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"Breaking the Bank" Mergers: How Bank Consolidation is Hurting Communities

Hannah M. Dunaway

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I. INTRODUCTION

Where do you bank? If I were to make an educated guess, without knowing anything about you, I would say one of the "Top Four" U.S. banks.[1] My reasoning would be purely statistical: the Top Four control over 40% of America's banking assets.[2] The reason so many people bank with the largest banks in country is partially because, even though the total assets of American banks has steadily increased, the total number of banks has simultaneously decreased.[3] Part of this consolidation is due to banks merging and acquiring one another to keep up with the Top Four banks that dominate the industry.[4] These bank mergers and acquisitions have decreased the total number of banks while increasing bank size.[5]

1. *See Largest Banks in the U.S. in 2021, by Total Assets*, STATISTA (Feb. 2022), https://www.statista.com/statistics/799197/largest-banks-by-assets-usa/ [https://perma.cc/M496-2J3B] (showing that the four largest banks in America by assets are JPMorgan Chase, Bank of America, Wells Fargo, and Citibank).

2. *See, e.g.*, Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 436 (2020) (explaining that the top four banks control 42% of US banking assets); *see also* Letter from Banking Pol'y Inst. and Mid-Size Bank Coal. of Am. to Jonathan Kanter, Assistant Att'y Gen. for the Antitrust Div. 16 (Feb. 10, 2022) [hereinafter Letter from BPI & MBCA] (on file with the FDIC), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-002.pdf [https://perma.cc/UB3Y-8L98] (showing on a bar graph that the top three banks control 35% of the marketplace and top five banks control 46% of the marketplace).

3. *See* Bd. of Governors of the Fed. Rsrv. Sys., *Total Assets, All Commercial Banks*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/TLAACBW027SBOG [https://perma.cc/3DV3-GQKQ] (last visited Oct. 7, 2022) (graphing the incline of banking assets over the past 50 years, showing current assets total almost $23 trillion); *see also Banks, Mergers, and the Affected Communities: Field Hearing Before the Comm. on Fin. Servs.*, 108th Cong. 1-4 (2004) [hereinafter *Hearing*] (statement of Hon. Spencer Bachus, Chairman, Comm. on Fin. Servs.), https://www.govinfo.gov/content/pkg/CHRG-108hhrg20952/html/CHRG-108hhrg20952.htm [https://perma.cc/6LSH-UHRX] ("Since the mid-'40s, there's been a decline of about [40%] in the number of banking organizations . . . . [T]here has been a tremendous consolidation in the industry.").

4. *See* Vijay D'Silva & Zane Williams, *US Midcap Banking: The Shakeout Ahead?*, MCKINSEY & COMPANY (June 30, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/us-midcap-banking-the-shakeout-ahead [https://perma.cc/9EU4-SG8T] (describing how midcap banks are pressured to merge to keep up with larger banks).

5. *Id.*

In five parts, this Note will consider the background, potential ramifications, and solutions to the consequences of banking consolidation. Part II provides a brief background on banking mergers and acquisitions, explaining broadly why banks merge and how banks are regulated.[6] Part III analyzes how the disappearance of community banks as they merge negatively impacts communities, specifically small businesses and people of color.[7] Part IV discusses potential regulations to help slow bank mergers by contemplating a change in the merger application process and incentivizing banks to stay small by offering a tax subsidy.[8] Finally, Part V summarizes and concludes this Note.[9]

II. Background on Banking Mergers and Acquisitions

In the last 100 years, the total number of banks has decreased from over 30,000 banks to a little over 4,000—a decline of about 86%.[10] Even taking out the pre-Great Depression years to account for stabilization of the banking industry, the quantity of banks has declined by 71%.[11] Compared to just thirty years ago, the number of banks with assets over $20 billion has increased nearly five times, while community banks (less than $30 million in assets) are the only type of bank to decline in number.[12] This decline is not due to community banks going out of business but due to the overwhelming trend of community banks being acquired by and merged into larger banks.[13] Since 2013, there have been over 1,000 banking merger requests

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6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part IV.
9. *See infra* Part V.
10. William R. Emmons, *Slow, Steady Decline in the Number of U.S. Banks Continues*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECON. BLOG (Dec. 9, 2021), https://www.stlouisfed.org/on-the-economy/2021/109nvestop/steady-decline-number-us-banks [https://perma.cc/JT27-DTK2].
11. *Id.*
12. Oscar Perry Abello, *Small Banks Save Small Businesses, So Why Aren't There More Small Banks?*, NEXT CITY: THE BOTTOM LINE (May 12, 2020) [hereinafter Abello, *Small Banks Save Small Businesses*], https://nextcity.org/urbanist-news/small-banks-save-small-businesses-so-why-arent-there-more-small-banks [https://perma.cc/C7RG-3XJL].
13. *See* MAXIMILIANO BERCUM ET AL., DELOITTE, 2022 BANKING & CAPITAL MARKETS M&A OUTLOOK 5 (2022), https://www2.deloitte.com/us/en/pages/financial-services/articles/banking-securities-mergers-acquisitions-outlook.html [https://perma.cc/6RQ3-RLHS] ("For the sixth consecutive year, the vast majority of 2021 banking M&A transactions occurred at the small-bank level . . . .").

submitted to the Federal Deposit Insurance Corporation ("FDIC"),[14] and applications are generally accepted.[15] In fact, "[a]t today's pace, more than three banks a week are exiting the industry, as banking franchises move into stronger hands."[16] There has been no indication this decline will cease.[17]

Though community banks have been disappearing for years, the reason for consolidation is simple: competition.[18] Some banks, particularly the Top Four, have become Too-Big-To-Fail ("TBTF").[19] TBTF banks are so large, the failure of one poses a risk to the financial system.[20] Community banks are not only competing in the same market as large banks, they are competing against TBTF banks—both of which have significant advantages in the marketplace.[21]

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14. *See* Press Release, Elizabeth Warren, At Hearing, Warren Blasts Federal Regulators for Lack of Bank Merger Oversight (Aug. 3, 2021) [hereinafter Press Release, Elizabeth Warren, Warren Blasts Federal Regulators], https://www.warren.senate.gov/newsroom/press-releases/at-hearing-warren-blasts-federal-regulators-for-lack-of-bank-merger-oversight [https://perma.cc/RN2W-TRET] (addressing how the FDIC did not deny any of the 1,124 banking and merger acquisitions submitted between 2013 and 2021).

15. *See Bank Application Actions – Search Result*, FED. DEPOSIT INS. CORP. (last updated Jan. 10, 2023), https://www.fdic.gov/regulations/applications/actions.html [https://perma.cc/3WQY-QXTM] (select a start date of 01/01/2013 and an end date of 11/30/2022, select the application type as "Merger – Regular," then click the search button) (showing 1,259 applications for mergers with 1,147 approved and none denied).

16. D'Silva & Williams, *supra* note 4.

17. *See* Emmons, *supra* note 10 ("The long-term decline in the number of commercial banks shows no signs of ending.").

18. *See generally* Press Release, Elizabeth Warren, Warren Blasts Federal Regulators, *supra* note 14 ("Community banks are being gobbled up by larger competitors or forced to shut down because they can't compete on a level playing field."); *see also* D'Silva & Williams, *supra* note 4 (finding smaller banks compete with larger banks, but do not have the financial strength to keep up).

19. *See* Julie Young, *Too Big to Fail: Definition, History, Examples, and Reforms*, INVESTOPEDIA (Oct. 31, 2021), https://www.investopedia.com/terms/t/too-big-to-fail.asp [https://perma.cc/KS5L-RNKC] (listing JPMorgan Chase & Company, Bank of America Corporation, Citigroup Incorporated, and Wells Fargo & Company as among those in the financial system that are TBTF).

20. *See* Sharon E. Foster, *Too Big to Fail – Too Small to Compete: Systematic Risk Should Be Addressed Through Antitrust Law but Such a Solution Will Only Work if It Is Applied on an International Basis*, 22 FLA. J. OF INT'L LAW 31, 34 (2010) ("But years of deregulation coupled with consolidation in the financial services sector due to a lack of antitrust enforcement resulted in mega financial service firms that pose systemic risk; that is, they are too big to fail.").

21. *See* D'Silva & Williams, *supra* note 4, Exhibit 1 (graphing each segment of bank, total assets and deposits in 2020, and total number of firms in the country).

Large banks necessarily have more funds.[22] With this financial power, large banks fund investments with ease, service large corporate clients, and spend money on technology.[23] Community banks, on the other hand, lack the financing and resources to create and maintain innovative technology.[24] As the world becomes increasingly digitized, customers move to the large banks that give twenty-four-seven access to banking, leaving behind smaller banks that are unable to keep up.[25]

Additionally, the cost to comply with regulations like the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") have increased.[26] Dodd-Frank was passed as a response to the 2008 financial crisis in order to stabilize the financial industry[27] and generally imposes regulations upon financial institutions.[28] If this sounds like an oversimplification, it is: Dodd-Frank "is an extraordinarily complicated regulation that covers a wide spectrum of financial industry activities."[29]

A comparison between pre-Dodd-Frank and post-Dodd-Frank shows that compliance costs have increased by over 60%.[30] The cost for labor needed to comply with regulations can be up to $10,000 per

22. *See* Kress, *supra* note 2, at 436 (explaining that the top four banks control 42% of US banking assets).

23. *See* D'Silva & Williams, *supra* note 4 ("Larger banks are advantaged . . . . [T]hey can afford more of the technology and skills needed to compete.").

24. *See id.* ("JPMorgan Chase, for instance, spends approximately $11 billion on technology annually, while technology spending for the midcap banks in total is estimated at about $3 billion.").

25. *See id.* ("Consumers are used to the high bar that e-commerce firms have set for mobile and digital experiences, and they have started demanding the same convenience from their banks.").

26. *See* Shakeel Lone, *The Creeping Cost of Compliance*, FORBES (Oct. 21, 2021, 7:23 PM), https://www.forbes.com/sites/servicenow/2021/10/21/the-creeping-cost-of-compliance/?sh=4e48c12856cc [https://perma.cc/4EH3-PUVM] (explaining that expenses to comply with regulations have gone up every year since the Dodd-Frank Act was passed).

27. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 165, 12 U.S.C. § 5365(a)(1) (stating a purpose "to prevent or mitigate risks to the financial stability of the United States . . . .").

28. *See* Dodd-Frank § 168, 12 U.S.C. § 5368 ("The Board of Governors shall have authority to issue regulations . . . .").

29. Kelly Anne Smith, *How the Dodd-Frank Act Protects Your money*, FORBES (last updated July 25, 2022 1:25 PM), https://www.forbes.com/advisor/investing/dodd-frank-act/ [https://perma.cc/4M9W-6FFB].

30. *See* MONICA O'REILLY & DILIP KRISHNA, DELOITTE, THE FUTURE OF REGUL. PRODUCTIVITY, POWERED BY REGTECH, 2 (2017), https://www2.deloitte.com/us/en/pages/regulatory/articles/cost-of-compliance-regulatory-productivity.html [https://perma.cc/T685-M89M] ("[O]perating costs spent on compliance have increased by over [60%] for retail and corporate banks.").

employee.[31] Further, compliance is more expensive for community banks: regulations cost banks with less than a billion dollars in assets double the percentage of retail operating expenses compared to banks with over a billion dollars in assets.[32] The complexity of compliance may be eased by the purchase of newer, better technology.[33] However, community banks not only struggle to pay the upfront cost of technology,[34] but community banks are often located in remote areas that lack the qualified personnel that could manage such technology.[35] Even if community banks had access to qualified personnel to hire as technology managers, they would likely lack the funds to pay competitive salaries.[36]

Since community banks lack the money to pay and keep up with compliance technology, the majority of the expenses for compliance are tied up in salary.[37] Granted, community banks are exempt from certain

31. Lone, *supra* note 26.

32. *See* MARC LABONTE, CONG. RSCH. SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 30 (2015), https://crsreports.congress.gov/product/pdf/R/R43999 [https://perma.cc/K593-5LZM] (finding that compliance costs of certain regulations for banks with less than a billion in assets cost 3.9% to 5.6% of retail deposit operating expenses, double the percentage of banks with over one billion in assets).

33. *See* Lone, *supra* note 26 ("[D]igitized processes can help banks maintain regulatory compliance, while improving experiences and reducing costs . . . .").

