 U.S. 171, 184 (1968) ("The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market.").

485. United States v. First City Nat'l Bank, 386 U.S. 361, 369 (1967).

486. *Id.* (citing 12 U.S.C. § 1828(c)(5)(B)).

487. *Third Nat'l Bank*, 390 U.S. at 178 ("[T]he merging banks hav[e] the burden of proving that defense.").

Although the agencies used to take their enforcement mission seriously, as of late, according to Professor Jeremy Kress, "the agencies' public interest analyses are typically perfunctory and often focus on advantages to the merging banks—such as projected cost savings—rather than to their consumers."[488] Examining the banking agencies' merger decisions after the financial crisis of 2008, Mitria Wilson observed that "[i]n the vast majority of the financial regulatory institutions' orders on bank merger or acquisition applications [since the crisis], there is no discussion of the regulators' analysis of the public-interest provision beyond a single reference to the fact that the regulator considered the issue."[489] Because banking regulators do not take antitrust concerns seriously, "the banking agencies approve merger applications at historically high rates and in record-low time."[490] Their review is performative.[491] And even this performance is constrained, as federal officials reviewing bank mergers do not generally consider the issue of branch closure.[492]

This seems at odds with the CRA, which Congress enacted to ensure that banks would serve LMI communities.[493] But CRA compliance has become nominal,[494] and when the banks satisfied a minimal standard of LMI engagement, their proposed mergers were rubber stamped without serious consideration as to whether that merger would hurt LMI communities after the merger consummated and the merged entity began cleaning house and closing branches.[495] Merger officials ask whether

488. Kress, *supra* note 178, at 475–76.

489. Mitria Wilson, *Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions*, 130 BANKING L.J. 351, 372 n.8 (2013).

490. Kress, *supra* note 178, at 454.

491. *Id.* at 480 ("Today, the agencies typically address the 'convenience and needs' standard perfunctorily, without seriously questioning whether a merger would, in fact, benefit consumers.").

492. *See infra* notes 596–98 and accompanying text.

493. *See supra* notes 448–52 and accompanying text.

494. Kress, *supra* note 178, at 476 ("[A]gencies regularly approve applications by banks with only marginal consumer compliance and CRA records, despite public protests opposing such mergers.").

495. Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1339–40 (2014) ("After the enactment of the CRA in 1977, the focus of the public benefit test shifted to ask whether the bank was in compliance with the CRA, which served as a rubber stamp for meeting the public benefit test.").

banks have in the past complied with the CRA, not what the merged bank will do in the future.[496]

Ultimately, the banking agencies are not closely scrutinizing bank mergers. Professor Kress reports that the banking "agencies . . . have not formally denied a merger application in more than fifteen years."[497] Neither are they demanding meaningful concessions or conditions that would minimize the risk of anticompetitive or anti-consumer effects from proposed bank mergers. Indeed, in recent years, the Fed has seemingly approved nearly all bank mergers with increasing alacrity.[498]

In comparison, however, the DOJ has made the banking agencies seem positively rigorous. While the "banking agencies have not formally denied a bank merger application since 2003," the DOJ has not litigated a bank merger case since 1985.[499] The DOJ made its deference to merging banks more official in 1995 when it joined the Fed and the OCC to promulgate the "Bank Merger Guidelines," which were more lenient than the Horizontal Merger Guidelines issued jointly by the DOJ and FTC.[500] More recently, through deregulation and expedited merger approvals, the Trump Administration accelerated bank mergers.[501] Despite not bringing any challenges to bank mergers, Trump's DOJ, in 2020, began the process of further weakening the Bank Merger Guidelines, calling for public comment to revise them,[502]

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496. Kress, *supra* note 178, at 479 ("Agencies now consider the banks' history of meeting the credit needs of LMI communities under the CRA.").

497. *Id.* at 438–39.

498. Jeremy Kress, *Fed Is a Rubber Stamp for Bank Mergers—It's a Problem*, AM. BANKER: BANKTHINK BLOG (Apr. 10, 2019), https://www.americanbanker.com/opinion/fed-is-a-rubber-stamp-for-bank-mergers-its-a-problem [https://perma.cc/G6FU-HZ3J] ("Not only is the Fed greenlighting nearly all merger proposals, but it is signing off on them with record speed. In the past, the Fed has taken nearly a full year, on average, to review bank mergers that attract adverse public comments. In 2018, it approved such applications in an average of four months.").

499. Kress, *supra* note 12, at 525 n.22.

500. *Id.* at 545–46 ("[T]he DOJ partnered with the banking agencies to create special merger rules for banks (the 'Bank Merger Guidelines') that are weaker, in certain respects, than the standards for other industries.").

501. *Id.* at 554 ("Despite escalating bank concentration, Trump administration policymakers sought to relax bank antitrust standards even further.").

502. Press Release, Dep't of Just., Off. of Pub. Affs., Antitrust Division Seeks Public Comment on Updating Bank Merger Review Analysis (Sept. 1, 2020), https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis [https://perma.cc/D7H9-FMAH].

an effort that did not succeed during that administration.[503] Professor Kress credits—or blames—the influence of the Chicago School for the fact that "the DOJ and the federal banking agencies have effectively stopped challenging bank mergers, even as bank consolidation reaches a historic peak."[504] Whatever the cause, bank merger review is anemic, and LMI communities are paying the price.

V. ADDRESSING BANKING DESERTS AND BRANCH CLOSURES AS AN ANTITRUST ISSUE

Bank mergers have ushered in banking deserts. Weak merger enforcement allows banks to consolidate and then close branches in low-income neighborhoods with impunity. When reviewing proposed bank mergers, antitrust enforcement agencies should be protecting competition in all neighborhoods. To the extent that weak merger enforcement plays a role in creating banking deserts in some communities, antitrust officials should consider how banking deserts and branch closures implicate antitrust concerns. Resourceful merger enforcement should play a corresponding role in remedying the problem that antitrust officials helped cause.

A. BANKING DESERTS AND BRANCH CLOSURES AS ANTITRUST INJURIES

In general, mergers can be anticompetitive because they result in the merged entity having market power or because they produce a market that is overly concentrated, which creates a risk of tacit or explicit collusion. These negative outcomes are referred to as unilateral effects and concerted effects, respectively. In both cases, the merger is likely to harm competition and consumers by firms reducing output and increasing price. These are the quintessential anticompetitive effects that warrant the blocking of a proposed merger.[505] Bank mergers that result in banking deserts or branch closures have these anticompetitive effects and, thus, raise significant antitrust concerns.

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503. Kress, *supra* note 12, at 554 ("[T]he Trump administration ultimately did not adopt revisions to the Bank Merger Guidelines.").

504. *Id.* at 525.

505. Other anticompetitive effects, such as reduced innovation and diminished quality, are also important.

1. Reduced Output

Branch closures represent a form of reduced output, with the creation of a banking desert being the most extreme instance. Mergers that lead to banking deserts reduce output of banking services to zero in affected communities. But even without the extreme case of banking deserts, large bank mergers generally lead to reduced output of small business loans, residential mortgages, and other banking services.

First, because larger banks tend to focus on larger customers, bank mergers cause banks to invest less time and money in small business clients.[506] Merged banks support small businesses less; they concentrate on financing larger firms.[507] Recent research shows that mergers by banks with more than $10 billion in assets result in fewer small business loans.[508] Most notably, one recent study out of U.C. Berkeley discovered that "when merging banks closed a branch, the number of small business loans made in the tract [where the branch had been located] fell by 13 percent for more than eight years afterward."[509] The study also found:

> Annual, tract-level small business loan originations decline by $453,000 after a closing, off a baseline of $4.7 million, and remain depressed for up to 6 years. This amounts to a cumulative loss of $2.7 million in forgone loans. These effects are very localized, dissipating within six miles of the tract where the closing occurs.[510]

In short, bank mergers significantly reduce output of small business loans.

The output of relationship lending also decreases dramatically after bank mergers. Bank mergers eliminate independent community banks.[511] Because community banks do significantly more relationship lending, the elimination of community banks

506. Kress, *supra* note 12, at 559 ("When banks consolidate . . . small business lending declines, as bigger banks tend to serve larger commercial customers.").

507. Karceski et al., *supra* note 149, at 2047.

508. Bernadette A. Minton et al., *Bank Mergers, Acquirer Choice and Small Business Lending: Implications for Community Investment* 29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29284, 2021), https://dx.doi.org/10.3386/w29284.

509. Morgan et al., *supra* note 10.

510. Nguyen, *supra* note 51, at 3.

511. Harris III et al., *supra* note 17, at 53 ("During the year ended June 30, 2020, noncommunity banks acquired 57 community banks, while community banks did not acquire any noncommunity banks.").

reduces the output of relationship lending. If relationship lending is considered a relevant product market unto itself—as it should be—then these bank mergers reduce output in a manner that should be considered an anticompetitive harm under antitrust law.

