NOTES

COORDINATION RIGHTS AFTER BANK FAILURE

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In spring 2023, the Federal Deposit Insurance Corporation (FDIC) resolved three of the four largest bank failures in U.S. history. When the FDIC resolves failed banks, this Note argues, it (unselfconsciously) allocates coordination rights—that is, the right to legally permitted economic coordination. Specifically, by reflexively merging failed banks into larger banks, the FDIC adopts antitrust law's preference for hierarchical firm-based coordination. Recent scholarship challenges that pattern in antitrust law. In banking, it is especially problematic. Yet even according to antitrust and bank resolution orthodoxy, the FDIC's allocation of coordination rights is incoherent as such. This Note proposes instead that the FDIC self-consciously disperse coordination rights after banks fail. The Agency can do so without new law, turning failed banks into quasi-worker cooperatives.

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* J.D. Candidate 2025, Columbia Law School. Special thanks to Professor Lev Menand for his advice, encouragement, and feedback. Thanks also to Professor Sanjukta Paul and Nathan Tankus for their thoughts and support, and to the members of the *Columbia Law Review* for their generous editorial work. This Note is dedicated to my teachers.

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INTRODUCTION

Spring 2023 saw the second, third, and fourth largest bank failures in U.S. history. Within six weeks of the first failure, First Republic Bank ($229 billion in assets), Silicon Valley Bank (SVB) ($209 billion), and Signature Bank ($110 billion) were each sold to other banks.[1] Academic and popular commentary on the 2023 banking crisis has covered its

1. Bank Failures: 2023 in Brief, FDIC, https://www.fdic.gov/resources/resolutions/bank-failures/in-brief/2023 [https://perma.cc/MKF4-DYZD] (last visited Jan. 14, 2025).

regulatory background,[2] supervisory shortfalls,[3] deposit insurance coverage,[4] cryptocurrency entanglement,[5] lender of last resort activity,[6] and more.[7] The Federal Deposit Insurance Corporation (FDIC) responded with a report on deposit insurance reform and an amendment to its 2012 resolution plan rule.[8] The suite of banking agencies proposed

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2. See Christine Desan, Lev Menand, Raúl Carrillo, Rohan Grey, Dan Rohde & Hilary J. Allen, Six Reactions to the Silicon Valley Bank Debacle, LPE Blog (Mar. 23, 2023), https://lpeproject.org/blog/six-reactions-to-the-silicon-valley-bank-debacle/ [https://perma.cc/FDR7-F7FY] (noting shortcomings in bank supervision, regulation, deposit insurance, technology, and more).

3. See A Failure of Supervision: Bank Failures and the San Francisco Federal Reserve: Hearing Before the Subcomm. on Health Care & Fin. Servs. of the H. Oversight Comm., 118th Cong. 9 (2023) (statement of Kathryn Judge, Harvey J. Goldschmid Professor of Law, Columbia Law School), https://www.congress.gov/118/chrg/CHRG-118hhrg52572/CHRG-118hhrg52572.pdf [https://perma.cc/7LPK-383J] ("Shortcomings in bank supervision . . . played a meaningful role contributing to the recent bank failures."); Jeanna Smialek & Emily Flitter, Federal Reserve and Lawmakers Eye Bank Rules After Collapse, N.Y. Times (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/business/economy/silicon-valley-bank-federal-reserve-regulation.html (on file with the *Columbia Law Review*) ("The Federal Reserve is facing criticism over Silicon Valley Bank's collapse, with lawmakers and financial regulation experts asking why the regulator failed to catch and stop seemingly obvious risks.").

4. Compare Michael Ohlrogge, Why Have Uninsured Depositors Become De Facto Insured?, 100 N.Y.U. L. Rev. (forthcoming 2025) (manuscript at 43), https://ssrn.com/abstract=4624095 [https://perma.cc/6L43-GMFK] ("FDIC mission creep is the best available explanation for the recent rise in FDIC resolution costs and in uninsured depositor rescues."), with Lev Menand & Morgan Ricks, Scrap the Bank Deposit Insurance Limit, Wash. Post (Mar. 15, 2023), https://www.washingtonpost.com/opinions/2023/03/15/silicon-valley-bank-deposit-bailout/ (on file with the *Columbia Law Review*) [hereinafter, Menand & Ricks, Deposit Insurance] ("Large depositors are both bad at monitoring banks and perfectly capable of engaging in destabilizing runs.").

5. See Amy Castor & David Gerard, Crypto Collapse: Silvergate Implosion Continues, Signature Bank, Tether Lied to Banks, Voyager, Celsius, Amy Castor: Blog (Mar. 4, 2023), https://amycastor.com/2023/03/04/crypto-collapse-silvergate-implosion-continues-signature-bank-tether-lied-to-banks-voyager-celsius/ [https://perma.cc/A3TC-AWE3] ("There were two banks critical to US crypto. Silvergate on the West Coast and Signature Bank in New York.").

6. See Hal S. Scott & Connor R. Kortje, Lender of Last Resort: The 2023 Banking Crisis and COVID, at 9 (Sept. 8, 2023) (unpublished manuscript), https://ssrn.com/abstract=4566160 [https://perma.cc/XB2X-DTH4] ("[O]perational and procedural shortcomings, as well as an ostensible assessment by the Fed that SVB's assets were insufficient to collateralize a loan of sufficient size to stem the run, prevented the FHLB and Fed from acting as effective lenders of last resort.").