34. *See* CONSUMER FIN. PROT. BUREAU, UNDERSTANDING THE EFFECTS OF CERTAIN DEPOSIT REGULATIONS ON FINANCIAL INSTITUTIONS' OPERATIONS 116 (2013), https://files.consumerfinance.gov/f/201311_cfpb_report_findings-relative-costs.pdf [https://perma.cc/K7YX-KLBP] ("The costs of technology in compliance are likely to correlate strongly with the costs of technology in the business overall. Smaller institutions that have difficulty getting the best price and service from technology vendors for general business purposes may also have higher associated compliance costs.").

35. *See Can Smaller Community Banks Afford a Dedicated Resource to Manage IT Networks and Workstations?*, SAFE SYS. (Dec. 3, 2015), https://www.safesystems.com/blog/2015/12/can-smaller-community-banks-afford-a-dedicated-resource-to-manage-it-networks-and-workstations/ [https://perma.cc/LVF2-QVRC] ("[M]any smaller community banks are often located in communities that lack the qualified personnel resources to efficiently manage their IT and regulatory responsibilities.").

36. *See id.* (explaining that most community banks cannot afford to have a team dedicated to IT management and, even if they could, likely could not pay qualified individuals enough to keep them).

37. *See* WILLIAM DUNKELBERG & JONATHAN SCOTT, COMMUNITY BANK COMPLIANCE COSTS, CONF. OF STATE BANK SUPERVISORS 2 (2018), https://www.csbs.org/sites/default/files/2018-12/CSBS%20Survey%20Report_COMPLIANCE%20COSTS.pdf [https://perma.cc/KLK6-92CJ] (charting that the cost of salary for compliance is 8.5% of a small bank's total expenses).

rules and regulations that larger banks must comply with.[38] Nevertheless, compliance is financially burdensome for community banks because of the numerous rules implemented by Dodd-Frank that do apply and because community banks have significantly less capacity to comply with regulations compared to larger banks.[39] The financial burden to comply with regulations eats into community banks' profits, adding to the competition problem they already face.[40]

One way for community banks to keep up with larger banks is to grow, which contributes to the increase in banking mergers and acquisitions and, thus, larger banks overall.[41] As community banks merge into mid-size and large banks, the increase in capital allows the banks to spend money on technology and more easily comply with regulations.[42] The benefit of increased capital outweighs the con of increased regulatory scrutiny.[43]

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38. *See* MARC LABONTE, CONG. RSCH. SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 25 (2015), https://crsreports.congress.gov/product/pdf/R/R43999 [https://perma.cc/K593-5LZM] ("Small banks are exempt from many rules, especially recent ones, and the regulations that do apply to small banks are often tailored to reduce their regulatory burden."); *see also* Hoanh Le, The Effects of the Dodd-Frank Act on Community Banks 55–56 (2017) (Masters thesis, South Dakota State University) (on file with Open Prairie, South Dakota State University), https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=2782&context=etd [https://perma.cc/KH66-5NJ5] (stating that several sections of the Dodd-Frank Act that impact community banks more severely than larger banks do not impose a large economic burden on any bank).

39. *See* LABONTE, at 25 ("[I]f small banks are facing unduly burdensome regulation, it is either in absolute terms, as a result of numerous rulemakings implementing the Dodd-Frank Act and other recent acts, or because small banks have less capacity for regulatory compliance than large banks (because there is economies to scale to regulatory compliance, for example), and not because small banks face relatively more regulatory burden than large banks."); *see also* Le, *supra* note 38, at 55–56 ("My estimated results showed that [Dodd-Frank's] seven final rules affected community banks more severely, but had little or no impact on larger banks.").

40. *See supra* notes 18, 30–32 and accompanying text.

41. *See* DUNKELBERG & SCOTT, *supra* note 37, at 7–8 ("Of the [fifty-six] small banks reporting a decision to seriously consider an offer [to merge], [73%] reported that the costs of dealing with regulations was [sic] 'important' or 'very important' part of the decisions.")

42. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 34, at 116 ("The costs of technology in compliance are likely to correlate strongly with the costs of technology in the business overall. Smaller institutions that have difficulty getting the best price and service from technology vendors for general business purposes may also have higher associated compliance costs.").

43. *See* LABONTE, at 30 (finding that compliance costs of certain regulations for banks with less than a billion in assets cost 3.9% to 5.6% of retail deposit operating expenses, double the percentage of banks with over one billion in assets); *see also* Le, *supra* note 38, at 55 ("The Dodd-Frank Act exempts institutions with $10 billion or less in total assets; thus, much of the Act is not intended to apply to community banks.").

Ever-evolving legislation created to regulate banks further fuels increasing bank sizes. Though now repealed, the Banking Act of 1933 (commonly referred to as "Glass-Steagall") intended to support and encourage community banks after the 1929 stock market crash.[44] Bankers took unnecessary risks with deposits prior to 1929, leading to the Great Depression—Glass-Steagall sought to stabilize the financial industry and prevent such an economic collapse from happening again.[45] What Glass-Steagall is primarily remembered for, however, is the regulation that separated commercial and investment banking.[46] Currently, large commercial banks are primarily owned by holding companies, which may also own investment companies.[47] Though these holding companies do not run day-to-day operations, they are in control of management and company policies.[48] Had the act not been repealed, bank holding companies would be less likely to own investment companies.[49] For example, Glass-Steagall would have likely prohibited mergers like Bank of America Corporation's purchase of Merrill Lynch in 2008.[50]

Yet Glass-Steagall was not without its faults: for example, it allowed for commercial banks to work with investment companies so

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44. *See* Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/glass-steagall-act [https://perma.cc/3364-QHNP] (informing how Glass-Steagall was meant to make banks safer for consumers, further regulate bank control, and prevent funds from going into speculative operations).

45. *See id.* ("In the wake of the 1929 stock market crash and the subsequent Great Depression, Congress was concerned that commercial banking operations and the payments system were incurring losses from volatile equity markets.").

46. *See* Dylan Matthews, *Elizabeth Warren & John McCain Want Glass-Steagall Back. Should You?*, WASH. POST (July 12, 2013 9:10 AM), https://www.washingtonpost.com/news/wonk/wp/2013/07/12/elizabeth-warren-and-john-mccain-want-glass-steagall-back-should-you/ [https://perma.cc/3S97-Z7BW] (describing how sections 20 and 32 of the Glass-Steagall Act banned banks from being affiliated with or sharing corporate board members with companies that engaged principally in securities dealing).

47. *See* Julia Kagan, *Bank Holding Company Definition, How It Operates*, INVESTOPEDIA (Nov. 23, 2020), https://www.investopedia.com/terms/o/one-bank-holding-company.asp [https://perma.cc/64ME-8SAK] (explaining that banks are primarily owned by holding companies, which also own investment companies).

48. *See id.* ("Holding companies do not run the day-to-day operations of the banks they own . . . . [T]hey exercise control over management and company policies.").

49. *See* Matthews, *supra* note 46 (explaining that Glass-Steagall prohibited holding companies from owning "both securities firms and commercial banks . . . .").

50. *See id.* ("Bank of America's purchase of Merrill Lynch in 2008 also likely wouldn't have been possible before Gramm-Leach-Blilely.").

long as the investment companies were not "principally engaged" in underwriting securities.[51] The "principally engaged" language created a loophole within the act for banks to still partner with some investing firms.[52] So from 1984 to 1999, while Glass-Steagall was still enacted, the number of commercial banks decreased by over 30%, and bank holding companies increased in size.[53]

Portions of Glass-Steagall, including the sections which precluded affiliation between investment banks and commercial banks, were officially repealed by the Financial Modernization Act of 1999 (commonly referred to as "Gramm-Leach-Bliley").[54] Gramm-Leach-Bliley allowed banks to integrate with investors while purporting to protect the financial industry.[55] Less than a decade later, the financial crisis of 2008 occurred[56] due to risky investments made within the industry.[57] Congress responded to the crash with an attempt to stabilize the industry via Dodd-Frank.[58]

Dodd-Frank tiers its regulations so that financial institutions considered systemically significant must comply with increased

51. *See* Glass-Steagall, 12 USC §§ 377, 78 (repealed 1999) (prohibiting banks from affiliating with firms primarily engaged in securities activities); *see* DAVID H. CARPENTER ET AL., CONG. RSCH. SERV., R44349, THE GLASS-STEAGALL ACT: A LEGAL & POLICY ANALYSIS 2 (2016), https://sgp.fas.org/crs/misc/R44349.pdf [https://perma.cc/2HHL-ZHKB] ("[S]ome argue that the Glass-Steagall Act is ill-suited for the current financial system and that the recent financial crisis would have occurred even if the FLBA had never partially repealed the Glass-Steagall Act."). *But see* Matthews, *supra* note 46 ("Few policy ideas have energized activists in recent years quite like calls to bring back the Glass-Steagall Act of 1933.").

52. *See* Matthews, *supra* note 46 (analyzing how the "engaged principally" wording in the Glass-Steagall Act created loopholes).

53. *See* Joe Mahon, *Financial Services Modernization Act of 1999, Commonly Called Gramm-Leach-Bliley*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/gramm-leach-bliley-act [https://perma.cc/R8NQ-55PD] (describing how by the late 1990s, the banking industry had been consolidating for twenty years, with banks declining by more than 5,000 from 1984 to 1999).

54. *See id.* (explaining that Gramm-Leach-Bliley repealed portions of the Glass-Steagall Act).

55. *See id.* ("[Gramm-Leach-Bliley] was intended to promote the benefits of financial integration for consumers and investors while safeguarding the soundness of the banking and financial systems.").

56. *See* CARPENTER ET AL. at 19–23 (analyzing how Glass-Steagall may have affected the financial crisis of 2008).

57. *See id.* (explaining the housing boom and subsequent bust due to subpar underwriting standards that led to the financial crisis).

58. *See id.* at 25 ("The Dodd-Frank Act attempts to promote financial stability and to limit some of the potential speculative activities of commercial banks in various ways . . . .").

regulations.[59] Systemically significant institutions are generally those considered TBTF.[60] In 2018, Dodd-Frank's designation for TBTF increased from its initial threshold of $50 billion in assets to $250 billion in assets.[61] Bank holding companies were previously reluctant to engage in bank mergers that would put them above the $50 billion in assets threshold because it would subject them to increased regulation; the threshold's increase eliminated this trepidation.[62] As a result, banks within the American marketplace have continually grown in size.[63] Banks have been allowed to become so large that mergers are the only way to keep up with competition.[64]

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59. *See* Dodd-Frank § 165, 12 U.S.C. § 5365(a)(1) ("[T]o prevent or mitigate risks to the financial stability of the United States . . . the Board of Governors shall . . . establish prudential standards for . . . bank holding companies with total consolidated assets equal to or great than $250,000,000 . . . ."); *see also* MARC LABONTE, CONG. RSCH. SERV., R43999, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS 25–29 (2015), https://crsreports.congress.gov/product/pdf/R/R43999 [https://perma.cc/K593-5LZM] (offering reasons for why large banks are subject to increased regulatory scrutiny).

60. *See supra* notes 19–20 and accompanying text (explaining TBTF and the risks such institutions pose to the financial system).

61. *See* § 5365(a)(1) ("[T]o prevent or mitigate risks to the financial stability of the United States . . . the Board of Governors shall . . . establish prudential standards for . . . bank holding companies with total consolidated assets equal to or great than $250,000,000 . . . ."); *see also* D'Silva & Williams, *supra* note 4 ("In 2018, the criteria under the Dodd-Frank Act, which subject US banks to enhanced prudential standards, were revised, so that only banks with assets exceeding $250 billion would be affected . . . ."); Joe Adler, *Dodd-Frank at 10: How Regulation Has (& Hasn't) Changed Since Law's Passage*, AM. BANKER (July 12, 2021 11:56 AM), https://www.americanbanker.com/list/dodd-frank-at-10-how-regulation-has-and-hasnt-changed-since-laws-passage [https://perma.cc/8XG5-KTMP] (describing how large banks are subject to certain liquidity and capital ratio requirements as well as federal stress tests).