Because large banks emphasize lending to large firms while small banks focus on supporting small firms, when a large bank acquires a small bank, the result is one large(r) bank with less interest in developing relationships with small businesses. Part of the reason that merged banks discount small firms is that larger banks rely on hard information when making lending and other decisions.[512] Small banks have a comparative advantage in using soft information to make lending decisions.[513] But once the small bank no longer exists, the institutional drive to use soft information disappears.

Within a merged bank, the institutional prerogatives of the acquiring bank dominate, including its organizational mission and strategic plans, especially as the management and staff of the acquired bank are terminated or replaced.[514] The lending policies of the acquired bank—such as utilizing soft information—are no longer followed.[515] And as the employees of the acquired bank exit, they take with them both the business outlook and personal bonds to borrowers that are necessary for relationship lending.[516]

Second, branch closures reduce the output of residential mortgages.[517] Bank mergers reduce output because as banking markets become more concentrated, approval rates for loans go

512. Karceski et al., *supra* note 149, at 2047 ("Large, hierarchical banks optimally rely on 'hard' information, such as audited financial statements, because this type of information is credibly transferred up to the various levels of management of large banks.").

513. *Id.* at 2047–48 ("[T]he organizational structure of small, decentralized banks is well suited to loan decisions based on 'soft' information, such as trust and reputation, which is critical in lending to small firms.").

514. *Id.* at 2048 ("Acquisitions commonly result in the replacement of target management, staff turnover that favors acquirer employees . . . ." (citations omitted)).

515. *Id.* ("Acquisitions commonly result in . . . the adoption of organizational structures and policies familiar to the acquirer." (citations omitted)).

516. *Id.* ("[D]ismissal of key employees could disturb existing lending relationships.").

517. Morgan et al., *supra* note 10 ("The mere closing of a branch—even if other branches remain in the same area—can reduce the supply of mortgages.").

down and rejection rates for mortgages go up.[518] Not surprisingly, the post-merger reductions in credit access are particularly severe for racial minorities and low-income borrowers.[519] This decreased access to credit can have life-changing consequences, as "households in LMI neighborhoods are more likely to experience evictions and have debts sent to collection agencies following bank mergers."[520]

Third, in addition to outright branch closures, bank mergers reduce output by reducing services, such as ATMs and safety deposit boxes.[521] Bank mergers also limit access to account managers.[522] Reducing the quantity or quality of available services is a classic form of antitrust injury.[523]

Indeed, all these output reductions represent anticompetitive harms. Post-merger suppressed output hurts individuals, communities, and the national economy. Over half a century ago, the Supreme Court in *Philadelphia Bank* recognized that a reduction in credit availability caused by a bank merger constitutes anticompetitive harm because when "banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will

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518. Kress, *supra* note 12, at 556 ("[B]ank mergers lead to lower approval rates and higher rejection rates for mortgage applications.").

519. *Id.* at 557–58 ("[W]hile greater concentration reduces credit access for all borrowers, the reduction is particularly large for low-income borrowers . . . and borrowers belonging to racial minorities." (quoting Greg Buchak & Adam Jørring, Do Mortgage Lenders Compete Locally? Implications for Credit Access 29 (July 13, 2021) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.3762250)).

520. *Id.* at 558.

521. *Id.* at 567 ("[A] study by Federal Reserve economists found that greater concentration reduced the probability that a bank would offer a particular service, such as extended banking hours, automated teller machines, and safety deposit boxes." (citing Arnold A. Heggestad & John J. Mingo, *Prices, Nonprices, and Concentration in Commercial Banking*, 8 J. MONEY, CREDIT & BANKING 107, 111 (1976))).

522. *Id.* (explaining how mergers had an adverse effect on service delivery with account managers as a factor).

523. *E.g.*, Nahas v. Shore Med. Ctr., 828 F. App'x 89, 91 (3d Cir. 2020) (finding that the denial of appellant's application for endovascular surgery privileges was "not an injury that 'affected the prices, quantity or quality of goods or services' available to consumers").

be affected."[524] While the Supreme Court was talking about the economy writ large, its insight is particularly true for neighborhoods and rural areas that are banking deserts or otherwise underserved by traditional banks.

2. Increased Price

Branch closures after a bank merger reduce price competition in the affected area in the form of higher interest rates on loans, increased fees, and decreased interest rates on deposits. First, bank mergers increase the cost of credit. For example, small businesses are charged more for loans after their bank is acquired.[525] Bank consolidation increases the interest rates that consumers pay on mortgages and personal loans.[526] After eliminating local competition, merged banks increase interest rates on loans because loan rates are a function of geographic concentration.[527] Moreover, closing bank branches leaves consumers vulnerable to payday loan providers who can charge usurious rates, in part because local banks are not present to price discipline the only moneylenders left in town.

In addition to higher interest rates, bank mergers also increase prices to consumers in the form of bank fees. Higher bank concentration is associated with higher fees on personal loans.[528] Bank mergers are followed by increased fees for quotidian transactions, such as ATM withdrawals, and increased penalties for slip-ups, such as overdrafts.[529]

Finally, merged banks not only charge their borrowers more, they also pay their depositors less, another anticompetitive harm akin to a price increase. Merged banks can pay less to

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

525. Kress, *supra* note 178, at 460 ("For small businesses that are able to obtain loans, the cost of credit increases, while loan sizes shrink.").

526. Charles Kahn et al., *Bank Consolidation and the Dynamics of Consumer Loan Interest Rates*, 78 J. BUS. 99, 109 (2005); Buchak & Jørring, *supra* note 519, at 29; Kress, *supra* note 12, at 555–56 ("Bank consolidation is associated higher interest rates on both mortgages and personal loans.").

527. Garmaise & Moskowitz, *supra* note 100, at 496 ("[W]hen loan competition declines (via large bank mergers), interest rates charged on loans rise significantly and borrowers receive smaller loans.").

528. Kahn et al., *supra* note 526, at 109 (describing the correlation between bank concentration and consumer loan rates).

529. Kress, *supra* note 12, at 556 ("Common transaction fees—including charges for overdrafts, stopped payments, and ATM withdrawals—tend to rise after banks consolidate.").

depositors when their mergers confer market power,[530] which allows them to reduce interest rates on checking and savings accounts.[531] Thus, both borrowers and savers face negative price consequences from bank mergers.[532] These price effects are quintessential antitrust harms. But the anticompetitive effects of bank mergers are difficult to detect when geographic markets are improperly defined, as the following section explains.

B. RECONCEIVING GEOGRAPHIC MARKETS

Antitrust merger review requires an accurate definition of the relevant markets, including both their product and geographic components. The Supreme Court has long held that "[t]he geographic market selected must . . . 'correspond to the commercial realities' of the industry."[533] The geographic market definition is particularly critical for bank merger analysis,[534] in part because market definition largely determines whether the agencies and courts will conclude that a proposed bank merger is likely to be anticompetitive.[535] If the geographic market is defined too broadly, a merger's likely anticompetitive effects will be camouflaged. This Section explains the relevance of bank proximity and relationship lending when defining geographic markets; presents a case study of how the Fed's broad geographic market definition facilitates bank mergers that exacerbate

530. Valeriya Dinger, *Bank Mergers and Deposit Rate Rigidity*, 47 J. FIN. SERVS. RSCH. 27, 55 (2015) ("[B]anks chang[e] their retail rates after the merger mostly in a negative direction especially in the more concentrated markets where they operate.").

531. Kress, *supra* note 12, at 557 ("[C]onsolidation has harmed consumers by reducing the interest banks pay to their depositors.").

532. *Id.* ("[W]hen banks merge, they exploit their market power by increasing the cost of loans, raising transaction fees, and paying less interest to depositors.").

533. Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962) (quoting Am. Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp 387, 398 (S.D.N.Y. 1957), aff'd 259 F.2d 524 (2d Cir. 1958)).

534. Erik A. Heitfield, *What Do Interest Rate Data Say About the Geography of Retail Banking Markets?*, 44 ANTITRUST BULL. 333, 333 (1999) ("Geographic market definitions play a central role in banking antitrust analysis where they provide a starting point for determining whether proposed mergers may lead to substantial increases in market power. Seemingly small differences in market definitions can have dramatic effects on policy outcomes.").

535. Kress, *supra* note 178, at 449 ("[B]anking agencies and DOJ rely on the HHI [a measure of business concentration] to flag potentially problematic merger proposals.").

branch closures and banking deserts; and proposes using past government policies, such as redlining, to inform current deliberations on how to define geographic markets for bank mergers.