7. See Nathan Tankus, Every Complex Banking Issue All at Once: The Failure of Silicon Valley Bank in One Brief Summary and Five Quick Implications, Notes on the Crises (Mar. 14, 2023), https://www.crisesnotes.com/every-complex-banking-issue-all-at-once-the-failure-of-silicon-valley-bank-in-one-brief-summary-and-five-quick-implications/ [https://perma.cc/8M5L-URT5] (covering the Federal Reserve's collateral schedule, Bank Term Funding Program, and 13(3) emergency lending authority; the least cost test and systemic risk exception; tying arrangements and their banking law exceptions; and more).

8. 12 C.F.R. § 360.10 (2024); FDIC, Options for Deposit Insurance Reform (2023), https://fdic.gov/system/files/2024-07/options-deposit-insurance-reform-full.pdf [https://perma.cc/WNH7-JHY5]; see infra note 287 and accompanying text.

new long-term debt requirements.[9] But there is a problem yet to be examined: Bank resolution law allocates coordination rights—the right to legally permitted economic coordination[10]—and it does so on an incoherent basis.

Coordination rights are primarily allocated by antitrust law.[11] Antitrust favors vertical coordination of economic activity with concentrated control (e.g., within hierarchical firms) rather than horizontal coordination of economic activity between firms or individuals (e.g., cartels or cooperatives).[12] For example, rideshare drivers who collectively set prices for their services may be illegally conspiring under antitrust law, but it is presumptively legal for Uber or Lyft to set prices for those same rideshare services.[13] Orthodox accounts justify this pattern by appealing to competition, consumer welfare, and efficiency.[14]

Meanwhile, when commercial enterprises suffer financial distress, they often enter federal bankruptcy.[15] Bankruptcy triggers an automatic stay, shielding enterprise assets from creditors.[16] This process favors vertical coordination to some extent: Firms are reorganized, not liquidated (i.e., sold off in pieces to other firms), if they have value as a going concern, and reorganized firms retain decisionmaking hierarchy.[17]

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9. Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organization, and Large Insured Depository Institutions, 88 Fed. Reg. 64,524 (proposed Sept. 19, 2023) (to be codified at 12 C.F.R. pts. 3, 54, 216–17, 238, 252, 324, 374).

10. See Sanjukta Paul, Antitrust as Allocator of Coordination Rights, 67 UCLA L. Rev. 378, 380 (2020) [hereinafter Paul, Allocator]; Sanjukta Paul & Nathan Tankus, The Firm Exemption and the Hierarchy of Finance in the Gig Economy, 16 U. St. Thomas L.J. 44, 45 (2019). In other words, coordination rights are the set of legal permissions and restrictions governing how people work together to provide goods and services.

11. See Paul, Allocator, supra note 10, at 380.

12. See id. at 383, 424–25; Paul & Tankus, supra note 10, at 44.

13. See Paul & Tankus, supra note 10, at 46–47; see also 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); Marshall Steinbaum, Uber's Antitrust Problem, Am. Prospect (May 11, 2016), https://prospect.org/labor/uber-s-antitrust-problem/ [https://perma.cc/7Q2X-NML9] (discussing a challenge to this pattern in a lawsuit filed by Uber drivers, which was subsequently moved to arbitration by Uber without a decision on the merits); infra note 27.

14. See infra section I.A.1.

15. See generally Chapter 11—Bankruptcy Basics, U.S. Cts., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics [https://perma.cc/R5BE-GZPZ] (last visited Oct. 15, 2024) (describing the "reorganization" bankruptcy process from start to finish).

16. See 11 U.S.C. § 362 (2018).

17. See, e.g., Richard M. Hynes & Steven D. Walt, Why Banks Are Not Allowed in Bankruptcy, 67 Wash. & Lee L. Rev. 985, 1037 (2010) ("[A] traditional Chapter 11 reorganization can resolve a failed firm without an actual sale of its assets.").

But banks do not enter bankruptcy.[18] When a bank fails, it triggers a legal process known as resolution.[19] Resolution is governed by the Federal Deposit Insurance Act (FDIA).[20] Although the FDIA does not expressly address how coordination rights should be allocated, in practice, the FDIC prefers to use a resolution method that transfers as much as possible of a failed bank's balance sheet to another bank, increasing the concentration of coordination rights compared to the status quo ante.

This Note makes two claims. First, bank resolution allocates coordination rights. It decides which parts of the failed bank's balance sheet it will transfer, to whom it will be transferred, and thus how the post-resolution balance sheet and bank charter will be controlled. The FDIC's preference for merging a failed bank into another bank privileges hierarchical firm-based coordination for banks, just like antitrust does for nonbank firms. But resolution's allocation of coordination rights need not follow antitrust's default allocation. Instead, failed banks could be reconstituted with different firm boundaries or more horizontal intrafirm relations. In other words, a failed bank could be broken up or reorganized as a quasi-worker cooperative—both outcomes that would disperse coordination rights.

Second, resolution's reflexive concentration of coordination rights is unsupported. While it mirrors antitrust's allocation, it is not justified by antitrust's orthodox criteria: competition, consumer welfare, and productive efficiency. Nor is it justified by the rationales underlying banking law, or even by those internal to resolution law. In fact, all these criteria clash with the FDIC's resolution-by-merger preference.[21] This reveals that, without good reason, the Agency defers to antitrust's favor for hierarchical firms.