62. *See* D'Silva & Williams, *supra* note 4 ("In 2018, the criteria under the Dodd-Frank Act, which subject US banks to enhanced prudential standards, were revised, so that only banks with assets exceeding $250 billion would be affected . . . . [W]hile previously there was a reluctance among midcap banks to breach the $50 billion asset level, this barrier was now eliminated.").

63. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 (graphing the number of banks grouped by size from 1988 to 2019, showing an increase in the number of banks with over $300 million in assets).

64. *See* Press Release, Elizabeth Warren, Warren Blasts Federal Regulators, *supra* note 14 ("Community banks are being gobbled up by larger competitors or forced to shut down because they can't compete on a level playing field."); *see also* D'Silva & Williams, *supra* note 4 (explaining that smaller banks compete with larger banks, but do not have the financial strength to keep up). *But see* Katy Milani, *Community. Banking is Alive, Well: The Three Myths About Dodd-Frank & Community Banks*, ROOSEVELT INST. (June 8, 2017), https://rooseveltinstitute.org/2017/06/08/community-banking-is-alive-well-the-three-myths-about-dodd-frank-and-community-banks/ [https://perma.cc/F7GT-B4BS] (showing the community banks' net income has gone up).

III. BANKING MERGERS AND ACQUISITIONS ARE HARMFUL TO LOCAL COMMUNITIES

Large banks and community banks differ in their portfolios for revenue generation. Whereas in 1985, the largest twenty-five banks' loan-to-asset ratio was just over 60%, this percentage decreased to approximately 54% by the end of 2019.[65] On the other hand, the remaining banks as a whole have increased their loan-to-asset ratio from just under 60% to nearly 70% in the same period.[66] This disparity is partially due to big banks' tendency to focus revenue portfolios on items that generate more money than loans: stocks, bonds, and assets.[67]

Though investments are the money-making items, they are not what the average person needs from a bank. Americans rely on banks for loans to buy houses, to buy cars, and to pay for college; some also use loans via credit cards to pay for their day-to-day purchases like food and gas.[68] American businesses similarly rely on loans for machinery, operating equipment, and general business expenses.[69] When banks get larger, the asset percentage shifts from loans to investments, making larger banks "too big to succeed at what we need banks to do."[70] Though the Community Reinvestment Act ("CRA") was enacted to

65. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 (graphing the loan-to-asset ratio for the largest twenty-five banks compared to other banks from 1985 to 2019).

66. *Id.*

67. *See id.* (detailing that beginning in the late 1990s, big banks began to focus their business models on investment branches).

68. *See* Frank Partnoy, *The Looming Bank Collapse*, THE ATL. (July/Aug. 2020), https://www.theatlantic.com/magazine/archive/2020/07/coronavirus-banks-collapse/612247/ [https://perma.cc/5LWM-PVNN] (explaining that many Americans rely on loans not only to buy homes and cars and pay for college, but also to pay for daily necessities); *see also* Megan Leonhardt, *Nearly 25% of Americans are Going Into Debt Trying to Pay for Necessities Like Food*, CNBC (May 24, 2019 9:00 AM), https://www.cnbc.com/2019/05/23/nearly-25-percent-of-americans-are-going-into-debt-trying-to-pay-for-necessities.html [https://perma.cc/F2ZG-4VJJ] ("A full 23% of Americans say that paying for basic necessities such as rent, utilities and food contributes the most to their credit card debt . . . .").

69. *See Effect of Bank Failure on the Economy*, TATA CAP. BLOG (Apr. 20, 2020), https://www.tatacapital.com/blog/wealth-management/effect-of-bank-failure-on-the-economy/ [https://perma.cc/DTM8-2PN6] (explaining that businesses tend to rely on loans for big purchases like machines, manufacturing hardware, and storage units).

70. *See* Abello, *Small Banks Save Small Businesses, supra* note 12 (quoting Stacy Mitchell, a local economy advocate: "The problem with big banks isn't just that they're too big to fail, they're also too big to succeed at what we need banks to do." (internal quotations omitted)).

ensure bank consolidation is beneficial to local communities,[71] there is speculation that it is not balancing out the overall decrease in lending activity.[72]

This Note takes the position that the shift in focus from loans to investments negatively impacts small businesses[73] and people of color,[74] and that the CRA is not enough to offset these negative effects.[75]

A. How Banking Consolidation Harms Small Businesses

Protecting community banks protects small business by proxy, which in turn protects capitalism. Capitalism is "an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision, and by prices, production, and the distribution of goods that are determined mainly by competition in a free market;"[76] it is the economic system utilized by the United States.[77] However, capitalism only works when there is competition, which allows people to enter and exit the market as they choose.[78] Competition gives economic freedom: if a consumer is dissatisfied with a business, they can buy somewhere else, and workers

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71. *See* Community Reinvestment Act of 1977 (CRA) § 802, 12 U.S.C. § 2901(a) (2018) ("[R]egulated financial institutions have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.").

72. *See* Krista Shonk, *Community Reinvestment Act*, AM. BANKERS ASS'N, https://www.aba.com/banking-topics/compliance/acts/community-reinvestment-act [https://perma.cc/J6TS-T45U] (last visited Oct. 11, 2022) ("The rules implementing [the] CRA, however, have not kept pace with the times or with new technologies and are actually holding back investment in the very communities the law is intended to serve.").

73. *See infra* Part III.A.

74. *See infra* Part III.B.

75. *See infra* Part III.C.

76. *Capitalism*, MERRIAM-WEBSTER (11th ed. 2003).

77. *See* William A. Galston, *The U.S. Is Still a Capitalist Country*, BROOKINGS (Mar. 11, 2009), https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Capitalism [https://perma.cc/LT3N-HK2T] (explaining that, despite ongoing discussions about the best type of economic system, the United States remains a capitalist country).

78. *See* Sarwat Jahan & Ahmed Saber Mahmud, *What Is Capitalism?*, INT'L MONETARY FUND, https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Capitalism [https://perma.cc/UZ7Z-HDZC] (last visited Oct. 30, 2022) ("[C]ompetition, through firms' freedom to enter and exit markets, maximizes social welfare, that is, the joint welfare of both producers and consumers . . . .").

can choose to leave lower-paying jobs for ones offering a higher salary.[79]

Capitalism relies on competition to succeed, and competition relies on small businesses.[80] Small businesses diversify industries, boosting competition, thereby leading to an increase in consumer choice.[81] However, small businesses are financed almost exclusively by community banks.[82]

When a local bank closes, "small business lending in the area around that branch drops off and never recovers."[83] This is problematic not just to America's capitalist marketplace but also because small businesses employ over 52% of American employees.[84] Small businesses play a "vital role in job creation," without which many Americans may be left unemployed.[85] Additionally, small businesses help local communities thrive.[86] Whereas larger businesses hire non-local employees and pay non-local taxes, small business tend to hire locally and pay local taxes.[87] Small businesses tend to donate a higher percentage of profits to charity and be more environmentally friendly

79. *See id.* ("Capitalism is founded on . . . [the] freedom to choose with respect to consumption, production, and investment . . . .").

80. *See* Noah Smith, *If You Love Capitalism, Worry About Small Business*, FIN. POST (July 17, 2018), https://financialpost.com/entrepreneur/small-business/if-you-love-capitalism-worry-about-small-business-noah-smith [https://perma.cc/X6U3-GU6K] ("As big companies become more powerful, fewer new companies are being started."); *see also* NANDI ROBINSON, WHY BUY LOCAL?, MICH. STATE UNIV. CTR. FOR CMTY. & ECON. DEV. (2010), https://ced.msu.edu/upload/reports/why%20buy%20local.pdf [https://perma.cc/4M6P-Z54S] ("Small businesses employ more than [52%] of the nation's employees . . . . [and] have played a vital role in job creation, adding more than 5.1 million new jobs to our economy since 2003.").

81. *See* Smith, *supra* note 80 (explaining how small businesses promote capitalism).

82. *See* Oscar Perry Abello, *Why Are Two Community Banks from Across the Country Merging?*, NEXT CITY: THE BOTTOM LINE (Sept. 15, 2020) [hereinafter Abello, *Two Community Banks Merging*], https://nextcity.org/urbanist-news/why-are-two-community-banks-from-across-the-country-merging [https://perma.cc/3VL8-Q9SZ] (explaining that small banks are the financial backbone of small businesses).

83. *Id.*

84. *See* ROBINSON, *supra* note 80 ("Small businesses employ more than [52%] of the nation's employees . . . . [and] have played a vital role in job creation, adding more than 5.1 million new jobs to our economy since 2003.").

85. *Id.*

86. *See generally id.* ("[B]y buying local, you help create jobs for your friends and neighbors, contribute to improved public infrastructure, and invest in your community both socially and economically.").

87. *See id.* (explaining that small businesses put money back into the local economy, which helps with public infrastructure, such as public libraries and public schools, and small businesses tend to use locally sourced materials, reducing waste and pollution while simultaneously improving air quality and health).

than larger businesses.[88] Yet small businesses cannot succeed without community banks: community banks are "the primary, and frequently the only, outside creditors for small businesses."[89] When small businesses cannot rely upon community banks for loans, the business is typically left without other lending options.[90]

When large banks issue loans, the loans tend to be to larger businesses.[91] Larger businesses take out larger loans, meaning a greater return on interest without increasing underwriting costs.[92] Further, larger businesses are generally considered to be less risky, because they have more assets to put up as collateral or to liquidize if need be.[93] Larger banks are then disincentivized from making smaller loans to small businesses.[94] When large banks do issue smaller loans, the lenders typically have less knowledge about the community and the small business requesting the loan, which can result in higher interest rates compared to community banks.[95] These practices coupled together

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88. *See id.* (stating that local businesses tend to donate a higher percentage of sales to charity than larger, national businesses).

89. Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services. Industry, 1975-2000: Competition, Consolidation, and Increased Risks*, U. ILL. L. REV. 215, 262 (2002); *see* Robert M. DiChiaria et al., *Notable Lending Strengths of Community Banks*, *in* FDIC CMTY. BANKING STUDY, 4–12 (2020), https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf [https://perma.cc/97BN-XBP8] ("[C]ommunity banks continue to be key supporters of small business in their local areas . . . .").

90. *See* Wilmarth, *supra* note 89, at 262 (analyzing that small businesses are usually unable to find lending options beyond small banks).

91. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 ("Larger banks can make larger loans to businesses, and larger loans earn more in interest for a bank while costing the same amount of staff resources to underwrite as smaller loans.").

92. *Id.*

93. *See* Renee O'Farrell, *The Differences Between Large & Small Business Financing Options*, CHRON, https://smallbusiness.chron.com/differences-between-large-small-business-financing-options-3660.html [https://perma.cc/KRH9-3RX4] (last visited Dec. 30, 2022) (explaining that larger businesses have more assets to use as collateral and sell, have a longer and larger business history to determine risk, and are generally more established than smaller companies). *But see* Mitratech Holdings, Inc., *What Is Concentration Risk and How to Reduce It?*, JD SUPRA (Aug. 20, 2020), https://www.jdsupra.com/legalnews/what-is-concentration-risk-and-how-to-50651/ [https://perma.cc/Y3G3-Z43P] (explaining that when loans are concentrated to one business or area, the financial institution may be unable to operate should that loan default).

94. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 ("[A] bigger bank has less incentive to make the smaller loan sizes that many small businesses need.").

95. *See* Wilmarth, *supra* note 89, at 262 (describing how large banks typically have less information about the local community and local business because managers and lending officers tend to be rotated on short-term assignments between offices).

lead to small businesses rarely receiving or taking a loan fromlarger banks.[96]

Community banks with lower lending limits and smaller assets than larger banks rely more on small business lending for revenue than their larger counterparts.[97] Further, community banks do not have expensive financial analysts to help make risky investments, so their assets are primarily comprised of loans granted to community members.[98] Since loans are the primary source of revenue for community banks, they are familiar with the local economy and are aware of the reputation and creditworthiness of the small business borrower.[99] Smaller community banks tend to be "more flexible, more responsive, and more likely to maintain a credit relationship during an economic downturn," making community banks appealing to small business owners.[100] Should community banks become extinct, many small businesses would be lost as well.[101] This in turn would leave local economies vulnerable to liabilities like an increase in unemployment rates and a decrease in tax revenue.[102]

B. How People of Color Are Negatively Affected by Banking Consolidation

Banking consolidation negatively impacts people of color by restricting loan access. Large banks and community banks differ in the way loans are granted for consumer lending because community banks

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96. *Id.*; *see also* Abello, *Small Banks Save Small Businesses*, *supra* note 12 ("[A] bigger bank has less incentive to make the smaller loan sizes that many small businesses need.").

97. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 (describing why community banks are the primary source of loans for small businesses).

98. *See id.* (explaining that big banks pay high salaries for financial analysists to make investments, whereas smaller banks rely more on interest from loans to generate asset growth).

99. *See* Wilmarth, *supra* note 89, at 264 (explaining how small banks and small business are inherently complimentary).

100. *Id.*

101. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 (quoting Stacy Mitchell, a local economy advocate: "not having a banking system that can actually respond to the needs of local economies is a huge liability in a crisis." (internal quotations omitted)).

102. *See supra* notes 83–86 and accompanying text (explaining how small businesses help local communities thrive).

use loan officers.[103] Loan officers assess the risk of a potential borrower and have conversations throughout the process.[104] It is often a more personalized experience than the automated loan applications used by larger institutions.[105] Community banks "help keep their local economies vibrant and growing by taking on and managing the risks of local lending . . . ."[106] Further, community banks are able to "respond with greater agility to lending requests" due to the "detailed knowledge of the needs of their customers and their close ties to the communities they serve."[107] Big banks, on the other hand, typically use online forms that are then run through an algorithm to determine the suitability of the potential borrower.[108] The application process for large banks is less forgiving towards clients labeled high risk because it does not consider individual circumstance.[109] If a potential borrower does not meet the necessary requirements, like having a high enough credit score, the loan is automatically rejected.[110] Large banks' automated credit process is likely to disproportionately affect people of color.[111] Though

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103. *See* Abello, *Two Community Banks Merging*, *supra* note 82 (stating that community banks rely on relationships with loan officers to the community to assess lending risk).

104. *See id.* (juxtaposing community banks versus large banks: community banks rely on relationships of loan officers to the community to assess lending risk; larger banks rely on credit scores and algorithms).

105. *Id.*

106. Le, *supra* note 38, at 4.

107. *Id.*; *see also* Santiago Sueiro, *Banking for the People*, PROSPERITY NOW (Mar. 30, 2021), https://prosperitynow.org/blog/banking-people [https://perma.cc/ZB7S-2TXM] ("Community-owned banks are sometimes considered 'relationship' banks because they are small and develop close relationships with communities.").

108. *See* Abello, *Two Community Banks Merging*, *supra* note 82 (juxtaposing community banks versus large banks: community banks rely on relationships of loan officers to the community to assess lending risk; larger banks rely on credit scores and algorithms).

109. *Id.*

110. *Id.*

111. *See id.* (explaining that there is still a perception of risk when lending to communities of color); *see also* Sueiro, *supra* note 107 (describing how community banks, like credit unions and mutual banks, are committed to supporting vulnerable and underserved areas); *see also* Kristen Broady et al., *An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges In Accessing Banking Services*, BROOKINGS (Nov. 2, 2021), https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/ [https://perma.cc/J6ZQ-JGGH] ("The FICO scoring system, created in 1989, was designed to assess the creditworthiness of consumers . . . . The FICO credit score is used by financial institutions as a qualifier to assess financial health. It is not easy for individuals to improve their financial health once their credit score is damaged. Black

community banks, too, could improve lending practices for people of color,[112] they generally are a better option than larger banks due to their relationship-lending practices.[113]

The relationship lending offered by community banks benefits Black and Hispanic Americans: 54% of Black Americans and 41% of Hispanic Americans report having no credit score or a poor to fair score.[114] Meanwhile, only 37% of White Americans[115] report having bad or no credit.[116] Additionally, over half of Black Americans report living paycheck to paycheck, whereas the average rate of all Americans living paycheck to paycheck is 44%.[117] These are the metrics larger banks rely upon when granting loans.[118] As people of color are statistically more likely to have unsatisfactory credit financial metrics,[119] the process used by larger banks negatively affects them the

people are more likely to be excluded from conventional financial services based on their credit scores." (internal citations omitted)).

112. *See* Linna Zhu et al., *Who Serves More People of Color in Mortgage Lending: Banks or Nonbanks?*, URBAN INST. (Feb. 21, 2022), https://www.urban.org/urban-wire/who-serves-more-people-color-mortgage-lending-banks-or-nonbanks [https://perma.cc/D6WU-AZQD] ("Overall, banks made [23.2%] of their owner-occupant home purchase mortgage loans to borrowers of color, compared with [31.3%] for nonbanks.").

113. *See* Kyle Wooten, *Measuring What Community Banks Bring to the Table*, ABA BANK MKTG. (Apr. 24, 2019), https://bankingjournal.aba.com/2019/04/measuring-what-community-banks-bring-to-the-table/ [https://perma.cc/CME8-3T2F] ("Community banks are relationship lenders."); *see also* Henry Burgess-Marshall, *Socially Responsible Banks: Who You Should (And Shouldn't) Bank With!*, GROW ENSEMBLE (Feb. 13, 2020), https://growensemble.com/socially-responsible-banks/ [https://perma.cc/5U94-CGAV] ("[Smaller banks] are also known for granting loans to our most economically vulnerable communities, allowing for the vicious cycle of poverty to be stopped in its tracks.").

114. Megan Leonhardt, *Black and Hispanic Americans Often Have Lower Credit Scores – Here's Why They're Hit Harder*, CNBC (Jan. 28, 2021), https://www.cnbc.com/2021/01/28/black-and-hispanic-americans-often-have-lower-credit-scores.html [https://perma.cc/M7WF-4793].

115. This author has made the conscious decision to capitalize White. *See* Kristen Mack & John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity [https://perma.cc/24QT-GTRA] ("Choosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the standard and norm.").

116. *Id.*

117. *Id.*

118. *See* Abello, *Two Community Banks Merging*, *supra* note 82 (explaining that larger banks rely on credit scores and algorithms to grant loans).

119. This Note does not purport to adequately address all the reasons this statistic is true, such as systemic racism and the difficulties of breaking the cycle of poverty; however, the author would like to note that there are several sources available that explain and address these issues. *See, e.g.*, Angela Hanks et al., *Systematic Inequality: How America's*

most.[120] Banking consolidation is leading to the extinction of community banks,[121] which potentially means the extinction of relationship lending.[122] Such a loss could further increase the wealth gap in America between Black and White Americans.[123]

Banking mergers are rarely beneficial for people of color.[124] A recent example of this is Bank of Montreal's ("BMO") recent proposed acquisition of Bank of the West.[125] In Milwaukee, where over one-third of the population is Black, BMO made a mere seventeen mortgages to Black borrowers in 2021.[126] This track record leads many locals who bank with Bank of the West anxious about the future of lending in the community.[127]

Banking consolidation further harms people of color as brick-and-mortar banks are closed. Bank mergers can lead to branch closures,

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Structural Racism Helped Create the Black-White Wealth Gap, CTR. FOR AM. PROGRESS (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality/ [https://perma.cc/I2-64S6] (explaining the wealth gap between Black and White Americans and the policies that shaped the gap: "[f]rom slavery to Jim Crow, from redlining to school segregation, and from mass incarceration to environmental racism, policies have consistently impeded or inhibited African Americans from having access to opportunities to realize the American dream. Direct action must be taken to change an American system built on suppression, oppression, and the concentration of power and wealth."); *see also infra* notes 156–57 and accompanying text (defining redlining).

120. Burgess-Marshall, *supra* note 113 ("[Smaller banks] are also known for granting loans to our most economically vulnerable communities, allowing for the vicious cycle of poverty to be stopped in its tracks.").

121. *See* Abello, *Small Banks Save Small Businesses*, *supra* note 12 (explaining that while large and mid-size banks are increasing in number, small banks continue to decline).

122. *See* Wooten, *supra* note 113 ("Due to relationship banking at community financial institutions, these banks have the ability to take both the financial statements the borrower provides—as well as the personal knowledge of the borrower—into consideration for a loan.").

123. *See* Hanks et al., *supra* note 119 ("Unfortunately, wealth in this country is unequally distributed by race – and particularly between white and black households.").

124. *See* Dan Ennis, *BMO, Community Groups Square Off at Merger Hearings*, BANKING DIVE (July 15, 2022), https://www.bankingdive.com/news/bmo-community-groups-square-off-at-merger-hearing/627399/ [https://perma.cc/83GV-ADW7] ("Mergers rarely benefit communities already suffering from a history of redlining, racial covenants and other discriminatory practices." (quoting Letter from Amy Nelson, Exec. Dir., Fair Hous. Ctr. of Cent. Ind., to the Off. of the Comptroller of Currency & Fed. Rsrv. Sys. (July 14, 2022))).

125. *See id.* (describing the recent proposed acquisition Bank of the West by Bank of Montreal).

126. *See id.* ("[BMO] made just 17 mortgage loans to Black borrowers in that city last year — a 7% proportion for an area where more than one-third of the population is Black.").

127. *See id.* (explaining that community groups oppose BMO acquiring Bank of the West because of BMO's poor track record in lending to people of color).

harming low- and moderate-income ("LMI") areas.[128] LMI neighborhoods tend to have a higher proportion of people of color than more affluent neighborhoods.[129] Branch closures harm LMI communities that rely on physical branches to help them with the banking and lending process, while more affluent communities do not typically require such services.[130] In particular, banking consolidation in LMI neighborhoods leads to predatory financial services coming in to promote high-fee check-cashing.[131] With the increased cost of simply cashing a check, families in these neighborhoods lose more money, which can snowball into larger issues like being sent to collections, being evicted, or even needing to declare bankruptcy.[132] Some have

128. *See* Letter from Jesse Van Tol, CEO of Nat'l Cmty. Reinvestment Coal. to James P. Sheesley, Assistant Exec. Sec'y for the Fed. Deposit Ins. Corp. 18 (May 30, 2022) [hereinafter Letter from NCRC] (on file with the FDIC), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-017.pdf [https://perma.cc/K9BM-ZAQL] (explaining that in a community with 119 branches of a community banks and one large bank, merger of the two would likely lead to significant branch closure); *see also* Jed Edlebi et al., *The Great Consolidation of Banks & Acceleration of Bank Closures Across America*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 16, 2022), https://ncrc.org/the-great-consolidation-of-banks-and-acceleration-of-branch-closures-across-america/ [https://perma.cc/UG2W-DZJD] ("One-third of the branches closed from 2017 to 2021 were in a low- to moderate-income and/or a majority-minority neighborhood where access to branches is crucial to ending inequities in access to financial services."). *But see* OFF. OF THE COMPTROLLER OF THE CURRENCY, SUMMARY OF PROPOSAL TO MODERNIZE COMMUNITY REINVESTMENT ACT RULES 2, https://www.occ.treas.gov/topics/consumers-and-communities/cra/summary-of-cra-proposed-rule.pdf [https://perma.cc/992R-TDCA] (last visited Jan. 3, 2022) (proposing that any changes to the CRA include a policy that preserves bank branches, especially in LMI neighborhoods).

129. *See* Hanks et al., *supra* note 119 ("Unfortunately, wealth in this country is unequally distributed by race – and particularly between white and black households."); *see generally* Jeramy Townsley et al., *The Lasting Impacts of Segregation and Redlining*, SAVI (June 24, 2021), https://www.savi.org/2021/06/24/lasting-impacts-of-segregation/ [https://perma.cc/3936-AEEA] (providing background on how redlining is used to keep people of color in poverty).

130. *See* Letter from NCRC, *supra* note 128, at 18 ("These closures must receive elevated scrutiny under convenience and needs analysis since consumers and small businesses in lower income communities rely on branches to guide them through the banking and lending process.").

131. *See generally* Letter from Rohit Chopra & Jeremy Kress to William Barr, Att'y General 2 (Oct. 16, 2020) (on file with the FTC), https://www.ftc.gov/system/files/documents/public_statements/1581730/chopra_-_comment_doj_banking_merger_guidelines.pdf [https://perma.cc/QJZ5-HBKM] (explaining how branch closure disproportionately affects people in low- and moderate-income areas).