1. The Role of Proximity in Geographic Market Definition

Understanding the power of proximity between banks and their customers proves that the relevant geographic market—for many banking consumers—is local. The Supreme Court in *United States v. Philadelphia National Bank*[536] explained that geographic markets in banking are localized: "In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance."[537] The Court noted that "[t]he factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries."[538] Following upon *Philadelphia National Bank*, the district court in *United States v. Manufacturers Hanover Trust Co.*,[539] for example, noted that when defining the relevant geographic market for banking, "most individuals depend upon banks in the immediate neighborhood of their home or place of work because their resources are small, their banking needs limited, and it is neither necessary nor convenient for them to bank elsewhere."[540] Consumers will not travel great distances for banking services.

These insights appear to be lost or forgotten as the Federal Reserve today defines geographic markets more broadly than in decades past. For example, in *Philadelphia National Bank*, the Supreme Court defined "the four-county Philadelphia metropolitan area" as the relevant geographic market in which to appraise the proposed merger's effects, in part because "the three federal banking agencies regard[ed] the area in which banks have their offices as an 'area of effective competition.'"[541] But today, the Federal Reserve Bank of Philadelphia defines the

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

537. *Id.* at 358.

538. *Id.*

539. United States v. Mfrs. Hanover Tr. Co., 240 F. Supp. 867 (S.D.N.Y. 1965).

540. *Id.* at 901.

541. *Phila. Nat'l Bank*, 374 U.S. at 361.

relevant geographic market as a ten-county market around Philadelphia.[542] Similarly, although in 1970, the Supreme Court found that the relevant geographic market for banking in the Phillipsburg-Easton area of western New Jersey excluded neighboring areas of Pennsylvania, now that "the Federal Reserve Bank of New York includes the adjoining part of Pennsylvania and Phillipsburg-Easton within its huge New York City metro area market, which consists of thirty entire counties and parts of others."[543] Geographic markets are treated as more expansive despite banking practices remaining inherently local for many customers.

The dynamics of relationship lending should inform how courts define geographic markets when the banking agencies or the DOJ challenge a proposed bank merger. Because banks eschew long-distance relationship lending, even consumers willing to traverse the miles to a faraway bank cannot access credit. This provides another separate reason why the relevant geographic market is local for the purposes of reviewing proposed bank mergers. The Supreme Court in *United States v. Phillipsburg National Bank & Trust Co.*[544] recognized that "the small borrower frequently cannot 'practicably turn for supplies' outside his immediate community; and the small depositor—because of habit, custom, personal relationships, and, above all, convenience—is usually unwilling to do so."[545] This insight should be formalized.

The fact that banks treat large borrowers (who have hard information) and small borrowers (who rely on soft information) differently supports the notion that bank merger analysis should include multiple relevant geographic markets. In *Philadelphia National Bank*, the Supreme Court observed: "Large borrowers and large depositors . . . may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood . . . ."[546] Harnessing this insight, current courts—and the agencies

542. *See* Gregory J. Werden, *Perceptions of the Future of Bank Merger Antitrust: Local Areas Will Remain Relevant Markets*, 13 FORDHAM J. CORP. & FIN. L. 581, 584 (2008).

543. *Id.* at 584–85 (discussing *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970)).

544. 399 U.S. 350 (1970).

545. *Id.* at 364 (quoting *Phila. Nat'l Bank*, 374 U.S. at 359).

546. *Phila. Nat'l Bank*, 374 U.S. at 360.

reviewing bank mergers—should recognize different geographic markets for large customers (who use hard information when conducting bank business) and small customers (who rely on soft information and relationship lending). The relevant geographic market is large for those established firms with plentiful hard information, especially publicly traded companies. For small businesses and consumers, the geographic market in which to look for anticompetitive effects is considerably smaller.

Proper merger analysis would define geographic markets in ways that account for a proposed merger's likely effect on relationship lending. Mergers lead to reduced relational lending as "some lending institutions may abandon relationship lending because restructuring and mergers have increased the geographical and social distance between lender and borrower."[547] When big banks acquire local banks, they reduce relational lending, which diminishes "access to capital for local entrepreneurs, especially those seeking to start new businesses."[548] The geographic market definition should cast light on these anticompetitive effects.

Ultimately, the lived experience of banking deserts provides important guidance on how to better define geographic markets during bank merger review. Many residents of banking deserts cannot participate in the broader geographic market for banking services. Although some scholars have championed improvements in credit scoring and information technology as diminishing the importance of "geographic ties between customers and banks,"[549] distant lenders charge higher interest rates, if they will lend money at all.[550] If banks treat the residents of banking deserts differently, then so should the banking agencies and DOJ officials who review bank mergers. The failure to do so can exacerbate the problem of banking deserts, as the following case study illustrates.

547. Charles M. Tolbert et al., *Restructuring of the Financial Industry: The Disappearance of Locally Owned Traditional Financial Services in Rural America*, 79 RURAL SOCIO. 355, 361 (2014) (citation omitted).

548. *Id.* at 376.

549. *E.g.*, Nguyen, *supra* note 51, at 1.

550. Gilje et al., *supra* note 154, at 1162 ("[L]ocal lenders still extend more credit to riskier borrowers than distant lenders: loan rates tend to decline with the distance between borrower and lender . . . ."); Hegerty, *supra* note 44, at 195 ("As Degryse and Ongena (2005) noted, monitoring costs might be related to the distance between borrowers and lenders . . . .").

2. A Case Study of Bank Mergers and Banking Deserts

In early 2019, BB&T and SunTrust Banks commenced the largest bank merger in a decade, one that would create the sixth-largest bank in the country, renamed as Truist.[551] The Fed approved the merger over the objections of Black farmers who predicted branch closures "would particularly impact minority-owned and rural small businesses."[552] The Fed discounted the opposition by defining the affected geographic markets broadly. For example, despite requests to define geographic markets based on Metropolitan Statistical Areas (MSAs)—which are themselves overly broad—the Fed asserted that "MSAs are not geographic banking markets and are not consistent with the [Fed]'s geographic banking markets."[553] Consequently, the merger increased market concentration in dozens of cities and regions.

A brief review of just three metropolitan areas—Atlanta, Richmond, and Charlotte—demonstrates how the Fed's use of broad geographic market definitions when reviewing the BB&T/SunTrust merger obscured anticompetitive effects regarding banking deserts. Although the Atlanta area was already replete with banking deserts,[554] in approving the merger, the Fed defined a *single* geographic market for banking around Atlanta as nineteen counties plus some additional neighboring towns.[555] This large single market definition masked the merger's effects in LMI communities. Banking deserts did not register as an issue because the Fed buried them in a vast geography with an abundance of banks, almost all inaccessible to the residents of Atlanta's banking deserts.

Similarly, the Fed defined the Richmond, Virginia banking market as twelve counties plus several additional cities and

551. Michael J. de la Merced & Emily Flitter, *The Financial Crisis Put a Chill on Big Bank Deals. That Ended Thursday.*, N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/business/dealbook/bbt-suntrust-bank-mergers.html [https://perma.cc/HL7L-PSZD].

552. DAVID DAYEN, MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER 147 (2020).

553. BB&T Corp., No. 2019-16, at 8 n.24 (Fed. Rsrv. Sys. Nov. 19, 2019) (order approving merger).

554. *Banking Deserts: Lack of Convenient Branches Impairs Low-Income Communities*, 71 BANCOLOGY 1, 2 (2019) ("In Atlanta, 115,000 households live in banking deserts . . . .").

555. BB&T Corp., *supra* note 553, at 12 n.34.

subdivisions.[556] Even under this broad geographic market definition, the Fed acknowledged that the BB&T/SunTrust merger would significantly increase concentration in the already concentrated Richmond banking market.[557] But the Fed's broad definition missed the likely effects of the merger in poor neighborhoods. For example, following the merger between BB&T and SunTrust, the newly stylized Truist bank closed its branch in the eastern half of Richmond—a neighborhood with a largely African American and Latinx population—fueling its movement toward "increasingly becom[ing] a banking desert, bereft of branch banks that are more commonplace in the Downtown and western half of the city."[558] The merger hurt LMI families in Richmond, but the Fed's overly broad geographic market obscured this predictable effect.

The merger also led to bank closures in Charlotte, North Carolina, one of the centers of American banking and international financial markets, yet also home to many banking deserts.[559] Truist closed branches in LMI neighborhoods while opening new branches in upper-income, white neighborhoods around Charlotte.[560] The Fed, however, defined the geographic market for Charlotte banking to include several counties in both North and South Carolina, which concealed the neighborhood effects of the merger.[561] With its broad definition of the geographic market, the Fed asserted that the BB&T/SunTrust merger would not have an adverse effect on the Charlotte market

556. *Id.* at 16 n.39.