This Note argues the FDIC can solve this problem by reallocating coordination rights after banks fail. One option is to disperse interfirm coordination rights. The FDIC could draw firm boundaries such that resolution no longer results in one bank where previously there were two. Another option is to disperse intrafirm coordination rights. A new resolution method outlined herein—the intrafirm reallocation transaction (IRT)—could do both, breaking up banks and flattening intrafirm hierarchy as desired. Doing so would better fulfill the criteria of antitrust, banking, and resolution law.

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18. See id. at 993–94 (contrasting bankruptcy with bank resolution).

19. See, e.g., FDIC, Resolutions Handbook 5 (2019), https://www.lb7.uscourts.gov/documents/18c8697.pdf [https://perma.cc/PG9V-9DKA] ("Resolution activities begin when an institution's primary regulator notifies the FDIC of the potential failure.").

20. Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, §§ 11, 13, 64 Stat. 873, 884–89 (codified at 12 U.S.C. §§ 1811–1835a (2018)). Note that the FDIC itself was created by an earlier statute, the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as scattered sections of 12 U.S.C.).

21. See infra Part II.

This Note proceeds as follows. Part I explains what coordination rights are, how they are allocated, and why. It also describes the basic structure and aims of banking law and bank resolution. Part II searches for, but struggles to find, justification for the FDIC's approach to allocating coordination rights in bank resolution. Part III explores alternatives. It shows how the banking agencies could use tools already at their disposal to disperse coordination rights and bring coherence to resolution law. It proposes a new resolution method, IRT, which it argues would best align the practice of bank resolution with the goals of antitrust and banking.

I. COORDINATION RIGHTS, BANKING, AND BANK RESOLUTION

After a bank fails, the FDIC reconstitutes the bank as a going concern.[22] In doing so, it redraws firm boundaries and (unselfconsciously) allocates coordination rights.[23] The primary allocator and ultimate arbiter of coordination rights is antitrust law. Understanding how and why antitrust allocates coordination rights is crucial for understanding the patterns of coordination that emerge from the FDIC's resolution process, resolution law's specific allocative role, and whether its allocation is justified.

A. *Antitrust Law and Coordination Rights*

Coordination rights refer to the set of legal permissions and restrictions governing economic coordination.[24] Antitrust law at once allocates coordination rights and serves as an "appellate body" for the set of coordination rights that emerge from all other areas of law.[25] In other words, it "makes private decisions to engage in economic coordination subject to public approval."[26] Property law, for example, may give an actor the right to use, exclude others from, and transfer an asset, such as a machine. And contract and employment law may grant that actor the ability to hire an employee. Putting these privileges together, the actor can hire someone to use the machine to produce a good, and thereby begin to coordinate social provisioning. But property, contract, and employment privileges are insufficient for legally permitted coordination. That is

22. See infra section I.C.

23. See infra section II.A.

24. See generally Paul & Tankus, supra note 10, at 45 (describing allocating coordination rights as deciding "who gets to engage in economic coordination, and who doesn't" and listing examples of economic coordination such as joint bargaining, production, market allocation, resource allocation, and price setting).

25. Nathan Tankus & Luke Herrine, Competition Law as Collective Bargaining Law, *in* The Cambridge Handbook of Labor in Competition Law 72, 78–79 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022).

26. Paul, Allocator, supra note 10, at 382. "Because private actors cannot contract among each other to generate [coordination] rights, the rights are a dispensation from the public." Id. at 400.

because antitrust law stands ready to veto coordination it disfavors. So which types of coordination are favored, which types are disfavored, and why?

1. *The Firm Exemption.* — Whether two actors can coordinate to produce and sell goods and services depends on the coordination rights allocated to their relationship.[27] If those two actors are a manager and nonmanagement employee in a firm, then their coordination (e.g., setting prices for their joint output) is permitted. But if they do not belong to a single firm, then their coordination may be illegal. This pattern is known as the "firm exemption."[28]

The firm exemption reflects a disfavor of horizontal coordination across firm boundaries and a preference for vertical interfirm and intrafirm coordination. Because firms are internally structured by relations of command and therefore suppress business rivalry,[29] the firm exemption's breadth varies inversely with the number of firms in a given market: If fewer firms control the same resources, then those resources are governed less by business rivalry and more by intrafirm command.[30] Further, neither firm boundaries nor the firm exemption itself can be derived from corporate law, property law, or contract law.[31] Rather, it is a designation internal to antitrust law.[32] So how does antitrust conceive of the firm?

Professor Sanjukta Paul, the legal scholar who coined the term "coordination rights,"[33] finds only one noncircular explanation for antitrust's firm exemption: an ex ante commitment to "concentrated

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27. Paul uses the example of truck drivers who coordinate among themselves to set prices for their services, versus truck drivers who work for a firm that sets prices for their services: The latter is "uncontroversially permitted," yet the former is considered price-fixing. See Paul, Allocator, supra note 10, at 395.

28. Sanjukta M. Paul, Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications, 38 Berkeley J. Emp. & Lab. L. 233, 256 (2017); Paul & Tankus, supra note 10, at 45.