132. This list contemplates the severest cases and does not suggest that all families who pay more to cash checks will end up bankrupt. *See id.* ("[H]igh-fee check-cashing

pointed out that, on a macro scale, bank branches in the past two decades have almost doubled.[133] While this may be true, micro-level, individual bank closures remain prominent in LMI communities.[134]

Banking consolidation can lead to higher prices for consumers, pricing people of color out of the banking industry. Larger banks tend to have higher fees and higher requirements for minimum balances compared to community banks.[135] Accordingly, as banks consolidate, fees and minimum balances increase.[136] Bank consolidation also affects credit: it increases the price of loans while decreasing loan availability.[137] These rising price raises primarily impact lower-income households, which lack the funds to keep up with the price increases.[138] Considering that Black Americans are more likely to be low-income than White Americans,[139] price raises disproportionately affect people of color. When people cannot afford to pay the new banking prices, they frequently close their accounts and exit the banking industry.[140]

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companies other predatory financial service providers have proliferated in LMI areas affected by bank consolidation . . . . [H]ouseholds in LMI neighborhoods have been more likely to experience evictions and have debts sent to collection agencies following bank mergers.").

133. *See* Letter from BPI & MBCA, *supra* note 2, at 14 (asserting that over the past forty years, bank branches have doubled).

134. *See* Edlebi et al., *supra* note 108 ("One-third of the branches closed from 2017 to 2021 were in a low- to moderate-income and/or a majority-minority neighborhood where access to branches is crucial to ending inequities in access to financial services.").

135. *See* VITALY M. BOARD, BANK CONSOLIDATION & FIN. INCLUSION: THE ADVERSE EFFECTS OF BANK MERGERS ON DEPOSITORS, HARV. U. 6 (Dec. 1, 2018), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf [https://perma.cc/JF2R-GYYN] (explaining that large banks have higher fees and minimum required balances).

136. *Id.*

137. *See* Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. OF FIN. 495, 513 (2006) ("Increases in bank concentration affect not only the price of credit, but its availability as well.").

138. *See* BOARD, *supra* note 135, at 6 ("[Low income and unbanked] households' survey responses suggest that some of them respond to high account fees or minimum required balances by closing their deposit accounts and exiting the banking system.").

139. *See* Hanks et al., *supra* note 119 (discussing the wealth gap between Black Americans and White Americans).

140. *See* BOARD, *supra* note 135, at 6 ("[Low income and unbanked] households' survey responses suggest that some of them respond to high account fees or minimum required balances by closing their deposit accounts and exiting the banking system.").

Some argue that bank mergers are beneficial due to economies of scale, risk-diversification, and other efficiencies.[141] Economies of scale is used to theorize that the cost benefit of bank mergers will pass on to consumers through lower prices and more lending, but evidence shows bank mergers have harmed consumers by increasing pricing and decreasing lending.[142] Studies about economies of scale as it pertains to the financial system have concluded that, upon reaching the $10 to $25 billion dollar range, banks stop producing increasing returns.[143] Economies of scale cannot go on forever—eventually, large banks reach the point of diminishing returns.[144] Increasing costs for larger banks may also be attributed to the diversity in the products they offer: home mortgages, credit cards, securities brokerage accounts, and mutual funds.[145] These products are subject to stiff competition and thin price margins that may negatively impact returns.[146]

The continuing decline of community banks has disadvantaged people of color by restricting access to loans,[147] closing physical branches in LMI areas,[148] and increasing the overall cost to participate in the banking industry.[149]

141. *See generally* Letter from BPI & MBCA, *supra* note 2, at 18 (explaining that benefits of mergers primarily include economies of scale, risk-diversification, and general efficiencies).

142. *See* Letter from NCRC, *supra* note 128, at 17 (explaining that though economies of scale assume cost benefits will pass on to consumers, communities typically experience higher prices and less lending).

143. Wilmarth, *supra* note 89, at 279.

144. *See id.* at 280 ("[M]egamergers have produced banks that are likely to be scale-inefficient, because the resulting banks fall within a size range for which most empirical studies have identified decreasing returns to scale.").

145. *See id.* at 282 (explaining that large banks are more diverse in the financial products offered when compared to smaller banks).

146. *See id.* ("[T]hese 'commodity-like' consumer products are subject to intense competition and thin pricing margins.").

147. *See* Burgess-Marshall, *supra* note 113 ("[Smaller banks] are also known for granting loans to our most economically vulnerable communities, allowing for the vicious cycle of poverty to be stopped in its tracks.").

148. *See* Edlebi et al., *supra* note 128 ("One-third of the branches closed from 2017 to 2021 were in a low- to moderate-income and/or a majority-minority neighborhood where access to branches is crucial to ending inequities in access to financial services.").

149. *See* BOARD, *supra* note 135, at 6 (explaining that large banks have higher fees and minimum required balances).

C. Why the CRA Fails to Fix Problems Arising From Banking Consolidation

The CRA requires banking institutions to "serve the convenience and needs of the communities in which they are chartered to do business" which includes "the need for credit services" and the "obligation to help meet the credit needs of the local communities."[150] Part of the CRA gives the appropriate federal financial regulatory agency the power to "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods" and to take this record into account when considering a bank's application for a merger or acquisition.[151]

The policy governing the CRA is that when a bank is given the benefit of a public charter, it owes a duty to serve the credit needs of the community where it is chartered.[152] Regulators examine the bank's practices to determine if the local credit needs are being met.[153] When a bank is engaging in activities like mortgages, consumer and business lending, community investments, and low-cost services that benefit LMI areas, the bank receives points, which are then summed up to receive an overall rating.[154] The bank will receive a rating of outstanding, satisfactory, needs to improve, or substantial noncompliance.[155] Ratings are used by regulators when considering applications for bank mergers.[156]

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150. CRA § 802, 12 U.S.C. 30 § 2901(a) (2018).

151. CRA § 804, 12 U.S.C. 30 § 2903(a) (2018).

152. *See, e.g.*, Katherine Pino, Note, *OCC's Final Rule on the Community Reinvestment Act – Separate From Other Regulators*, 40 REV. BANKING & FIN. L. 768, 770 (2021) (explaining that the CRA was made under the understanding that banks are obliged to meet the credit needs of communities in which they were chartered).

153. *See* DARRYL E. GETTER, CONG. RSCH. SERV., R43661, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT 1 (2020), https://crsreports.congress.gov/product/pdf/R/R43661 [https://perma.cc/VUV4-RVKN] ("The CRA requires federal banking regulators to conduct examinations to assess whether a bank is meeting local credit needs.").

154. *See id.* (explaining how points are issued for the CRA).

155. CRA § 807, 12 U.S.C. 30 § 2906(b)(2) (2018).

156. *See* 12 C.F.R. § 225.84(a)(1)(i) (2005) ("Upon receiving a notice regarding performance under the Community Reinvestment Act . . . a financial holding company may not . . . [d]irectly or indirectly acquire control, including all or substantially all of the assets, of a company engaged in any activity under section 4(k) or 4(n) of the BHC Act."); *see also* GETTER at 1 (explaining that regulators take a bank's CRA rating into account when the institution applies for a charter, branch, merger, acquisition, or when the bank seeks to take other actions that require regulatory approval).

The CRA was initially enacted (1) to address concerns about using community deposits to fund nonlocal activities at the expense of community needs, and (2) to prohibit redlining.[157] Redlining can be defined in two ways: "the refusal of a bank to make credit available to all of the neighborhoods in its immediate locality," and "the practice of denying a creditworthy applicant a loan for housing located in a certain neighborhood even though the applicant may qualify for a similar loan in another neighborhood."[158] Redlining almost exclusively impacts people of color.[159]

Regulators apply three tests—lending, investment, and service—to determine if a bank is meeting their local credit needs, with lending being the weightiest of the tests.[160] The lending test considers "the number, amount, and distribution across income and geographic classifications of a bank's retail banking activities . . . ."[161] The service test considers the availability of brick-and-mortar branches and low-cost checking within the geographic area.[162] Finally, the investment test evaluates the bank's community development within the geographic area.[163] Only large banks are subjected to all three tests, while

157. *See* GETTER at 1 (summarizing the concern that banks were using local money to fund out-of-state activities at the expense of the community's housing, agricultural, and small business needs; there was also a need to discourage redlining).

158. *Id.* at 2.

159. *See* Jason Richardson et al., *Redlining and Neighborhood Health*, NAT'L CMTY. REINVESTMENT COAL., https://ncrc.org/holc-health/ [https://perma.cc/RC5A-Y5LV] (last visited Jan. 3, 2022) (explaining that redlining was "a practice that intentionally restricted investment in parts of American cities based largely on the race of people that lived there . . . .").

160. *See* GETTER at 5–6 (illustrating that equitable lending may receive up to 12 points whereas strong investment and service may only receive up to 6).

161. *Id.* at 5; *see also* COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS, COMMUNITY REINVESTMENT ACT EXAMINATION PROCEDURES, 37–42 (revised May 1999), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/cra-exam-procedures/pub-ch-cra-exam-procedures.pdf [https://perma.cc/AC6M-9HTF] (stating the procedure for the lending test).

162. *See* GETTER at 5 ("The *service* test examines a bank's retail service delivery, such as the availability of branches and low-cost checking in the assessment area."); *see also Community Reinvestment Act Examination Procedures*, *supra* note 152 (prescribing the steps for evaluating a bank's service).

163. *See* GETTER at 5 ("The *investment* test grades a bank's community development investments . . . ."); *see also Community Reinvestment Act Examination Procedures*, *supra* note 152 (prescribing the steps for the investment test).

intermediate banks are subject to the lending and investment tests, and community banks are subjected to only the lending test.[164]

A recent, ongoing concern has been that the CRA is not stringent enough, which is why federal agencies have recently proposed updating the act.[165] Almost all banks receive a satisfactory rating, which could indicate weak enforcement.[166] At the same time, this is difficult to prove: the CRA is largely subjective because the number of points given is at the regulator's discretion; there is no objective rule to determine why banks have received a particular rating.[167] It is difficult to discern if the CRA is influencing banking behavior or if the procedures need improvement.[168] The inherent subjectivity of the CRA has created a lack of consistency, simplicity, and transparency.[169]

In 2022, changes to the CRA were proposed to "measure CRA performance more objectively by assessing the distribution and the impact of a bank's CRA activity"[170] and help eliminate some of the current subjectivity of the CRA.[171] Further, the proposal seeks to "adopt a metrics-based approach" to provide greater clarity and

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164. *See* GETTER at 6–7 ("Small banks are typically evaluated under the lending test . . . . Intermediate small banks are subject to both the lending and investment tests. Large banks are subject to all three tests.").

165. *See* Joint Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., & Off. of the Comptroller of the Currency, Agencies Issue Joint Proposal to Strengthen and Modernize Community Reinvestment Act Regulations (May 5, 2022) (on file with the OCC), https://www.occ.treas.gov/news-issuances/news-releases/2022/nr-ia-2022-47.html [https://perma.cc/PK76-FTQP] (proposing changes to the CRA based on the recent concerns around its effectiveness). *But see* Bethany Johnson, Note, *Proposals for Regulatory Reforms to the Community Reinvestment Act*, 39 REV. BANKING & FIN. L. 898, 903 (Spring 2020) ("While critique of the regulatory framework of the CRA abound, critiques of the CRA itself also exist . . . .").

166. *See* Kress, *supra* note 2, at 490 (explaining that 90% of banks receive a satisfactory rating and have no incentive to reach an outstanding rating).

167. *See* GETTER at 10 ("Without specific definitions of the criteria or quotas, the CRA examination may be considered subjective.").

168. *See id.* ("Whether the consistently high ratings reflect the CRA's influence on bank behavior or whether the CRA examination procedures needs improvement is difficult to discern"). *But see* Pino, *supra* note 152, at 772 ("The CRA continues to have a strong impact on credit availability in LMI neighborhoods, helping to grow businesses and strengthen communities overall.").

169. *See* Johnson, *supra* note 165, at 902 (explaining that critics of the CRA's regulatory framework complain of a lack of consistency, simplicity, and transparency in the evaluation process).

170. OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 128, at 2.

171. *See* GETTER at 10 ("Without specific definitions of the criteria or quotas, the CRA examination may be considered subjective.").

consistency.[172] Whether such measures will be adopted successfully will be indicated with time.[173]

As it stands, the CRA is not enough to combat the impact of banking mergers and acquisitions on marginalized communities.[174] There is no consideration of: (1) how well banks have met credit needs specifically for people of color, (2) the banks engagement in diverse hiring and diverse contract awards, or (3) the creation of local community councils.[175] The recent proposal also makes no explicit mention of race,[176] despite the CRA's purpose of preventing racial discrimination.[177] It seems unlikely the CRA will address this problem in the near future.

A bank is not immediately sanctioned for failing CRA applications, and most banks are content to remain at a "satisfactory" rating, with no incentive to reach "outstanding."[178] In fact, other than

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172. FED. RSRV., FACT SHEET: COMMUNITY REINVESTMENT ACT PROPOSAL (May 2022), https://www.federalreserve.gov/consumerscommunities/files/cra-fact-sheet-20220505.pdf [https://perma.cc/DH5P-2GA6] ("The proposal would adopt a metrics-based approach to CRA evaluations of retail lending and community development financing, and which includes public benchmarks, for greater clarity and consistency.").

173. *See* Letter from Jesse Van Tol, President & CEO of Nat'l Cmty. Reinvestment Coal., to Chief Couns.'s Off., Off. of the Comptroller of the Currency, Ann E. Misback, Sec'y of the Bd of Governors of the Fed. Rsrv. Sys., & James P. Sheesley, Assistant Exec. Sec'y of the Fed. Dep. Ins. Corp. 5 (Aug. 3, 2022) [hereinafter Letter Two from NCRC] (on file with NCRC), https://ncrc.org/wp-content/uploads/dlm_uploads/2022/08/NCRC-CRA-NPR-comment-letter.pdf [https://perma.cc/2E5X-BGTX] (opining that the agencies have not yet provided enough guidelines to the proposed objective tests to prevent loopholes that could inflate ratings).

174. *See* Shonk, *supra* note 72 ("[T]he rules implementing CRA, however, have not kept pace with the times or with new technologies and are actually holding back investment in the very communities the law is intended to serve.").

175. *See Hearing*, *supra* note 3 (statement of Maureen Flynn, Deputy Director, Mass. Ass'n. of Cmty. Dev. Corps., Inc.) (describing how when Bank of America acquired a smaller bank, the bank would not commit to small business lending goals, diversity in hiring goals, diversity in contract awarding goals, or a community bank advisory council).

176. *See* Letter Two From NCRC, *supra* note 173, at 2 ("The agencies proposed important improvements in the CRA regulation . . . However, they did not sufficiently address pressing and persistent racial inequities.").

177. *See* DARRYL E. GETTER, CONG. RSCH. SERV., R43661, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT 1 (2020), https://crsreports.congress.gov/product/pdf/R/R43661 [https://perma.cc/4Z56-WJ3X] (explaining the CRA was enacted, in part, to prohibit redlining).

178. *See* Bank Holding Companies and Change in Bank Control, 12 C.F.R. § 225.84(a)(2) (2022) ("A financial holding company receives notice for purposes of this paragraph at the time that the appropriate Federal banking agency . . . provides notice to the institution or company that the institution has received a rating of 'needs to improve record of meeting community credit needs' or 'substantial noncompliance in meeting community credit needs' in the institution's most recent examination under the Community

the consideration of CRA ratings during the merger process, the only consequence for failing to receive a satisfactory rating is that bank holding companies are unable to engage in investment banking.[179] There is no indication that any update to the CRA will include a stronger consequence, such as a sanction.[180]

Further, the CRA is an assessment used to ensure requirements are met prior to a merger, but there's no incentive for banks to continue meeting these requirements post-merger.[181] So even though two banks merging may pledge to make decisions based on the CRA, there is no way to ensure the banks will follow through once merged.[182] One reason for this is because mergers look to the past by considering how the bank has previously complied with the CRA, and ratings can sometimes be up to three years old.[183] Another reason is that a merged bank changes the institutional structure, so there is no guarantee the bank can follow through on such promises after merging.[184] Without an incentive to continue meeting the CRA post-merger, the CRA cannot

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Reinvestment Act."); *see also* Kress, *supra* note 2, at 490 (explaining that 90% of banks receive a satisfactory rating and have no incentive to reach an outstanding rating).

179. *See* 12 C.F.R. § 225.84(a)(1) ("Upon receiving a notice regarding performance under the Community Reinvestment Act . . . a financial holding company may not . . . commence any additional activity under section 4(k) or 4(n) or the BHC act (12U.S.C. 1843(k) or (n)); or . . . [d]irectly or indirectly acquire control, including all or substantially all of the assets, of a company engaged in any activity under section 4(k) or 4(n) of the BHC Act."); *see also* GETTER at 1 (explaining that regulators take a bank's CRA rating into account when the institution applies for a charter, branch, merger, acquisition, or when the bank seeks to take other actions that require regulatory approval).

180. *See* Community Reinvestment Act, 87 Fed. Reg. 107, 33925 (May 5, 2022) (to be codified at 12 C.F.R. pts. 25, 228, 345) (acknowledging concerns regarding the lack of consequence for failure to comply with the CRA, but proposing no solution).

181. *See Hearing*, *supra* note 3 (statement of Maureen Flynn, Deputy Director, Mass. Ass'n. of Cmty. Dev. Corps., Inc.) (explaining that after banks merge, there is no assessment under the CRA or the Bank Holding Company Act to ensure that requirements are met, meaning there is no incentive for banks to maintain their diminishing services post-merger).

182. *See* Letter from NCRC, *supra* note 128, at 17 (explaining that mergers change the institutional structure of banks, so banks may become less responsive to areas farther away from the main office, and noting that the CRA cannot account for this).

183. *See id.* at 18 (explaining that CRA exams can be two or more years old); *see also* 12 C.F.R. § 225.84(a)(2) (defining "notification" as "the time that the appropriate Federal banking agency" provides notice of an institution's rating for "the institution's most recent examination under the Community Reinvestment Act.").

184. *See* Letter from NCRC, *supra* note 128, at 17 (explaining mergers change the institutional structure of banks, so they may become less responsive to areas farther away from the main office, and the CRA cannot account for this).

truly address the problems created by the influx of bank consolidation.[185]

The current problems surrounding the CRA leads one to believe that perhaps there is not a way to ensure that large banks benefit people of color and small businesses,[186] insinuating that protecting community banks from banking consolidation is the best way to shield LMI communities from financial hardship.

IV. KEEPING COMMUNITY BANKS AS COMMUNITY BANKS

The layered problem of bank consolidation has received many suggestions, such as breaking up banks labeled TBTF or changing the corporate governance or finances of TBTF banks in order to increase competition.[187] At this point, however, it is unlikely that breaking up TBTF banks is feasible.[188] Some suggest bringing back Glass-Steagall: without bank holding companies being able to engage in investing, banks will necessarily be smaller, taking pressure off competition and consolidation.[189] Though Glass-Steagall could help alleviate some of the ramifications of banking consolidation, the number of banks

185. *See Hearing*, *supra* note 3 (statement of Maureen Flynn, Deputy Director, Mass. Ass'n. of Cmty. Dev. Corps., Inc.) (explaining that after banks merge, there is no assessment under the CRA or the Bank Holding Company Act to ensure that requirements are met, meaning there is no incentive for banks to consider diminishing services post-merger); *see generally* 87 Fed. Reg. 107 (proposing changes to the current CRA).

186. *See* DARRYL E. GETTER, CONG. RSCH. SERV., R43661, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT 1 (updated Jan. 16, 2020), https://crsreports.congress.gov/product/pdf/R/R43661 [https://perma.cc/VUV4-RVKN] ("Whether the consistently high ratings reflect the CRA's influence on bank behavior or whether the CRA examination procedures need improvement is difficult to discern."). *But see* Pino, *supra* note 152, at 772 (opining that the CRA continues to have an impact on credit availability in LMI neighborhoods); OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 128, at 2 ("The [CRA] proposal would increase support for small businesses . . . by raising the eligible size of loan that qualifies as a small business loan . . . in LMI areas and indexing that ceiling to inflation going forward.").

187. *See* Dale B. Thompson, *Beyond Dodd-Frank: Pinning Down the Octozilla of Too-Big-To-Fail with Multiple Market Instruments*, 35 BANKING & FIN. SERVS. POL'Y REP. 1, 2 (2016) (explaining that scholars have suggested several ways to address the problems caused by banks labeled TBTF).

188. *See* Peter Boone & Simon Johnson, *Way Too Big to Fail*, NEW REPUBLIC (Nov. 7, 2010), https://newrepublic.com/article/78563/way-too-big-fail [https://perma.cc/U8AZ-WHSP] (opining that legislation reforming big banking is unlikely to succeed).

189. *See* Matthews, *supra* note 46 (describing how some activists are pushing for the reenactment of Glass-Steagall).

decreased by a third in the fifteen years before it was repealed, suggesting that Glass-Steagall as it was did not stop consolidation.[190]

One prevalent proposal is to apply a more rigorous standard to banking merger applications.[191] While a necessary step, if it was the only one taken, community banks would still struggle to compete with larger banks.[192] Simply restricting mergers and acquisitions could lead to community banks closing due to an inability to compete, effectively the same outcome as intentional consolidation.[193] To rectify the problems caused by the influx of bank mergers and acquisitions, Congress should consider revamping the banking merger and acquisition process[194] while simultaneously incentivizing banks to stay small by offering tax breaks.[195]

A. Rigorizing Banks Merger and Acquisition Applications

Since 2013, there have been over a 1,000 banking merger requests submitted to the FDIC, and none of them have been rejected.[196] Part of this is because an applicant may withdraw their proposal after they are informed of any issues that may preclude approval.[197] Even

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190. *See* Mahon, *supra* note 53 (observing that, although the Gramm-Leach-Blilely Act further encouraged banking consolidation, the trend of consolidation began before the act's passage while Glass-Steagall was still in force).

191. *See* Press Release, Elizabeth Warren, Sen. Warren & Rep. Chuy Garcia Introduce the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications (Sept. 30, 2021) [hereinafter Press Release, Bank Merger Review Modernization Act], https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-chuy-garca-introduce-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications [https://perma.cc/WL46-LALC] ("It's time to stop rubberstamping bank mergers at the expense of consumers, communities, workers and the financial system.").

192. *See* D'Silva & Williams, *supra* note 4 (describing how smaller banks compete with larger banks, but do not have the financial strength to keep up with the fierce competition from larger banks).

193. *See* Foster, *supra* note 20, at 55 (opining that any competitors that are not TBTF are unable to compete in the market).

194. *See infra* Part IV.A.

195. *See infra* Part IV.C.

196. Press Release, Elizabeth Warren, Warren Blasts Federal Regulators, *supra* note 14.

197. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., JANUARY 1 – JUNE 30, 2022, 9 BANKING APPLICATIONS ACTIVITY SEMIANNUAL REPORT 2, 2 (2022), https://www.federalreserve.gov/publications/files/semiannual-report-on-banking-applications-20221221.pdf [https://perma.cc/QE3H-8DEQ] ("Applicants may choose to withdraw a proposal after the Federal Reserve informs the applicant that one or more

considering this, in 2022 there were ninety-nine applications for regular bank mergers.[198] Of that total, none were denied: twenty were pending and twelve were withdrawn—the remaining sixty-seven were approved.[199] Currently, regulators are not required to reject a certain number of mergers.[200] When considering if a merger is granted, the agency approving the merger considers (1) the effect on competition, including any potential anti-trust issues; (2) how the merger may affect the public's needs and conveniences; (3) the strength of the merging bank's finances and manages; and (4) the financial stability of the banking industry as a whole.[201] However, in practice, regulators focus narrowly on competitiveness without considering the broader impacts of a merger.[202] Regulators neglect critically assessing how mergers impact the convenience and needs of local communities.[203]

Granted, there are proponents of the idea that merger and acquisition applications need to be less regulated.[204] These proponents point out that the banking industry is already "treated more stringently than any other industry," which, they argue, is counterintuitive when considering the number of choices a consumer has when choosing a bank.[205] Yet this ignores banks' fundamental role in the free market which is absent from other industries, a role that causes virtually every

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significant supervisory or other issues exist that could preclude staff from recommending approval under the relevant statutory factors . . . .").