557. *Id.* at 17 ("After consummation, and adjusting to reflect competition from the credit union, the market concentration level in the Richmond banking market as measured by the HHI would increase by 194 points, from 1963 to 2157, and the market share of BB&T would increase to 20.0 percent.").

558. Jeremy M. Lazarus, *Richmond's Banking Desert Grows*, RICHMOND FREE PRESS (June 17, 2021), https://richmondfreepress.com/news/2021/jun/17/richmonds-banking-desert-grows [https://perma.cc/DTJ3-UCSD].

559. Steve Crump, *As a Banking City, Charlotte Still Has Many Bank Deserts*, WBTV (Mar. 9, 2022), https://www.wbtv.com/2022/03/10/banking-city-charlotte-still-has-many-bank-deserts [https://perma.cc/SE2U-USBA] ("In a city applauded for having strong ties to international financial markets, parts of Charlotte exist in what's known as banking deserts.").

560. *Id.* ("Between 2017 and 2020, [BB&T and SunTrust] closed 565 branches . . . . [P]ost-merger, more than two-thirds of the[ir] openings have been in upper-income white neighborhoods.").

561. BB&T Corp., *supra* note 553, at 73 (listing the counties within the geographic banking market of Charlotte, North Carolina).

because forty-one competitors remained in the market.[562] Of course, many residents of banking deserts affected by the merger could not access these far-flung banks in different counties or another state.

Because the Fed's broad geographic market definition concealed the merger's likely effects in LMI communities and banking deserts, the Fed approved the Truist merger without requiring any divestitures in the Atlanta, Richmond, or Charlotte banking markets.[563] The only major concession made by Truist was to delay "closing the majority of overlapping branches until one year" from the consummation of the merger.[564] But even this commitment was limited in scope and duration, affording no meaningful relief for thousands of customers. Within seven months of the merger, the bank had announced the closure of 175 branches.[565] Exhibiting malicious compliance with its original promise, Truist closed fifteen branches in Florida alone just one year and one day after the merger was complete.[566] Briefly postponing the collapse of local banking markets provided little solace to the thousands of people who soon found themselves without easy access to banking services. In Florida, for instance, Truist branch closures left three zip codes with no banks and another handful of zip codes with just one or two banks.[567]

The BB&T/SunTrust merger illustrates three phenomena in bank merger review. First, the Fed defines geographic markets too broadly to highlight localized anticompetitive effects. Given

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562. *Id.*

563. *See id.* at 10 n.30 (requiring only that BB&T divest all branches to be acquired from SunTrust in the Lumpkin County, Wayne County, Eastern Shore, Martinsville, South Boston, and Winston-Salem banking markets).

564. Seay & Sikander, *supra* note 468.

565. *Id.* ("Since announcing their merger of equals on Feb. 7, 2019, BB&T and SunTrust have closed a combined 175 branches. That total represents about 22% of the 800 branches Truist estimates it will close . . . .").

566. *See Truist Branches Opened and Closed*, TRUIST FIN. (Apr. 2023), https://www.truist.com/content/dam/truist-bank/us/en/documents/cra/truist-branches-opened-closed.pdf [https://perma.cc/VA99-HACS].

567. *See Bank Deserts,* HOPE POL'Y INST., http://hopepolicy.org/whoweare/region/deserts [https://perma.cc/TL7J-3HER] ("Bank deserts are defined as ZIP Codes with zero or one bank branch."). *Compare Truist Branches Opened and Closed*, *supra* note 566, *with BankFind Suite*, FDIC, https://banks.data.fdic.gov/bankfind-suite/bankfind [https://perma.cc/87BD-EEEV] (noting the number of banks in a given zip code).

its rejection of MSAs as geographic markets, the Fed would not entertain even smaller geographic markets defined by the borders of banking deserts. Second, defining banking markets more accurately can prompt an antitrust response. The DOJ reviewed the BB&T and SunTrust merger and defined at least some geographic markets more narrowly, which triggered structural presumptions and resulted in divestitures that were considered unwarranted under the Fed's broad market definition.[568] Arguably, divestitures may be insufficient, and litigation to block a proposed banking merger would be more appropriate.

Third, the Fed seems less concerned with concentration in banking markets than it should be. Even under its relatively broad geographic market definition, the Fed acknowledged that the merger would cause "two banking markets [to] become highly concentrated [and] . . . 10 banking markets would become moderately concentrated."[569] Moreover, the merger would increase market concentration in ten banking markets that were already highly concentrated and another forty-one banking markets that were moderately concentrated.[570] The Fed justified approving the merger despite these troubling numbers, in part, because the decision was "consistent with Board precedent."[571] This statement, however, does not validate the BB&T/SunTrust merger; rather, it is a confession that the Fed's prior bank merger approvals were also probably too lax.[572]

3. Defining Current Banking Markets in Light of Past Discrimination

When defining geographic markets during bank merger review, officials should be cognizant of the history of banks and government agencies denying racial minorities access to credit. In many communities today, the unavailability of banking services is a legacy of racially discriminatory government policies and banking practices. The FHA defined geographic markets through its redlining rules that blocked eligibility for

568. Christine S. Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 ANTITRUST L.J. 55, 91–92 (2021).

569. Ann E. Misback, *Legal Developments: Fourth Quarter, 2019*, 106 FED. RSRV. BULL. 1, 6 (Feb. 2020).

570. *Id.*

571. *Id.*

572. *See* Wilson & Klovers, *supra* note 568, at 61–62.

government-backed mortgages for minority households.[573] Lending discrimination promoted segregated residential housing markets. But then the federal banking agencies later defined geographic markets broadly in ways that concealed and perpetuated racial asymmetries in banking access. That was a mistake.

Access is an important aspect of the geographic market. The Supreme Court has held that the relevant geographic market is "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."[574] If residents of banking deserts cannot "practicably turn" to banks several miles away, those banks are not in the relevant geographic market for those consumers. Geographic market definitions should not ignore how increasing the distance between LMI communities and the nearest physical bank reduces access to credit.

Unfortunately, some commentators overlook the significance of access. For example, although some studies argue that banking markets are geographically broad, these studies look at price uniformity across distances, not access to banking.[575] A large bank may charge the same interest rates across a state, but if the bank closes all its branches in LMI communities, then its former customers may not have access to banking services at all. These consumers care little about price uniformity in distant markets. Geographic markets should be defined to reflect the reality that proximity to physical banks is critical to create access to credit, as well as to facilitate savings behavior.[576]

Neglecting the importance of access when defining geographic markets for banking reinforces the dynamics of redlining.[577] Historically, federal bureaucrats defined neighborhoods narrowly around race to prevent minority families from having access to credit.[578] But in the 1960s era of white flight, as white families moved from cities to the suburbs, the Fed defined

573. *See supra* notes 328–34 and accompanying text.

574. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

575. *See, e.g.*, Heitfield, *supra* note 534, at 336.

576. *See supra* Part I and notes 72–87 and accompanying text.

577. Unfortunately, antitrust does not consider the effects of historic redlining on current markets. Hiba Hafiz, *Antitrust and Race*, 100 WASH. U. L. REV. 1471, 1492 ("Current antitrust analysis generally does not inquire into market segmentation based on race, the characteristics of racially minoritized consumers, or how markets may be localized and divided due to redlining, racial exclusion, or other historical factors that impact the preferences of people of color.").

578. *See supra* notes 325–34 and accompanying text.

geographic markets to include those suburban collar counties.[579] This broad geographic market definition made it seem like the nonwhite households left behind still had access to banking. In reality, many banks closed their existing local branches and abandoned the now nonwhite neighborhoods.[580] This effectively replicated redlining.[581] Just as it was immoral for government actors to redline minority communities beginning in the 1930s, it is inappropriate for government officials today to define markets in ways that ignore the continuing costs of historic redlining. These costs include increasing banking market concentration, which raises "rejection rates for low-income and nonwhite loan applicants compared to other borrowers"[582] and leaves residents of banking deserts more vulnerable to fringe banking providers, such as payday lenders, that charge high interest rates and offer no mechanisms for saving.[583]

C. Resuscitating the DOJ's Role in Bank Merger Review

In modern times, reviewing proposed bank mergers has been the de facto primary responsibility of the banking agencies—the Federal Reserve, the Comptroller of the Currency, and the FDIC. Congress tasked the banking agencies with examining a proposed merger's effects beyond any anticompetitive impacts[584] because their mission is broader than antitrust.[585] As of late, however, the agencies' track record has proved wanting. The amended Bank Merger Act, which created a dual-enforcement regime with the DOJ and federal banking agencies sharing the authority to challenge bank mergers, remains the law of the land.[586] The DOJ should exercise its power more assertively. This would entail challenging more proposed bank mergers and not seeking merely divestitures, but also conduct remedies and, in some cases, suing to block anticompetitive mergers altogether.