29. See infra notes 45, 86 and accompanying text.

30. See Sanjukta Paul, The Case for Repealing the Firm Exemption to Antitrust, *in* The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century 88, 91 (Richard Bales & Charlotte Garden eds., 2019) [hereinafter Paul, Firm Exemption] ("[A]ntitrust permissiveness [with respect to both unilateral conduct and mergers] is best understood as an *expansion* of the underlying allocation of coordination rights to the business firm, rather than as just a failure to regulate.").

31. Paul, Allocator, supra note 10, at 396–400. For example, incorporating a price-fixing ring does not exempt it from antitrust liability. "[I]ndeed, if it were not true, then virtually any arrangement at risk of liability under Section 1 of the Sherman Act could use incorporation as a shield . . . ." Paul & Tankus, supra note 10, at 46. And "[p]ositing the firm as a collection of contracts does not explain th[e] fundamental difference in legal treatment among sets of contracts." Paul, Allocator, supra note 10, at 399.

32. Paul, Allocator, supra note 10, at 396.

33. Tankus & Herrine, supra note 25, at 78.

ownership and control rather than cooperation."[34] Where ownership and control are sufficiently concentrated, antitrust designates a "single entity," or firm.[35] It therefore assigns coordination rights based on existing patterns of concentrated control.[36] But because antitrust stands ready to veto any coordination it disfavors, existing control rights are never enough to generate coordination rights on their own. Instead, antitrust makes a "separate and additional legal judgment" to assign coordination rights based on "the right to *control* while denying the right to *cooperate*."[37] What justifies that decision?

2. *Orthodox Criteria.* — Central to antitrust law's firm exemption are the theories of competition, consumer welfare, and productive efficiency articulated by Robert Bork's 1978 book *The Antitrust Paradox*.[38] Bork's definition of competition is distinct from the intuitive concepts of business rivalry or a neoclassical ideal state of the economy.[39] Instead, Borkian

34. Paul, Allocator, supra note 10, at 407. One such circular articulation begins by asking if two coordinating actors are competitors. But that is a question "antitrust's conferral or denial of firm status *decides*; [it is] not [an] independent bas[i]s for deciding firm status." Id. Otherwise, "if applied literally and in a noncircular manner, the potential competitor standard would imply that firms cannot employ large classes of people who perform the same service, which the firm goes on to sell." Id. at 408.

35. Id. at 401. Antitrust law can set firm boundaries both wider and narrower than corporate law. See Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196 (2010) (finding multiple entities when corporate law recognized one: individual NFL teams in relation to NFL Properties); Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (finding a single entity when corporate law recognized two: a parent–subsidiary relationship); Paul, Allocator, supra note 10, at 402–09 (discussing *American Needle*, *Copperweld*, and the single entity doctrine). Because a single entity's internal actions are—by definition—independent and not concerted, they are not subject to section 1 of the Sherman Act.

36. See Paul, Allocator, supra note 10, at 408 ("More precisely, antitrust imports the control rights inherent in the law of the employment relation into its *own* set of criteria for allocating coordination rights.").

37. Id. at 405.

38. See id. at 415 (discussing Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978)). While the preferences for hierarchical, firm-based, and ownership-based coordination existed in antitrust law prior to Bork, his arguments played a crucial role in their intensification and entrenchment. See id. at 422–23; Sanjukta Paul, Solidarity in the Shadow of Antitrust: Labor and the Legal Ideal of Competition (forthcoming) (manuscript at 61–63) (on file with the *Columbia Law Review*) [hereinafter Paul, Solidarity] (arguing that the Clayton Act's "labor exemption" was based on post-Sherman Act ideas about a self-coordinating market baseline). As Paul notes, "[t]ransaction cost analysis . . . effectively served to extend and purify th[e] already-existing [New Deal settlement's] legal and economic preference for firm-based coordination." Sanjukta Paul, On Firms, 90 U. Chi. L. Rev. 579, 603 (2023) [hereinafter Paul, Firms].

39. See Paul, Allocator, supra note 10, at 415–17 & n.131 (describing Bork's treatment of competition). Bork described this neoclassical sense of competition as "utterly useless" for antitrust law. Id. at 416 (internal quotation marks omitted) (quoting Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 59 (1978)). That many think of neoclassical competition when they think of antitrust's pro-competitive aims is rhetorically useful. See id. at 417. The ideal state definition of competition "provided the broader

competition rests entirely on consumer welfare, meaning lower prices or greater output (compared to a benchmark) for consumers as a class.[40] For him, lower prices come from lower costs; and lower costs come from "efficient" coordination.[41] So just as competition as a desideratum relies on consumer welfare, consumer welfare in turn relies on efficiency.

Specifically, Bork's argument turns on a prioritization of *productive* efficiency.[42] Professor Paul writes: "Productive efficiencies, per Bork, are cost savings realized from firm-based coordination, in theory passed onto consumers as lower prices."[43] This argument rests on an empirical presumption, namely that vertical coordination is less costly than horizontal coordination.[44] Yet its proponents do not marshal empirical proof. Rather, they rely on a theoretical argument, made by Ronald Coase, Oliver Williamson, and other "neo-institutionalists," that hierarchy reduces transaction costs, resulting in cost savings and thus productive efficiency.[45]

For example, Coase took for granted that the employment law relation—based on "the command relation inherent to master–servant

warrant for [Bork's] preferred form of economic coordination. This warrant derived from the intellectual prestige of neoclassical economics on the one hand, and also from the intuitively appealing ordinary language sense of business rivalry on the other." Id.