198. *Bank Application Actions – Search Result*, *supra* note 15 (select a start date of 1/01/2022 and an end date of 12/31/2022, select the application type as "Merger – Regular," then click the search button).

199. *Id.*

200. Press Release, Elizabeth Warren, Warren Blasts Federal Regulators, *supra* note 14.

201. *See generally* Bank Holding Companies, 12 U.S.C. § 1842© (listing the factors considered by regulators when determining whether to accept or deny a merger application).

202. *See* Press Release, Elizabeth Warren, Bank Merger Review Modernization Act, *supra* note 191 ("Financial agencies almost exclusively focus their analyses on narrow measures of competitiveness that fail to account for the broader impacts of the merger.").

203. *See* Letter from NCRC, *supra* note 128, at 3 ("We believe that current agency reviews prioritize concerns related to anti-competitiveness and neglect the part of the framework that requires them to assess how a merger would impact the convenience and needs of communities.").

204. *See* Letter from BPI & MBCA, *supra* note 2, at 12 ("Assertions that the bank-merger policy that has formed over the preceding decades is inadequate are wrong. Indeed, . . . today's approach is too restrictive . . . .").

205. *See id.* at 12 ("[T]he banking industry is treated more stringently than any other industry, which is particularly inappropriate in view of the growing and substantial choices available to customers beyond those banks with branches in their local community . . . .").

person to directly or indirectly interact with banks.[206] Banks also receive significant protection and assistance from the government.[207] One such benefit is that the FDIC insures deposits for checking accounts, saving accounts, money market deposit accounts, certificates of deposit, and prepaid cards.[208] The government's protection of banks renders stringent regulation not only appropriate but necessary.[209] Adversaries of modernizing bank merger regulations also point out that the banking industry is less concentrated than other industries.[210] However, since banking is a unique industry that impacts virtually every industry and every consumer,[211] consolidation has a greater impact on the banking industry than in other industries.

The legislation prescribing whether mergers will be approved details that "[i]n every case, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served."[212] Despite this clear instruction, banking regulators give greater weight to competition than to the impact of a bank merger on the public.[213] Previously, mergers were denied because they did not

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206. *See Hearing*, *supra* note 3 (statement of Rep. Barney Frank, Member, Comm. on Fin. Servs.) (pointing at the fact that, though banks are private institutions, banks are in a unique position to impact the free market, and virtually everyone must interact with them).

207. *See id.* (statement of Rep. Barney Frank, Member, Comm. on Fin. Servs.) (opining that regulation of banks is appropriate because they receive government protection and assistance).

208. *See Are My Deposit Accounts Insured By the FDIC?*, FED. DEPOSIT INS. CORP. (July 1, 2021), https://www.fdic.gov/resources/deposit-insurance/financial-products-insured/ [https://perma.cc/P33M-WKQX] (detailing that "FDIC insurance covers traditional deposit accounts, and depositors do not need to apply for insurance," then going on to describe what banking products are covered by deposit insurance).

209. *See Hearing*, *supra* note 3 (statement of Rep. Barney Frank, Member, Comm. on Fin. Servs.) (opining that regulation of banks is appropriate because they receive government protection and assistance).

210. *See* Letter from BPI & MBCA, *supra* note 2, at 14 (asserting that, compared to other industries such as cable programming and telecommunication, the banking industry is less concentrated).

211. *See Hearing*, *supra* note 3 (statement of Rep. Barney Frank, Member, Comm. on Fin. Servs.) (pointing out that, though banks are private institutions, banks are in a unique position to impact the free market, and virtually everyone must interact with them).

212. Federal Deposit Insurance (FDI) Act § 2[18], 12 U.S.C. § 1828(c)(5)(B) (2018).

213. *See* Letter from NCRC, *supra* note 128, at 3 ("We believe that current agency reviews prioritize concerns related to anti-competitiveness and neglect the part of the framework that requires them to assess how a merger would impact the convenience and needs of communities."); *see also* Letter from Ctr. for Am. Progress to James P. Sheesley, Assistant Exec. Secr'y for the Fed. Deposit Ins. Corp. 7 (May 27, 2022) [hereinafter Letter from CAP] (on file with the FDIC), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-013.pdf [https://perma.cc/E2L8-QFPN] (stating that the

affirmatively benefit the public, but such an approach is not used presently with community impact being an "afterthought" that is merely "perfunctory."[214] One way to change this perfunctory analysis is to first make a rebuttable presumption that mergers do not benefit the public and require banks to provide a quantifiable estimate as to how the merger may positively impact their community.[215] Regulators should develop a cost benefit analysis of merger impact,[216] considering, amongst other things, how a merger will impact access to and pricing of products like mortgages, loans, and digital payment services.[217]

Currently, regulators primarily consider CRA scores to assess public benefit, even though the CRA evaluates past performance and banks are typically incentivized to do the bare minimum in receiving a satisfactory score.[218] Banks applying for a merger should be required to present a community benefit plan and be encouraged to make a community benefit agreement.[219] A community benefit plan, on the other hand, would be a five-year forward-facing plan with clear performance standards and accountability mechanisms to ensure the

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reviews of bank mergers have placed insufficient emphasis on negative impacts to communities and consumers). The imbalance of focus between competition and community impact may be partially due to the statute itself. The statute emphasizes that agencies may not approve bank mergers that lessen competition and promote monopolies, whereas the statement about "convenience and needs of the community" feels lost in between. *See* § 1828(c)(5)(A) (stating that a merger which "would result in a monopoly, or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize" the banking industry will not be approved); *see also* § 1828(c)(5)(B) (instructing first that a merger that would "substantially lessen competition" or "tend to create a monopoly" will be rejected, and instructing the responsible agency to consider the stability of the United States financial system, with the portion about community impact embedded in between).

214. *See* Letter from CAP, *supra* note 213, at 7–8 (opining that, though banking mergers were previously denied explicitly because they did not affirmatively benefit the public, this standard is now an afterthought and the analysis is perfunctory).

215. *See id.* at 8 (proposing that agencies should presume mergers are not beneficial to the public and banks should provide a quantifiable estimate as to how the proposed merger may impact their communities).

216. *See* Letter from NCRC, *supra* note 128, at 4 (suggesting that regulators implement a cost benefit analysis to assess the impact of a merger on local communities).

217. *See* Letter from CAP, *supra* note 213, at 9 (proposing that regulators look at the market for products offered by banks and consider if a merger would impact access to and pricing of these products).

218. *See id.*, at 8 ("Since the CRA scores only evaluate banks' past performances, this leaves out a much-needed evaluation of the potential future public benefits of a merger."); *see also* Kress, *supra* note 2, at 490 (explaining that 90% of banks receive a satisfactory rating and have no incentive to reach an outstanding rating).

219. *See* Letter from NCRC, *supra* note 128, at 4 (suggesting that part of a banking application could be community benefit plan, with a community benefit agreement encouraged).

merger is beneficial to the public.[220] To further address how a merger may affect access to banking products,[221] these plans would contain specific goals to increase loans, investments, and services in communities of color and LMI communities.[222] A community benefit plan could be strengthened by being made into a community benefit agreement: an agreement with a community organization to ensure lending and reinvestment activity increases after the merger.[223] Further, since this would be an agreement, the merging bank would be held accountable in following through with its end of the deal.[224]

There must be stronger communication between federal agencies such as the Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency.[225] By considering commentary from other agencies, the agency determining if the bank merger will be granted can better ensure the analysis of public benefit is correct.[226] Part of this process, however, would be better maintaining agency websites so that the public can easily give feedback and input when a merger is being considered.[227]

Recent announcements that public hearings will become more frequent should help with the public weighing in on potential bank

220. *See id.* (explaining that community benefit plans would have clear performance standards and strong accountability mechanisms).

221. *See id.* at 8 (explaining that access to financial service needs to be factored in when considering potential bank mergers).

222. *See id.* at 4 ("A [community benefit plan] should contain quantitatively-expressed bank goals for increasing loans, investments and services in communities of color and low- and moderate-income communities over a time period of three to five years after the merger.").

223. *See id.* at 5 (explaining that research shows that community benefit agreements "have increased bank lending and reinvestment activity after mergers over the ensuing three or more years.").

224. *See supra* notes 179–83 (detailing that, currently, there is no requirement for merged banks to continue meeting CRA requirements post-merger).

225. *See* Todd Phillips & Alex Fredman, *How to Reform the Bank Merger Process*, CTR. FOR AM. PROGRESS (June 10, 2022), https://www.americanprogress.org/article/how-to-reform-the-bank-merger-process/ [https://perma.cc/LW49-6UCM] ("The FDIC should weigh in on every bank merger adjudicated by the OCC and the Fed.").

226. *See* Letter from NCRC, *supra* note 128, at 5–6 (opining that regulators should consider commentary from the CFB, DOJ, and FTC to ensure public benefit analysis is correct).

227. *See id.* at 11 (opining that agency websites are difficult to use and navigate, which makes it harder for the public to know what's going on and to weigh in on bank merger activity).

mergers.[228] However, hearings are still not mandated.[229] Hearings need to occur on a frequent basis to ensure regulators understand the full impact of a merger to the public and should be made accessible by implementing an interactive virtual option.[230] These hearings should be mandatory, at least where there is poor lending performance and the potential merger could lead to branch closure.[231]

By implementing strategies to focus on future public benefit and to better understand the impact of a bank merger on the public,[232] regulators will properly consider community needs and convenience as prescribed by statute.[233] These priorities would shift the priority of mergers to the public interest, thus "prevent[ing] harmful consolidation, protect[ing] bank customers, and safeguard[ing] the stability of the financial system."[234]

B. Incentivizing Banks to Stay Small with Tax Breaks

Generally, small business owners report being very or moderately financially burdened by taxes.[235] This is likely true when

228. *See* Evan Weinberger, *Bank Mergers Face More Public Hearings, Scrutiny Under Biden*, BLOOMBERG L. (May 24, 2022, 11:00 AM), https://news.bloomberglaw.com/antitrust/bank-mergers-face-more-public-hearings-scrutiny-under-biden?campaign=93BE5CB2-DBF2-11EC-841A-8FD24F017A06 [https://perma.cc/CDE7-NL3N] (analyzing the announcement that public hearings for bank mergers will become more frequent).

229. *See id.* (explaining that though regulators are required to "collect public comments on proposed bank mergers," they are not "required to hold public hearings.").

230. *See* Letter from NCRC, *supra* note 128 (explaining the importance of public hearings and how virtual hearings need to be improved upon).

231. *See id.* at 10 (opining that if hearings are not automatic in all mergers, they should be automatic where branch closures are considerable and fair lending performance is poor). *But see* Weinberger, *supra* note 229 (criticizing public hearings for being performative and distracting from changes to the banking merger process).

232. *See generally* Letter from NCRC, *supra* note 128, at 4–10 (explaining how regulators can better consider public benefit of a bank merger).

233. *See* FDI Act § 2[18], 12 U.S.C. § 1828(c)(5)(B) (2018) ("In every case, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served . . . .").

234. Press Release, Elizabeth Warren, Bank Merger Review Modernization Act, *supra* note 191.

235. *Compare 2021 Tax Survey*, NFIB RSCH. CTR., https://assets.nfib.com/nfibcom/NFIB-Tax-Survey-Full-Report.pdf [https://perma.cc/GF2M-4UKV] (last visited Jan. 15, 2023) ("NFIB surveyed its members on various tax-related topics. The survey collected information on . . . small business operations . . . . Respondents report significant financial and administrative tax burdens. Responses showed a high variability in the financial and administrative burdens associated with different taxes, with

applied to small banks, which are essentially small businesses.[236] When small banks pay taxes, the cost is removed from the bank's profits, which is capital that could have been used for community lending.[237] Taxes on community banks impact the banks' cash flow that could be used to invest in the business, invest in employees, and compete with larger banks.[238] It could then be inferred that small banks are incentivized to merge or acquire with larger banks in part to ease the financial burden of paying taxes.[239]

Previous tax cuts benefitted large banks, leading to higher net income and returns and strengthening capital.[240] The tax cuts resulted in record profits for large banks.[241] Further, tax cuts for companies in 2018 benefitted several community banks by increasing overall income for the year.[242] By redesigning banking taxes to benefit community banks, community banks might be incentivized to stay local instead of

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federal income tax being the most burdensome, followed by payroll and state/local income taxes."), *with Our Position: Tax Policy*, INDEP. CMTY. BANKERS OF AM. (ICBA), https://www.icba.org/our-positions-a-z/tax-policy [https://perma.cc/4YAA-72TA] (advocating for tax relief so community banks can give the money saved on taxes back to communities).