579. Wilson & Klovers, *supra* note 568, at 61 ("Whereas the DOJ has adopted ever narrower markets during its antitrust review, the Federal Reserve Bank (FRB) has retained the 1960s-era 'broad market' approach, often by broadening the geographic markets further to account for suburban sprawl.").

580. *See supra* notes 347–48 and accompanying text.

581. *See supra* notes 363–71 and accompanying text.

582. Kress, *supra* note 12, at 558.

583. *See supra* notes 195–237 and accompanying text.

584. Kress, *supra* note 178, at 476.

585. *Id.* at 497.

586. *Id.* at 446.

Under the dual-enforcement regime for bank mergers created by Congress, the DOJ retains independent authority to challenge bank mergers that run the risk of substantially lessening competition.[587] Bank mergers should not be the sole province of banking regulators. Antitrust officials are trained to study and analyze competitive dynamics in a way that most banking officials are not. The Antitrust Division of the DOJ possesses unique expertise in recognizing the anticompetitive effects of proposed mergers and its litigators are better versed in challenging mergers in court.

Yet, this wealth of knowledge, experience, and skill has been sidelined for almost four decades, as the DOJ has not challenged a bank merger in court since 1985.[588] This abdication of responsibility has coincided with waves of bank mergers leading to branch closures that sometimes result in banking deserts. And even without desertification, branch closures may leave former customers unable to access credit from another bank due to the importance of relationship lending. DOJ attorneys are more likely to perceive and appreciate these anticompetitive effects than regulators in the banking agencies.

Greater DOJ review of bank mergers would reduce the risk of agency capture allowing anticompetitive mergers to proceed. Banking industry executives may exercise improper influence over federal bank regulators because the latter "often leave government employment to find employment at banks, as bank lobbyists, as bank consultants, or as bank lawyers. Regulators might then attempt to curry favor with future employers by adopting regulatory stances favorable to those future employers, such as lax consumer protection."[589] Several studies have documented capture.[590] Because their mission is industry specific,

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587. *Id.* at 485.

588. *Id.* at 453.

589. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 331 (2013).

590. *See* Deniz O. Igan & Thomas Lambert, *Bank Lobbying: Regulatory Capture and Beyond* (Int'l Monetary Fund, Working Paper No. 2019/171, 2019); Gregory Scopino, *Expanding the Reach of the Commodity Exchange Act's Antitrust Considerations*, 45 HOFSTRA L. REV. 573, 655 (2016) ("The potential for regulatory agency capture or missed opportunities by banking (and other) regulators is not just an imagined problem."); Jared P. Roscoe, *State Courts and the Presumption Against Banking Preemption*, 67 N.Y.U. ANN. SURV. AM. L. 309, 327 (2011) ("[T]he financial crisis demonstrated that federal banking

banking regulators are subject to capture in a way that the DOJ is not.[591] As a truly independent enforcer, the DOJ can better exercise its authority to challenge bank mergers that could exacerbate the problems of banking deserts and branch closures. This will, however, require better-informed definitions of the relevant geographic market.

When it comes to defining geographic markets, the DOJ possesses a comparative advantage over the banking agencies. Unfortunately, when reviewing bank mergers, the Fed generally defines geographic markets too broadly.[592] In contrast, historically, when the DOJ did actively review bank mergers, its Antitrust Division was more likely to define geographic markets narrowly and to challenge bank mergers.[593] The DOJ's approach better highlighted anticompetitive effects in local banking markets.

D. A NEW ANTITRUST FOCUS ON BANKING DESERTS AND BRANCH CLOSURES

After defining geographic markets more appropriately, DOJ attorneys (and bank regulators) should assess a proposed merger's likely effects in local markets. Because antitrust law cares about preserving competition in all relevant markets, merger officials should protect small banks. Safeguarding community banks from outside acquisition could reduce the risk of banking deserts because evidence suggests that small community banks are less likely to close than the branch office of a megabank.[594]

regulators are prone to regulatory capture by the well-organized and well-funded financial industry."); Daniel C. Hardy, *Regulatory Capture in Banking* 3 (Int'l Monetary Fund, Working Paper No. WP/06/34, 2006), https://www.imf.org/external/pubs/ft/wp/2006/wp0634.pdf [https://perma.cc/PJE7-NU5N] (arguing that "bank regulation may be susceptible to capture" and that "capture had significantly influenced regulatory and supervisory decisions affecting banks and other financial institutions"). *See generally* Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175 (2011) (discussing different forms of regulatory capture of financial regulators).

591. Hardy, *supra* note 590, at 4–6.

592. BERNARD SHULL & GERALD A. HANWECK, BANK MERGERS IN A DEREGULATED ENVIRONMENT: PROMISE AND PERIL 95 (2001).

593. *See* Heitfield, *supra* note 534, at 333–34 (discussing the DOJ's reliance on a narrow geographic market definition in the context of a 1992 Ohio bank merger).

594. Jackowicz et al., *supra* note 23, at 3.

Antitrust officials and federal judges should be more cognizant of the problem of "no-opolies"—geographic markets in which there are no sellers of the relevant product or service. Banking deserts are no-opolies. Residents have no access to traditional banking services. Fintech is a largely unavailable and unsuitable substitute. Reliance on AFS makes consumers worse off in the long run. Consumers suffer from not having a bank in their geographic market. Because this is an anticompetitive harm, merger officials should seek to prevent this outcome. Either blocking mergers or the judicious use of merger conditions can achieve this result.[595]

Merger analysis, however, should not focus exclusively on banking deserts, because branch closures have anticompetitive effects even when the post-merger branch closure does not create a banking desert. Because residents of LMI communities rely on relationship lending, post-merger branch "[c]losings can have large effects on local credit supply, even in dense banking markets, if they disrupt lender-specific relationships that are difficult to replace."[596] Branch closures are an independent problem.

Current merger review does not afford sufficient attention to the problem of post-merger branch closures. Neither the banking agencies nor the DOJ seem to consider the likelihood or impact of branch closures when analyzing proposed bank mergers.[597] This is disappointing because federal officials have unique leverage during the bank merger review process but do not exercise it to prevent branch closures.[598]

The current regulatory framework relies on notification as a cure-all. Banking regulations require banks to give ninety days' notice of a branch's closure to the appropriate banking agency.[599] Notice must also be provided to the branch's customers.[600] If the branch is in an LMI community, that notice must include the relevant banking agency's mailing address and an invitation to mail comments on the proposed branch closure to that

595. *See infra* notes 609–19, 626 and accompanying text.

596. Nguyen, *supra* note 51, at 29–30.

597. Wolfram, *supra* note 20, at 2; Kress, *supra* note 12, at 595 ("[A]ntitrust enforcers do not currently consider reductions in branch access as part of a bank merger evaluation . . . .").

598. Kress, *supra* note 12, at 595.

599. 12 U.S.C. § 1831r–1(a)(1).

600. *Id.* § 1831r–1(b)(1).

address.[601] If the banking agency receives enough non-frivolous letters, the agency must convene a meeting with community leaders.[602] But the statute explicitly provides that this will have "[n]o effect on closing."[603] The agency, in other words, cannot stop the branch closure even if it will create a banking desert or have other devastating impacts on area residents.

As a response to the problem of branch closures and banking deserts, reliance on notification as a solution is inappropriate. Notification is neither a prophylactic nor a remedy. But the current notification approach is flawed, even on its own terms. Merging banks are not required to disclose their plans to close specific branches during the merger review process.[604]

Merger review provides a unique opportunity to address the problem of branch closures in LMI communities. Bank merger analysis should include two explicit goals. First, bank mergers should not be allowed if they would have the effect of creating one or more banking deserts. Because relationships and trust are difficult to reestablish once severed and broken, merger analysis should emphasize preventing banking deserts in the first place.[605] Second, because even post-merger branch closures that do not create banking deserts can still harm consumers significantly,[606] stopping banking deserts alone is insufficient to protect consumers who rely on relationship lending. Consequently, if the merger would result in branch closures in areas that rely on relationship lending, merger officials should act.

Conceptually, the most straightforward action would be for antitrust officials to sue to block the merger altogether. When the DOJ Antitrust Division pushes back on merging banks, it does so by seeking divestitures, not stopping the proposed merger outright.[607] When a proposed banking merger is likely to have anticompetitive effects—including those associated with branch closures—government antitrust attorneys should not hesitate to challenge the merger in court, explaining to the judge how the likely effects of higher interest rates, lower deposit

601. *Id.* § 1831r–1(d)(1).

602. *Id.* § 1831r–1(d)(2)(B).

603. *Id.* § 1831r–1(d)(3).

604. Kress, *supra* note 12, at 595.

605. *See* Dahl & Franke, *supra* note 7, at 20.