40. See id. at 416 ("'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs by judicial decree." (quoting Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 61 (1978))); id. at 418 (noting that, in practice, most understand consumer welfare to mean "lower prices in reference to existing reality"). Still, note that Bork equivocated about the meaning of consumer welfare, sometimes identifying it with allocative efficiency, but also "embrac[ing] the conception of consumer welfare as substantively ordering consumers' interests over others." See id. at 418.

41. See id. at 418–20 ("Indeed, actual lower consumer prices are Bork's and Williamson's professed justification for considering productive efficiencies in antitrust decisionmaking in the first place.").

42. See id. According to Paul, "[t]he conventional story is that [concentrated intrafirm control] succeeded because it offered technical efficiency benefits, which ultimately 'grew the pie' for everyone, even as both coordination rights and pecuniary benefits associated with productive activity were concentrated in fewer hands." Paul, Firms, supra note 38, at 593–94.

43. Paul, Allocator, supra note 10, at 419.

44. See id. at 419–20 (noting that Bork's view of "productively efficient coordination may consist in the vertical, hierarchically organized coordination presumed to take place within a firm, or it may be vertical, hierarchical coordination beyond firm boundaries, as for example when a large firm gives direction to a small subcontracted firm").

45. Paul identifies neo-institutionalists with the theory-of-the-firm or transaction cost literature, beginning with Ronald Coase in 1937. Paul, Firms, supra note 38, at 600–01. The name evokes earlier "institutional" economists (themselves responding to the classicals), but the core neo-institutionalist project was to explain what *neoclassical* economists did not: What is a firm? See id. For a richer account of these arguments, see Paul, Allocator, supra note 10, at 420–25; Paul, Firms, supra note 38, at 600–20.

law"—produced productive efficiency.[46] For Williamson, hierarchy was most efficient because it reduced costs of association, mainly by "prescreening workers . . . and . . . policing 'malingering and other ex post manifestations of moral hazard.'"[47] Other neo-institutionalists like Armen Alchian and Harold Demsetz "ultimately also shared the focus on 'shirking' and insufficient effort by workers."[48] By contrast, Henry Hansmann thought worker-ownership did better in terms of shirking, instead focusing his critique on "the simple time and effort costs of democratic and horizontal decision-making."[49] Still, all shared the premise, in the words of Williamson, that "[t]he organization of work is, predominantly, a transaction cost issue."[50]

The neo-institutionalists also argued that intrafirm hierarchy solves "holdup" problems—an actor's opportunistic abuse of control over a complementary resource (i.e., a resource another relies on).[51] Centralization—enclosing ownership and control of resources subject to holdup problems inside firm boundaries—purportedly solves such bottlenecks by changing the actors' relationship from contract to command, disappearing the coordination problem inside firm boundaries.

3. *Rebuttal.* — Paul gives us good reason to doubt both the analytical and theoretical bases for the "Borkian allocation of coordination rights."[52] This section begins by unsettling the assumption that hierarchy is, in fact, less costly than other forms of coordination. Yet even accepting that premise, other theoretical problems trouble productive efficiency as a keystone concept and, with it, the neo-institutionalist theory of the firm.

a. *Analytical Problems.* — The question whether centralized control produces cost savings is empirical, not theoretical. Therefore, Paul argues, productive efficiencies "exist . . . if and only if an empirical claim about organizing human activity and technological functioning in time and space is correct. This specificity, which quite clearly implicates technological, social and historical contingencies, is also why we should be

46. See Paul, Firms, supra note 38, at 606–07 (discussing Ronald Coase's *The Nature of the Firm*).

47. Id. at 607–08 (emphasis omitted) (quoting Oliver E. Williamson, Markets and Hierarchies: Some Elementary Considerations, 63 Am. Econ. Rev. 316, 321–24 (1973)).

48. Id. at 608 (citing Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 784 (1972)).

49. Id. at 612; see also Henry Hansmann, The Ownership of Enterprise 114–17 (1996) (addressing the lack-of-skill and -experience arguments against employee governance).

50. See Oliver E. Williamson, The Organization of Work: A Comparative Institutional Assessment, 1 J. Econ. Behav. & Org. 5, 35 (1980).

51. See Paul, Firms, supra note 38, at 615–17; Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, Networks, Platforms, and Utilities: Law and Policy 15–16 (2022) [hereinafter Ricks et al., NPU] (describing similar "particularized value extraction" problems, in which enterprises can "appropriate some or all of the economic value of the businesses that rely on them").

52. See Paul, Allocator, supra note 10, at 419.

skeptical of how universally such productive efficiencies exist."[53] Yet even without detailed empirics, the neo-institutionalist cost analysis is flawed because it is both under- and overinclusive.

Begin with underinclusivity. First, hierarchical decisionmaking has costs typically excluded from transaction cost analysis.[54] At the highest level, the political costs of managerial control go unaccounted for.[55] Values such as autonomy, antioligarchy, or antidomination simply aren't legible.[56] At a less abstract level, the theory is biased toward "outputism" and fails to account for the costs of *too much* labor effort.[57] The abstract and direct problems relate: A framework equipped with autonomy and antidomination norms, for example, might more readily recognize the costs of overwork and relegate the importance of maximizing value-neutral "output."[58] Moreover, an antioligarchy norm could make dispersed

53. Id. at 421. Historically, the technological advances of the industrial revolution began under "the older, supposedly inefficient guild system." Paul, Firms, supra note 38, at 594. So, at the very least, concentrated control is not a necessary condition for technical advance. For a thorough account of this debate, including its historical and theoretical foundations, see generally Stephen A. Marglin, What Do Bosses Do?: The Origins and Functions of Hierarchy in Capitalist Production, 6 Rev. Radical Pol. Econ. 60 (1974); Paul, Firms, supra note 38.