236. *2021 Tax Survey*, *supra* note 236; *see Our Position: Tax Policy*, *supra* note 236 ("A fair and unbiased tax code will enhance the viability of community banks and the vital role they service in the U.S. economy as a source of lending for consumers, small businesses, and farms.").

237. *See* William Dunkelberg, *Impact of Taxes On Small Business*, FORBES (Oct. 6, 2021, 3:06 PM), https://www.forbes.com/sites/williamdunkelberg/2021/10/06/impact-of-taxes-on-small-business/?sh=4bd74f323250 [https://perma.cc/TA4W-QUU5] ("Taxes reduce profits, and profits are the primary source of financing for small business . . . .").

238. *See id.* ("[T]axes are a financial and administrative burden that directly impact [small business's] ability to invest in their business, their employees, and compete in the broader economy.").

239. *See Our Position: Tax Policy*, *supra* note 236 ("A fair and unbiased tax code will enhance the viability of community banks and the vital role they service in the U.S. economy as a source of lending for consumers, small businesses, and farms.").

240. *See* Jim Tankersley, *Banks Are Big Winners From Tax Cut*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/us/politics/banks-are-big-winners-from-tax-cut.html [https://perma.cc/VMM4-472E] (describing how 2018 tax cuts benefited large banks, decreasing two of the largest banks' taxes by 19%).

241. *See id.* (explaining that some legislators believed the tax cuts only benefitted large banks).

242. *See* The Business Journal Staff, *Tax Cuts Drive Record Income to Community Banks in 2018*, BUS. J. (Feb. 8, 2019, 2:52 PM), https://thebusinessjournal.com/tax-cuts-drive-record-income-to-community-banks-in-2018/ [https://perma.cc/YU6P-A7B4] (explaining that five community banks in Central Valley increased overall income after tax cuts were passed in 2017).

merging or being acquired by larger banks.[243] Money saved from tax breaks could be used to strengthen technology, to diversify loan portfolios, or to help pay compliance costs.[244] Having such a tax break could deter community banks from merging, as a merger would result in losing the tax benefit.[245]

Giving a tax benefit is not unheard of in the financial industry.[246] Tax benefits are given to certain financial institutions when it would benefit communities that struggle to receive access to credit[247] and when the institution is generally small enough that the income generated from a tax is insubstantial to the government.[248] The biggest concern about giving such a tax benefit is the financial institution becoming so large the tax benefit is no longer appropriate.[249] However, this concern could be addressed by setting an asset limit dictating which banks are eligible for the tax benefit.[250] Once the bank becomes larger

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243. *See Our Position: Tax Policy*, *supra* note 236 ("Tax relief for community bank retained earnings would strengthen community banks and allow them to better serve their communities.").

244. *See id.* ("Carefully designed tax incentives for community bank lending would lower credit costs for targeted borrowers and help community banks diversify their loan portfolios and comply with the Community Reinvestment Act.").

245. *See id.* ("Tax relief for community bank retained earnings would strengthen community banks and allow them to better serve their communities.").

246. *See* Erica York, *Repealing the Federal Tax Exemption for Credit Unions*, TAX FOUND., 2 (Oct. 2019), https://files.taxfoundation.org/20191011133639/Repealing-the-Federal-Tax-Exemption-for-Credit-Unions-FF-670.pdf [https://perma.cc/NAG2-KENF] ("[B]oth state-chartered and federal credit unions are exempt from the federal corporate income tax, while federal credit unions are also exempt from state-level taxes except for real and tangible personal property taxes."); *cf.* Banks Editorial Team, *Community Banks vs. Credit Unions: What's the Difference?*, BANKS.COM (Sept. 3, 2020), https://www.banks.com/articles/banking/community-banks-vs-credit-unions/ [https://perma.cc/25CS-ND3D] (comparing and contrasting community banks and credit unions).

247. *See* York, *supra* note 247 (explaining that credit unions are tax exempt because of their restricted customer base, low- and middle-income members, and specific services offered).

248. *See* Liam Siguad, *Credit Unions Deserve Their Tax-Exempt Status*, THE HILL (Nov. 23, 2019, 1:00 PM), https://thehill.com/opinion/finance/471780-credit-unions-deserve-their-tax-exempt-status/ [https://perma.cc/HBB4-CYMW] (estimating that taxing credit unions would bring in $1.7 billion in taxes); *see also How Much Revenue Has the U.S. Government Collected This Year?*, FISCAL DATA, https://fiscaldata.treasury.g141nvestopcas-finance-guide/government-revenue/ [https://perma.cc/2KXG-C6Q4] (last visited Oct. 29, 2022) (showing that, in the past fiscal year, the federal government has collected $4.9 trillion in taxes).

249. *See* York, *supra* note 247 (graphing out how credit unions have increased in size over the past ten years).

250. *See id.* (opining that credit unions do not need tax exempt status anymore since they have gotten too big); *see also* Michael Emancipator et al., *Tax-Exempt Credit Unions*,

than the asset limit, it no longer receives the benefit.[251] Such a limit would prevent any concern that community banks receiving the tax benefit could become too large,[252] while simultaneously allowing community banks to increase profits that can then be re-invested in the bank.[253]

A tax benefit for community banks would most likely take the form of a tax subsidy.[254] A tax subsidy can generally be described as a tax cut given by the government to relieve a financial burden.[255] Such subsidies may be either a deduction or a credit to taxes owed.[256] Tax subsidies are appropriate to support businesses and jobs in certain industries;[257] community banks are such an industry. Though tax subsidies are not "right" or "wrong," there are pros and cons to offering such a subsidy.[258] For example, tax subsidies can save a necessary

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INDEP. CMTY. BANKERS OF AM. (ICBA), https://www.icba.org/our-positions-a-z/credit-union/tax-exempt-credit-unions [https://perma.cc/SY4B-XSKC] (last visited Oct. 29, 2022) (urging Congress to promote increased tax parity between credit unions and community banks); *Our Position: Tax Policy*, *supra* note 236 ("Carefully designed tax incentives for community bank lending would lower credit costs for targeted borrowers and help community banks diversify their loan portfolios and comply with the Community Reinvestment Act.").

251. *Cf.* York, *supra* note 247 (opining that credit unions do not need tax exempt status anymore since they have gotten too big).

252. *Id.*

253. *See* Dunkelberg, *supra* note 238 ("Taxes reduce profits, and profits are the primary source of financing for small business . . . .").

254. *See* 26 I.R.C. § 501(c) (2019) (listing tax-exempt organizations); *see also Exempt Organization Types*, INTERNAL REVENUE SERVS., https://www.irs.gov/charities-non-profits/exempt-organization-types [https://perma.cc/7DBF-2ZNN] (last visited Dec. 30, 2022) (detailing which organizations may apply for tax exempt status); Doug Koplow, *In Depth: Tax Subsidies*, EARTH TRACK (1993), https://www.earthtrack.net/tax-subsidies/depth-tax-subsidies [https://perma.cc/6Z4Q-VZ3G] (describing tax subsidies and how they are used to benefit particular groups or industries that promote policy objectives and strengthen the economy).

255. *See What Is a Subsidy & How Do Tax Subsidies Work?*, H&R BLOCK, https://www.hrblock.com/tax-center/filing/what-is-a-subsidy/ [https://perma.cc/VEB2-AD6D] (last visited Dec. 30, 2022) (explaining what a tax subsidy is).

256. *See generally Policy Basics: Tax Exemptions, Deductions, & Credits*, CTR. ON BUDGET & POL'Y PRIORITIES (last updated Nov. 24, 2020), https://www.cbpp.org/research/federal-tax/tax-exemptions-deductions-and-credits [https://perma.cc/76C5-SVYV] (explaining how different tax benefits work).

257. *See Subsidies: Definition, How They Work, Pros & Cons*, INVESTOPEDIA (last updated Feb. 22, 2022) [hereinafter *Subsidies: Definition*], https://www.investopedia.com/terms/s/subsidy.asp#toc-advantages-and-disadvantages-of-subsidies [https://perma.cc/6ZZ5-W4CT] ("Pro-subsidy economists argue that subsidies to particular industries are vital to helping support businesses and the jobs that they create.").

258. *See* Koplow, *supra* note 255 ("[T]ax subsidies are neither inherently right or wrong.").

service from failing and indirectly benefit third parties.[259] On the other hand, tax subsidies circumvent the free market[260] and can become ineffective or counterproductive over time.[261] Further, it is difficult to accurately project how a tax subsidy will impact the economy.[262] However, even when tax subsidies fail economically, they may still achieve cultural or political goals.[263] A tax subsidy for community banks would largely be used to circumvent the problem of continual banking consolidation, making it a necessary policy to consider.

Tax subsidies are given when they (1) benefit particular groups or industries that are considered socially desirable and (2) promote economic growth of business by the government foregoing expenditure.[264] A tax subsidy benefitting community banks would indirectly benefit small businesses[265] and people of color,[266] both of which are socially desirable goals. Further, a tax subsidy could promote community banks staying small instead of merging.[267]

V. CONCLUSION

In approximately 100 years, the number of banking institutions has declined by nearly 90%.[268] Consolidation is exacerbated by smaller

259. *See Subsidies: Definition*, *supra* note 258 (explaining that subsidies are given to industries that are struggling and typically have an indirect benefit to a third party).

260. *See id.* ("Some argue that subsidies unnecessarily distort markets, preventing efficient outcomes and diverting resources from more productive uses to less productive ones.").

261. *See* Koplow, *supra* note 255 ("[Tax subsidies] are static and may become ineffective or counterproductive as circumstances (be they demographic, technological, or economic) change.").

262. *See Subsidies: Definition*, *supra* note 258 ("Similar concerns come from those who suggest that economic calculation is too inexact and that microeconomic models are too unrealistic to ever correctly calculate the impact of market failure.").

263. *See id.* ("Most subsidies are long-term failures in the economic sense but still achieve cultural or political goals.").

264. *See* Koplow, *supra* note 255 (describing tax subsidies and how they are used to benefit particular groups or industries that promote policy objectives and strengthen the economy).

265. *See supra* Part III.A.

266. *See supra* Part III.B.

267. *See Our Position: Tax Policy*, *supra* note 236 ("Tax relief for community bank retained earnings would strengthen community banks and allow them to better serve their communities.").

268. *See* Emmons, *supra* note 10 ("Since its all-time high of 30,456 in 1921, the bank population has declined to only 4,377 at the end of 2020, a decline of about 86%.").

banks merging to compete with the largest banks in the country,[269] leading to a decline in the number of banks and an increase in overall bank size.[270] The decline in community banks has harmed small businesses, which struggle to receive financial aid from larger banks.[271] Further, the decline in community banks restrict racial-ethnic minorities' ability access loans, [272] brick-and-mortar banks, [273] and affordable banking services.[274] To solve these problems, Congress should consider revamping merger and acquisition applications and looking into offering tax subsidies for community banks.[275]

Community banks may not have the name recognition of the Top Four banks, but for small businesses and people of color, community banks are invaluable.[276]

HANNAH M. DUNAWAY[*]

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269. *See* D'Silva & Williams, *supra* note 4 (explaining how midcap banks are pressured to merge to keep up with larger banks).

270. *Id.*

271. *See supra* notes 76–102 and accompanying text.

272. *See supra* notes 103–123 and accompanying text; *see also* Burgess-Marshall, *supra* note 113 ("[Smaller banks] are also known for granting loans to our most economically vulnerable communities, allowing for the vicious cycle of poverty to be stopped in its tracks.").

273. *See supra* notes 128–134 and accompanying text.

274. *See supra* notes 135–140 and accompanying text.

275. *See supra* Part IV.

276. *See The Value of Community Banks*, FIRST STATE CMTY. BANK (Sept. 15, 2021), https://www.fscb.com/blog/the-value-and-economic-benefit-of-community-banks [https://perma.cc/VUB9-8BT7] ("Community banks may not have the name recognition of large national banking brands. But for local residents and small business owners, community banks offer incredible value through their traditional banking services and their overall impact on your local area.").

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