606. Morgan et al., *supra* note 10.

607. *See supra* notes 568–72 and accompanying text.

rates, fewer services, and/or fewer branch locations are anticompetitive harms that antitrust law cares about.[608] These harms take on greater significance in light of empirical evidence showing that bank mergers generally fail to create meaningful efficiencies. In retrospect, some proposed banking mergers should have been blocked, full stop.

E. Merger Conditions

In addition to suing to block a proposed merger outright, DOJ officials can negotiate conditions with the merging banks. This is an important tool when reviewing bank mergers that could result in banking deserts or branch closures, which can produce anticompetitive effects such as reduced output and increased prices.[609] Federal officials should prepare to argue that branch closures and increasing distances to the nearest bank impede or halt relationship lending and that relationship lending is critical for entrepreneurs and small businesses in LMI communities. Armed with a legal theory why bank mergers that create these risks violate antitrust law, the DOJ can make a credible case for blocking a proposed merger. This provides the Antitrust Division with leverage to negotiate merger conditions with the banks in exchange for not challenging the merger.

The DOJ should negotiate legally enforceable merger conditions because after the merger is consummated, the Antitrust Division can neither sue to undo a bank merger as an antitrust violation nor sue to enjoin branch closures absent a binding promise by the merging banks.[610] In formulating and negotiating conditions, officials should focus explicitly on the problem of banking deserts and how merger conditions can help alleviate the problem.

1. Precluding Branch Closures and Restoring Banking Deserts

When banks attempt mergers or acquisitions in the future, antitrust officials should consider requesting two conditions. First, officials should negotiate merger conditions that preclude branch closures in areas that are at risk of becoming banking

608. *See supra* notes 512–34 and accompanying text.
609. *See supra* notes 505–32 and accompanying text.
610. Kress, *supra* note 12, at 595.

deserts.[611] If banks refuse such a condition, the DOJ should challenge the bank merger in court and explain to federal judges why bank mergers are appropriately blocked when the merged entity retains the power to close branches in LMI communities. If this is too sweeping, the government could negotiate a preclearance process by which the merged bank can only close a branch with government approval.

Second, although the DOJ cannot sue to undo completed bank mergers, Antitrust Division attorneys can use their leverage during the merger review process to mitigate some of the anticompetitive harms from prior bank mergers. This requires examining past conduct by the merging banks to see whether they have created or contributed to banking deserts in communities that they once served. If so, the DOJ could negotiate a condition that the banks restore branches in those banking deserts as a prerequisite for the DOJ not challenging the currently proposed merger. While nontraditional perhaps, antitrust officials have latitude in fashioning merger conditions.[612]

A condition that the merged bank enter (or reenter) a banking desert is worth considering, but entry without relationship building is unlikely to significantly increase access to credit. Research shows that after post-merger bank closures, "the contraction in small business lending persisted even after a new branch opened."[613] The loss of relationships and previously accumulated soft information prevents immediate restoration of prior lending levels.[614] Reforestation of a banking desert will take time and effort.

2. The Reasonableness of Merger Conditions

Merger conditions are a proper mechanism to prevent the anticompetitive effects that a proposed merger would otherwise

611. While the DOJ sometimes negotiates promises that a merged bank will sell or lease a branch location to another bank before selling or leasing that space to a nonbank, this approach is insufficient. First, old branches close and are not replaced with banks. Second, a bank is more than its physical location; it's also the personal bonds and knowledge that facilitate relationship lending. If those are lost, a replacement bank will not be able to efficiently serve the community.

612. *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 50, 53 (2015).

613. Morgan et al., *supra* note 10.

614. *Id.*

create, and that would justify blocking that merger as a violation of antitrust law. When antitrust officials are rightfully concerned about a merged entity pursuing a particular line of conduct, they should negotiate explicit, legally enforceable conditions designed to prevent anticompetitive outcomes. To the extent that banking deserts represent the antithesis of a competitive market, government attorneys should use all of their available leverage to prevent anticompetitive branch closures.

Although the proposed merger conditions may seem like government agencies interfering with the free market, American banks do not operate in a truly free market. Instead, they are heavily subsidized by taxpayers, including those who are denied access to banking services. Following the 2008 financial crisis, for example, "the federal government bailed out a failing bank industry with over a trillion dollars of equity infusions, loans, guarantees, asset purchases, and other forms of financial support."[615] The banks received assistance at below-market rates unavailable to other businesses and consumers.[616] President George W. Bush justified these government subsidies in order to facilitate banks lending again, but the banks, of course, did not lend to those Americans residing in banking deserts.

Imposing conditions on merging banks is particularly appropriate given the public nature of banking. National banks (and thrifts) are unique, being "the only profit-seeking domestic business enterprises that are chartered by a federal government agency."[617] Scholars have argued that the banking system "is effectively a public-private partnership that is most accurately, if unavoidably metaphorically, interpreted as a *franchise* arrangement" whereby the sovereign acts as a franchisor that "effectively licenses private financial institutions, as franchisees, to dispense a vital and indefinitely extensible public resource: the sovereign's full faith and credit."[618] Banks are doing the work of

615. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 4.

616. *Id.*

617. Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1368 (2021).

618. Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1147 (2017); *see also* Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1235 (2021) ("In a franchise-like arrangement, the Fed modulates the supply of sovereign credit-money but outsources the economy-wide allocation of this

the federal sovereign.[619] In this conception of the market, the government (as franchisor) rightfully should have a voice, a vote, and perhaps a veto over whether a franchisee decides to close down a franchise location.[620]

Banking systems are inherently government supported.[621] Yet the government often fails to attach conditions on the money and benefits afforded to major market players. For example, in spending trillions of dollars of public money to bail out banks during the 2008 recession, the government did not require that the recipients actually use their taxpayer-funded bailouts to lend money to small businesses and consumers.[622] Instead, many bankers used the capital injections to reward themselves and their shareholders.[623] The government's failure to impose meaningful conditions benefitted the wealthy at the general public's expense.

Although merger approval is a far cry from a government bailout, it is nonetheless an opportunity to exert leverage over powerful banking actors to protect the interests of those with less power. In light of government subsidies, it is not unreasonable for the federal government—through the various banking agencies and the DOJ Antitrust Division—to have some of those subsidies support access to credit for those who are impoverished but are nonetheless creditworthy. Merger conditions are not punishment, but oversight. They would bring a measure of accountability that has been sorely lacking.

Negotiating merger conditions with banks is reasonable because these financial institutions are not simply private businesses but are instead imbued with the public interest.[624]

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precious resource to specially licensed and regulated private financial institutions: banks.").

619. Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1543 (2018) ("For most of U.S. history, . . . banks were understood to be monetary institutions engaged in the critical work of creating money and facilitating payments, functions which they performed *on behalf of the state*, whose ultimate obligation it was to provide a viable currency." (emphasis added)).

620. I am indebted to Jeremy Kress for this insight.

621. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 11–12.

622. *Id.* at 23.

623. *Id.* ("In the end, the government relied on the banks to disseminate the bailout funds to the public without actually making sure they would do so.").

624. Schaake v. Dolley, 118 P. 80, 83 (Kan. 1911) ("[B]anking has ceased to be, if it ever was, a matter of private concern only . . . .").

Merger conditions requiring banks to provide services to residents of formerly redlined neighborhoods are perfectly consistent with the body of civil rights laws from the 1960s and 1970s that mandated equal access to credit, mortgages, and other financial instruments. Proving violations of the letter of these laws can be difficult, even when the spirit of these laws has not been met. Where the promise of these laws has failed to achieve their goals, merger law can honor the laws' spirit. Negotiating specific merger conditions, such as which branch locations a merged bank will keep open or reopen, makes the agreement easier to enforce.

Merger conditions do not upset a free market status quo. Large banks benefitted from deregulation. But this deregulation instigated the disappearance of local and community banks.[625] Deregulation led to bank closures in Black and Latinx communities.[626] Ultimately, banking deregulation did not create a free market in banking that merger conditions would dismantle.

Moreover, merger conditions are not strictly regulation. The government is not operating by fiat. Instead, the merging parties negotiate with the antitrust officials, albeit in the shadow of the risk of litigation. This is the milieu in which all settlements occur; but courts nonetheless treat and describe settlement agreements as voluntary and enforceable.

Finally, the merging parties have an opportunity to convince reasonable antitrust officials about the best way to prevent future banking deserts and remedy past ones. Antitrust officials can identify the banking deserts that they are most concerned about. The merging banks can offer solutions that address the problem most efficiently. The point is that all parties to negotiations over merger conditions should focus on the specific problem of eliminating banking deserts and their accompanying harms.