54. For example, a centralized decisionmaking structure "has a basic weakness—that is, very few individuals are entrusted with a great number of complex decisions. . . . Because the members of the central office spend most of their business careers within a single functional activity, they have little experience or interest in understanding . . . the enterprise as a whole." Frederic S. Lee, Microeconomic Theory: A Heterodox Approach 80 (Tae-Hee Jo ed., 2018).

55. Cf. Ricks et al., NPU, supra note 51, at 19–21 ("[M]any of the largest individual fortunes have been amassed through ownership and control of NPU enterprises. . . . [E]conomic influence can create a vicious cycle in which the wealthy and powerful use their influence to gain special privileges from the government and then those privileges make them . . . wealthier and more powerful . . . ."); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynsky & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1806 (2020) (describing the second law and economics movement's expulsion of "certain commitments in our law . . . either reflecting or calling forth certain kinds of political values, or . . . taking a side in disputes that were inevitably struggles for power"); Paul, Firms, supra note 38, at 620 (noting "the tendency of existing differentials in coordination rights and flows of income to intensify themselves"); Lina M. Khan, The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655, 1668–69 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)) ("[A] price theory approach to antitrust necessarily privileges efficiency criteria over, say, concerns about justice or fairness.").

56. By contrast, norms engaging with power relations *were* legible to both Congress and the judiciary at the passage of the Sherman Act. See Paul, Solidarity, supra note 38 (manuscript at 3–9, 51–53); infra section I.A.4.

57. See Paul, Firms, supra note 38, at 609 (internal quotation marks omitted) (quoting John M. Newman, The Output-Welfare Fallacy: A Modern Antitrust Paradox, 107 Iowa L. Rev. 563, 569 (2022)).

58. Notably, as Louis Brandeis's analysis did. See Paul, Solidarity, supra note 38 (manuscript at 68–71). Coming at this problem from another angle, one might say that transaction cost analysis fails to account for dynamic costs to political economy over time.

control desirable in a negative sense, as an intrinsic prophylactic good.[59]

Second, as Paul argues, neo-institutionalist thought "overly discount[s] . . . [the] objective, substantive benefits for productive efficiency when all participants in a productive process are able to contribute their insights and experiences to decision-making that will direct that process."[60] Figures as diverse as Louis Brandeis and Adam Smith agreed. Brandeis thought it was "economically rational" to incorporate worker expertise into business decisionmaking,[61] while Smith acknowledged "that the variety of tasks and requisite skill levels required in production contexts where the 'division of labor' has not yet become too minute fosters a climate of innovation and invention."[62] The orthodox analysis, therefore, is underinclusive because it fails to count important costs of hierarchy and benefits of participatory decisionmaking.

An illustrative (if anecdotal) example is Citibank ("Citi") ($1,678 billion[63]), which was recently fined $136 million for submitting inaccurate

Cf. Ricks et al., NPU, supra note 51, at 21–22 (contrasting static and dynamic efficiency and noting the importance of accounting for dynamic costs (i.e., costs over time)).

59. Cf., e.g., Katharina Pistor, The New Washington Consensus, Project Syndicate (Jan. 28, 2025), https://www.project-syndicate.org/commentary/trump-business-controls-government-means-autocracy-instead-of-democracy-by-katharina-pistor-2025-01 (on file with the *Columbia Law Review*) (framing dispersed firm control as a necessary prophylactic for political freedom: "Now that we have watched business take over government in broad daylight, the only alternatives are to democratize business or abandon any pretense of democracy"); Katie Thornton, The Green Bay Packers: Where Fans Rather Than a Billionaire Are the Owners, The Guardian (Sept. 30, 2023), https://www.theguardian.com/sport/2023/sep/30/the-green-bay-packers-where-fans-rather-than-a-billionaire-are-the-owners [https://perma.cc/PR6D-49WM] (discussing the benefits of fan "ownership" in terms of prophylaxis against dominant owners, including preventing threatened or actual team relocation). Hence, antioligarchy qua prophylaxis can be a bulwark against spiraling concentrations of political economic power. See supra note 55; infra note 128.

60. Paul, Firms, supra note 38, at 614 & n.145; see also supra note 53. Instead, they variously acknowledge that cooperative forms of organization may create productivity-enhancing "team spirit," Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777, 790–91 (1972), or "mobilizing energies" and "atmosphere," Oliver E. Williamson, Markets and Hierarchies: Some Elementary Considerations, 63 Am. Econ. Rev. 316, 317, 321 (1973); see also Paul, Firms, supra note 38, at 614 (noting the subjective factors above).