F. THE EXAGGERATED FEAR OF OVERDETERRENCE

The primary argument against more aggressive review of bank mergers is that enhanced antitrust scrutiny could deter efficient bank mergers from occurring. Such concerns are exaggerated. Although bank mergers are justified in the name of efficiency, merging banks routinely exaggerate merger

625. Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan,* 55 HARV. C.R.-C.L.L. REV. 63, 87 (2020).

626. Friedline & Chen, *supra* note 238, at 371.

efficiencies.[627] Economies of scale are often illusory.[628] When banks are already behemoths, there are no more economies of scale to maximize.[629] Historical research shows bank mergers in the 1980s generally failed to create efficiency gains.[630] Indeed, many of these mergers created significant inefficiencies.[631]

The promised efficiency gains from large bank mergers often do not materialize.[632] This is hardly surprising because the merger review regime provides no accountability for unrealistic claims of merger-induced future efficiencies. The merging banks can make representations and predictions to get their merger approved, knowing that banking regulators will not penalize them if efficiency forecasts prove overly optimistic. Although the data on the efficiency of bank mergers is mixed at best,[633] much empirical data shows no meaningful cost savings from bank mergers,[634] especially when large banks merge with each other.[635] While mergers between small banks may generate efficiencies, large banks have already achieved economies of scale.

When a large bank acquires a rival, many so-called "merger efficiencies" are simply the cost savings from firing bank employees, often as part of the branch closure process.[636] Such terminations hurt customers who rely on relationship lending because "[s]oft information, by definition, is subjective and hard to transmit, so if a branch manager is fired when a branch is closed, the information may not be recoverable and the manager's former small business borrowers may pay more for credit or go

627. Kress, *supra* note 178, at 462 ("In many cases, however, banks vastly overstate the purported benefits of merging.").

628. *Id.*

629. *See* Kress, *supra* note 12, at 561–62.

630. Stephen A. Rhoades, *Efficiency Effects of Horizontal (In-Market) Bank Mergers*, 17 J. BANKING & FIN. 411, 419–22 (1993) (discussing 1980s bank mergers).

631. Allen N. Berger & David B. Humphrey, *Megamergers in Banking and the Use of Cost Efficiency as an Antitrust Defense*, 37 ANTITRUST BULL. 541, 589, 598 (1992).

632. Kress, *supra* note 178, at 439–40.

633. DeYoung et al., *supra* note 151, at 103.

634. Kress, *supra* note 12, at 561–62.

635. *Id.*; Erik Devos et al., *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1026–29 (2016) (finding that mega-bank mergers do not increase efficiency).

636. *See* Elyas Elyasiani & Lawrence G. Goldberg, *Relationship Lending: A Survey of the Literature,* 56 J. ECON. & BUS. 315, 325 (2004).

without."[637] These so-called efficiencies for bank mergers should not be credited as justifications for the merger but should be treated as additional reasons to block it.

If banks aren't merging to increase efficiency, then why are they merging? Three explanations seem likely. First, bank mergers may be motivated by reasons unrelated to efficiency, such as living a quiet life without competition and achieving a sufficiently large size that one's bank is considered "too big to fail" and will be bailed out by the government should the bank hit hard times.[638] Bank executives "may seek growth-by-acquisition in order to attain the status of a 'too-big-to-fail' (TBTF) bank. TBTF status results in an implicit government guarantee which reduces investor and creditor risk and provides a cost-of-credit advantage over smaller rivals."[639] Once a bank merges to this scale, it can behave more recklessly, knowing that the government will be compelled to save the bank from its own mistakes.[640] For example, Bank of America, JPMorgan, and Citigroup achieved their "too big to fail" status through mergers and were subsequently rewarded during the 2008 financial crisis with government bailouts—a free insurance policy that created a significant moral hazard.[641] Professor Kress notes that "critics worry that these firms are not only 'too big to fail,' but also 'too big to jail,' 'too big to manage,' and 'too big to supervise.'"[642] Size can render banks above the law. That's a powerful—and inefficient—motivation to merge.

Second, banks merge to achieve market power.[643] Merged banks often flex their newfound market power by restricting the output of credit, increasing fees and interest rates on loans, and reducing interest rates on savings accounts.[644] Although banks in more concentrated markets generally charge higher fees to their customers,[645] the fee increases are disproportionately high

637. Morgan et al., *supra* note 10.
638. DeYoung et al., *supra* note 151, at 95.
639. *Id.*
640. *Id.* at 96.
641. Kress, *supra* note 178, at 461.
642. *Id.* at 436.
643. Tolbert et al., *supra* note 547, at 359.
644. *Id.* at 556–58.
645. Timothy H. Hannan, *Retail Deposit Fees and Multimarket Banking*, 30 J. BANKING & FIN. 2561, 2577 (2006).

in LMI and minority communities.[646] If bank mergers increase profitability, the reason is more likely market power, not efficiency.

Third, agency costs may encourage bank executives to pursue mergers for personal enrichment. For bank CEOs, growth by merger increases their compensation significantly more than internal growth.[647] This may lead bank executives to undertake mergers and acquisitions that are unlikely to maximize shareholder wealth.[648] These executives have every incentive to present proposed mergers as efficient or socially beneficial—and certainly not anticompetitive—but their true motivation is personal profit. It is unsurprising that these bank mergers do not enhance efficiency.[649]

In contrast to the hypothetical benefits floated by merger proponents, bank mergers often have devastating effects on local communities. Post-merger branch closures can cause banking deserts that leave entire towns without access to credit. Even without creating a desert, closures disrupt or destroy relationship lending that is critical for building wealth in LMI communities. And even when merged banks do not close branches, they reduce the number of loans, increase customer fees and the price of credit, and reduce the interest rates paid on savings accounts. For these reasons, far from being a negative effect, deterring bank mergers could benefit consumers and the economy.

Finally, in addition to harming consumers and local economies, bank concentration makes the national economy and financial system more vulnerable to destabilizing shocks. Professor Kress reports that "according to the Federal Reserve's own research, distress at a single large bank poses a significantly greater threat to the economy than distress at several smaller

646. Kress, *supra* note 12, at 558; Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1302 (2021).

647. Zhian Chen et al., *The Impact of Bank Merger Growth on CEO Compensation*, 44 J. BUS. FIN. & ACCT. 1398, 1399–1400 (2017) ("Acquiring US$ 1 million of new assets through mergers increases CEO total compensation by US$ 187.5; by comparison, US$ 1 million of non-merger internal growth increases the total compensation by only US$ 13.").

648. Berger et al., *supra* note 480, at 147.

649. Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1013 (1992) ("Another reason many bank mergers have failed to increase efficiency and profits is that bank managers pursue mergers primarily as a means to increase their bank's market share and, thereby, entrench their own position.").

banks with equivalent total assets."[650] Consequently, "[w]eak bank merger regulation . . . not only hurts consumers, it could imperil the broader financial system."[651] In short, bank consolidation is, on balance, bad for consumers and for overall financial stability of the economy.[652] The purported fear of deterring bank mergers should not be driving antitrust enforcement decisions regarding bank mergers.

G. NON-ANTITRUST APPROACHES

Banking deserts are not solely—perhaps not even primarily—simply a failure of antitrust law. Although this Article examines banking deserts as an antitrust issue, banking deserts are not monolithic. Many banking deserts are not precipitated by bank mergers. Some banking deserts have multiple causes. Banking deserts reflect a failure of regulation and law enforcement across a wide sweep of doctrinal fields. And just as banking deserts may have diverse origins, remedying the problem of banking deserts will require multiple policy approaches, some antitrust related and others not.

Non-antitrust solutions may focus more on banking regulations. Historically, banking regulation and deregulation has fueled and foiled competition in banking markets. For example, New Deal–era banking reforms, such as the McFadden Act of 1927, the Glass-Steagall Act of 1933, and the Banking Act of 1935, temporarily paused the concentration in banking by forestalling mergers and branch banking across state lines.[653] Because previous regulations limited the geographic reach of banks, large banks could not expand to displace local banks.[654] These laws prevented large, well-capitalized banks from decimating smaller regional banks and from dominating the national market. This prevented local deposits from being transferred back to the banking centers of New York and Chicago, and community banks could reinvest funds back into their communities.[655] Ultimately, however, banking deregulation allowed

650. Kress, *supra* note 178, at 439.

651. *Id.* at 461.

652. *Id.* at 439–40.

653. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 123–24.

654. Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171, 181 (2019).

655. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 124.

banks to merge their way to behemoth status. One effect of this shift to the mega-bank model was the creation of banking deserts in some communities.

But regulation is not necessarily a panacea. Banking regulations can represent significant barriers to entry.[656] Some scholars blame the decline in new bank charters on federal regulations enacted after the 2008 crisis.[657] Courts have long recognized that regulatory barriers to entry can thwart competitive markets in banking.[658] Some scholars argue that the CRA deters bank entry into LMI communities because banks wish to avoid CRA obligations.[659] Any efforts at reregulation must avoid or minimize the risk of making servicing LMI communities more burdensome, which would—paradoxically—create a disincentive for banks to serve such communities. Targeted deregulation may be warranted to the extent that some banking regulations make it harder to open new banks.[660] Banking regulators should undertake policies to encourage new entry. Because many bank mergers eliminate community banks,[661] particular focus should

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656. The presence of entry barriers should make antitrust officials more concerned about merger-induced branch closures because new banks are unlikely to fill the void. Instead, abandoned neighborhoods will be targeted by predatory fringe financial services, like payday loan centers. *See supra* notes 195–218 and accompanying text.

657. Sengupta & Dice, *supra* note 22, at 46 (collecting sources with such arguments).

658. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 91 (1975) ("In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, 'particularly the legal restraints on entry unique to this line of commerce.'" (quoting United States v. Marine Bancorporation, Inc., 418 U.S. 602, 606 (1974))).

659. Barr, *supra* note 162, at 531–32 (first citing Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 296, 340 (1993); and then citing Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 FORDHAM URB. L.J. 281, 287 (1993)).

660. Sengupta & Dice, *supra* note 22, at 46 ("In addition, bank regulation ramped up after the crisis, and several economists and policymakers have argued that this post-crisis regulation imposed a significant burden, especially on smaller community banks. [Some scholars] argue that regulatory burden has contributed to the dramatic fall of new bank charters since 2010.").

661. Robert DeYoung et al., *Whither the Community Bank? Relationship Finance in the Information Age*, FED. RSRV. BANK OF CHI. (June 2002), https://www.chicagofed.org/publications/chicago-fed-letter/2002/june-178 [https://perma.cc/AAL9-943B] ("[N]ine out of every ten bank mergers have eliminated a community bank.").

be placed on encouraging community banks that focus on local borrowers.[662]

The proper response may involve a combination of deregulation and reregulation. As deregulation caused some market concentration,[663] any reregulation should focus on ensuring efficient levels of banking services in all neighborhoods. Banking regulators currently have insufficient tools to prevent branch closures.[664] Although federal regulations require banks to submit notice of planned closures,[665] federal regulators hear concerns about bank or branch closures but do not actually do anything meaningful to stop them.[666] Perhaps Congress should consider granting bank regulators—who are arguably operating as franchisors in our franchise model of banking[667]—more power to block large banks from closing branches.

In addition to reviewing and reassessing the scope and content of bank regulations, scholars have proposed promising solutions to the problem of banking deserts, many of which hold great potential. For example, having post offices provide banking services in inner-city and rural communities could address the problem of banking deserts.[668] Post offices can provide meaningful coverage to many banking deserts because "38% of post offices are located in ZIP codes that do not have banks."[669] Professor Baradaran explains that post offices can provide these financial services efficiently "because (1) they can use natural

662. Kress, *supra* note 12, at 559 ("Community banks have traditionally specialized in lending to local entrepreneurs and farmers." (citing Jeremy C. Kress & Matthew C. Turk, *Too Many to Fail: Against Community Bank Deregulation*, 115 NW. U. L. REV. 647, 654 (2020))).

663. Berger et al., *supra* note 480, at 150 ("The US evidence suggests that consolidation accelerated as a result of deregulation.").

664. Wolfram, *supra* note 20, at 5 ("Banks are private companies, and federal regulators have minimal oversight over branch closings. In fact, regulators cannot deny or delay a bank branch closure.").

665. *Id.* ("Federal regulations require that banks submit a notice of any proposed branch closing to the appropriate federal banking agency no later than 90 days prior to the date of the proposed branch closing. The required notice must include a detailed statement of the reasons for the decision to close the branch and statistical or other information in support of such reasons.").

666. *See id.* (discussing an example of bank regulators not performing due diligence in response to a bank closure in North Carolina).

667. *See supra* notes 176–94 and accompanying text.

668. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 198–220.

669. Faber, *Cashing in on Distress*, *supra* note 35, at 689.

economies of scale and scope to lower the costs of the products, (2) their existing infrastructure significantly reduces overhead costs, and (3) they do not have profit-demanding shareholders and would be able to offer products at cost."[670] Other alternative banking models include a central bank for the poor[671] and bolstering community financial institutions.[672]

Finally, to the extent that lack of demand for banking services can make it harder for banks to profitably enter banking deserts, reasonable efforts should be undertaken to increase demand. While there is undoubtedly some pent-up, unmet demand,[673] increasing access to banking services should increase demand.[674] In particular, reducing the distance between consumers and bank branches increases demand.[675] As individuals have more exposure to financial institutions, they make better use of financial services.[676] Financial education could benefit both individuals and banks as households become more prosperous and increase their usage of bank services. A comprehensive solution to the issue of unbanked and underbanked households

670. BARADARAN, HOW THE OTHER HALF BANKS, *supra* note 24, at 211.

671. *Id.* at 9.

672. Dunham, *supra* note 9, at 377 ("Another potential solution in private-sector retail banking is the Community Development Financial Institution (CDFI) model. CDFIs are financial firms that have community development as their primary goal and are driven by a mission to fight financial and economic exclusion of low- income populations."); BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 229–32.

673. Célerier & Matray, *supra* note 28, at 4780 ("Our result that the probability to be unbanked decreases when the supply of banking services increases suggests that low-income households are unbanked partly because they face barriers to financial services and not solely because they choose to remain outside the financial mainstream irrespective of the supply of banking services.").

674. Friedline & Despard, *supra* note 86 (noting that access increases demand, for instance "[i]n the same way that convenient access to grocery stores that sell affordable and nutritious food helps us maintain a healthy diet, convenient access to safe and affordable financial products and services helps us establish and maintain good financial health").

675. Kashian et al., *supra* note 21, at 3 (citing Katherine Ho & Joy Ishii, *Location and Competition in Retail Banking*, 29 INT'L J. INDUS. ORG. 537 (2011)).

676. Faber, *Segregation and the Cost of Money*, *supra* note 91, at 821 ("[S]ome research has shown that disparate exposure to financial services is correlated with disparities in the types of services used, suggesting influence of the local financial services ecosystem on individual choices." (citation omitted)); *see supra* notes 121–74 and accompanying text.

should address both the supply and demand aspects of the market.

In short, the policy prescriptions to address banking deserts will necessarily have to be multi-pronged. But one of those prongs should be the judicious use of antitrust principles, including more meaningful review of bank mergers.

CONCLUSION

Banking deserts are not inevitable. They are not a necessary evil; just an evil. Weak merger review has allowed bank mergers that subsequently eliminate branches from LMI neighborhoods. As a result, millions of households are denied meaningful access to traditional financial services and are forced to rely on predatory payday loan centers and other high-priced alternative lenders. These effects are often racialized because of decades of mortgage and lending discrimination against minority households. Properly executed, treating branch closures and banking deserts as an antitrust problem can harness the expertise and leverage of the DOJ Antitrust Division to prevent banks from abandoning local markets post-merger. This should provide better opportunities for LMI households to build wealth.

America's history of redlining and other forms of mortgage discrimination should inform how geographic markets are defined when reviewing proposed bank mergers. Housing segregation affected the evolution of geographic markets as that concept is used in antitrust analysis. Even after redlining based on race was outlawed, lenders replicated racial redlining by using loan applicants' zip codes to make lending decisions.[677] Banks—and for decades, the federal government through the FHA—have treated minority neighborhoods as separate markets for lending purposes. Remedial symmetry warrants treating these same neighborhoods as relevant geographic markets when reviewing bank mergers to ensure that these neighborhoods do not again suffer reduced access to credit on fair terms.

We are at an inflection point. Upon taking office, President Biden issued an executive order to encourage reinvigoration of antitrust policy, including more appropriate bank merger review in order to "ensure Americans have choices among financial

677. BARADARAN, THE COLOR OF MONEY, *supra* note 230, at 150.

institutions and to guard against excessive market power."[678] The Assistant Attorney General in charge of the DOJ's Antitrust Division, Jonathan Kanter, has announced that "it is appropriate for us to reassess whether the prevailing approach to bank merger enforcement is fit for purpose given current market realities."[679] As this Article is going to press, antitrust and banking officials are discussing issuing a new, updated version of the federal Bank Merger Guidelines, to replace the now-out-of-date 1995 guidelines.[680] It would be wise to include explicit consideration of the problems of bank closures and banking deserts in those new guidelines.

678. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36992 (July 14, 2021).

679. Jonathan Kanter, Assistant Att'y Gen., Keynote Address at Brookings Institution's Center on Regulation and Markets Event "Promoting Competition in Banking" (June 20, 2023) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution [https://perma.cc/55BU-KR5E]).

680. *Id.*