61. Paul, Solidarity, supra note 38 (manuscript at 66).

62. Paul, Firms, supra note 38, at 594 n.54 (citing Marglin, supra note 53, at 64).

63. See BankFind Suite: Find Institution Financial & Regulatory Data, FDIC, https://banks.data.fdic.gov/bankfind-suite/financialreporting/report [https://perma.cc/U58J-ZHZN] (last visited Oct. 16, 2024) (sorting by total assets in descending order). "Citibank" is the bank subsidiary of the bank holding company "Citigroup." Citigroup Material Legal Entities (May 16, 2024), https://www.citigroup.com/rcs/citigpa/akpublic/storage/public/corp_struct.pdf (on file with the *Columbia Law Review*).

reports to the Federal Reserve.[64] Citi hired CEO Jane Fraser in 2021 to solve "chronic technology and regulatory issues" that had "built up over the course of many years and acquisitions."[65] But as the *Financial Times* reports:

> Former Citi executives say Fraser has failed to change a culture where many employees search for short-term, least-cost fixes to deep-rooted problems, or try to avoid addressing them altogether. "At Citi, there are a lot of committees and working groups that get set up so people can sit around and talk about the issues," one former executive said.[66]

As Citi's committees sputtered, the bank turned to "heavy use" of expensive consultants, like McKinsey.[67] Before long, Citi terminated the relationship amid "widespread internal dissatisfaction" with McKinsey's work, which insiders blame for the inaccurate Federal Reserve filings.[68] Rather than the cost-efficient firm of neo-institutionalist imagination, conglomeration and hierarchy at Citi disempowered employees, creating high associational costs, shirking, and wasteful outsourcing.

On the flipside, the neo-institutionalist account is overinclusive. Even though, as Hansmann argues, participatory governance can be time-consuming, digital technology has dramatically reduced its transaction costs.[69] Further, explicit public support can spur innovation, making cooperative association less, not more, costly.[70]

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64. Stephen Gandel & Ortenca Aliaj, How Citi's Error-Riddled Loan Reports Led to a $136mn Fine, Fin. Times (July 25, 2024), https://www.ft.com/content/7f9d7dba-9c87-48c7-9b15-40a4b4c15692 (on file with the *Columbia Law Review*).

65. Id.; see also Stephen Gandel & Joshua Franklin, Citigroup Erroneously Credited Client Account With $81tn in 'Near Miss', Fin. Times (Feb. 28, 2025), https://www.ft.com/content/9921925e-5a32-48cc-a3e3-3f77042477d2 (on file with the *Columbia Law Review*) ("The series of near misses at Citi highlights how the Wall Street bank is struggling to repair its operational troubles nearly five years after it mistakenly sent $900mn to creditors engaged in a contentious battle over the debt of cosmetics group Revlon."); Joe Miller & Stephen Gandel, Citi Was Money Launderers' Favourite Bank, US Law Enforcement Officials Say, Fin. Times (July 1, 2024), https://www.ft.com/content/0187827b-f755-47fd-91ff-c3e755548097 (on file with the *Columbia Law Review*) ("Drug traffickers chose to launder money through Citigroup because they believed the bank was 'more favourable', with less robust fraud controls, according to senior US law enforcement officials.").

66. Gandel & Aliaj, supra note 64.

67. Id.

68. Id.

69. See Jerry Davis, Is This the End of Corporate Capitalism?, LPE Blog (Nov. 8, 2023), https://lpeproject.org/blog/is-this-the-end-of-corporate-capitalism/ [https://perma.cc/NAW9-GLEM].

70. See Sandeep Vaheesan, Selling Power: The Design of Energy Finance, From the New Deal to the IRA, Phenomenal World (Jan. 8, 2025), https://www.phenomenalworld.org/analysis/selling-power/ [https://perma.cc/HC9Z-VPKH] [hereinafter Vaheesan, Selling Power] ("The [Rural Electrification Administration] not only funded [power] line constructions but also provided vital technical assistance, such as

It is also wrong to assume hierarchical firms arose in the first place due to technological superiority.[71] As Paul notes, the economist Stephen Marglin "concluded that instead of technical efficiency gains, the best explanation for emergent hierarchy at the firm level was simply about interested parties seeking to entrench a distributional arrangement that benefitted them."[72] Intrafirm hierarchy more likely emerged as a way to supervise and discipline labor than as an empirically superior organizational form.[73] The orthodox analysis, therefore, is overinclusive because it overstates the costs of participatory decisionmaking and the historical benefits of hierarchy.

b. *Theoretical Problems.* — Even if the empirical fact of productive efficiency-from-hierarchy were true and the cost analysis sound, that would be insufficient to prove hierarchy increases consumer welfare. For example, firms might not pass along cost savings to consumers through lower prices.[74] To this critique, Bork responds: Cost savings imply unused resources available to serve consumer wants elsewhere, even if price decreases never materialize.[75] But this reply asks more questions than it answers. It assumes resources are fungible and zero-sum instead of nonscarce and socially determined.[76] And it still ignores the possibility that

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developing lower-cost designs for rural power lines and drafting model state laws to support the formation of electric cooperatives.").

71. See supra note 41.

72. Paul, Firms, supra note 38, at 595 & n.56 (citing Marglin, supra note 53, at 70) (noting that "Marglin drew in detail from available empirical evidence both before and after the organizational changes in question, in addition to dissecting the conventional story as advanced by [Adam] Smith and others"). In other words, "it is simply an instance of people and groups who already enjoy legally and socially sanctioned power over others using legal and social tools to entrench and expand that power." Id. at 596; cf. Lee, supra note 54, at 189 (describing the business enterprise as a social organization "[h]ierarchical in structure and authoritarian in terms of social control" that functions to "reproduce[] the capitalist class").

73. See Marglin, supra note 53, at 82–84, 114 ("The key to the success of the factory, as well as its inspiration, was the substitution of capitalists' for workers' control of the production process; discipline and supervision could and did reduce costs *without* being technologically superior."); Paul, Firms, supra note 38, at 595 ("[H]ierarchy did not so *distinctively* solve technical efficiency problems across a variety of very different sectors around roughly the same time, that neutral solutions to operational problems—rather than the human urge to consolidate power in interaction with favorable existing legal and social tools—mainly explains its entrenchment.").

74. Cost savings could simply accrue to retained earnings.

75. See Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 108 (1978).

76. The economist Fred Lee is worth quoting at length:

> [T]he absence of scarcity . . . do[es] not mean that nature (qua resources) is not fixed or exhaustible in some sense. . . . [It means] the 'fixity' of nature is not a constraint on production and a limit to the social provisioning process, which in turn implies that the concepts of production possibility frontier, opportunity cost, and the trade-off in the production of goods and services have no meaning in heterodox economics. The absence of original factors of production and scarcity

cost savings owe to an *increase* in input use (e.g., the problem of too much labor effort[77]) or a decrease in input *price* (e.g., cutting wages or squeezing suppliers[78]). Even more fundamentally, by slipping from the intuitive sense of technical efficiency (i.e., more output per input) to productive efficiency (i.e., more output per input cost),[79] Bork is vulnerable to the critique that the neoclassical price mechanism does not exist.[80]

Bork's argument is also logically incoherent. Benchmark prices (and output) can only exist *after* coordination rights have been allocated.[81]

> means that with circular production, the restraints on the social provisioning process are not given quantities of scarce factor inputs located in production, but are located in the decisions (agency) and values that affect the production of the surplus . . . and its distribution.

Lee, supra note 54, at 44 (citations omitted).

77. See Paul, Firms, supra note 38, at 610 ("True technical efficiencies consist in deriving more output while holding inputs—including labor effort—fixed. They do not consist in increasing output simply by *increasing inputs*."). By contrast, Paul notes that "Brandeis and the original institutionalists" *did* account for the problem of too much labor effort. Id. at 610 n.122.

78. See Sanjukta Paul, On Merger Policy and Labor, Money on the Left (June 9, 2023), https://moneyontheleft.org/2023/06/09/on-merger-policy-and-labor/ [https://perma.cc/72RB-X5T7] [hereinafter, Paul, Merger Policy] ("[C]onsider the difference between a machine that allows two workers to produce more (at the same quality) with the same effort, versus a new institutional or organizational arrangement that pays those two workers less to produce the same amount . . . . The second thing simply is not a technical efficiency."). Notice that a decrease in input prices—whether it be labor or supplier contracts—therefore, may be caused in the first place by the concentration of coordination rights and its concomitant economic power. Also note that Bork ignores the effect of a decrease in wage income on consumption: If workers are paid less and therefore face tighter budget constraints as consumers, they must either consume or save less. Both outcomes reduce their ability to serve their wants and thus *harm* consumer welfare. See supra note 75 and accompanying text.

79. See Luke Herrine, What Do You Mean by Efficiency? An Opinionated Guide, LPE Blog (Oct. 11, 2023), https://lpeproject.org/blog/who-cares-about-efficiency/ [https://perma.cc/MK5A-P38N] (defining technical efficiency as "producing more outputs with the same (or fewer) inputs"); Paul, Merger Policy, supra note 78 (contrasting technical with productive efficiency).

80. See, e.g., Tae-Hee Jo, What If There Are No Conventional Price Mechanisms? 1 J. Econ. Issues 327, 329–33 (2016) (rejecting the neoclassical price mechanism and substituting a heterodox approach to social provisioning); Paul, Allocator, supra note 10, at 417–18 (noting the assumption—made by the version of consumer welfare operationalizing allocative efficiency—that "higher prices are presumed to correspond to reduced output"); Sabiou M. Inoua & Vernon L. Smith, Neoclassical Supply and Demand, Experiments, and the Classical Theory of Price Formation *passim* (Econ. Sci. Inst., Working Paper No. 20-19, 2020) (rejecting the neoclassical price mechanism and substituting a classical price mechanism); Luke Herrine, Piercing the Monetary Veil, LPE Blog (May 13, 2019), https://lpeproject.org/blog/piercing-the-monetary-veil/ [https://perma.cc/5SMG-XGY8] (critiquing the Hayekian price mechanism for "[t]reating money as a neutral arbiter of values"); Nathan Tankus (@NathanTankus), X https://x.com/NathanTankus/status/1875279611334144165 (Jan. 3, 2025) [https://perma.cc/3VFA-T96F] (rejecting both the neoclassical and classical price mechanisms).

81. See Paul, Allocator, supra note 10, at 380 ("[T]his process of market allocation, which the law is supposed to facilitate but not displace, itself has no existence independent

Prices cannot be set, and thus benchmark prices cannot be formed, until the law decides who can participate in price setting in what forms and in which circumstances. One might counter that coordination rights can be allocated to best approximate a theoretical equilibrium,[82] accepting deviations (e.g., labor unions) and adjusting for imperfections (e.g., market concentration) as necessary. But that still fails as a logical matter. As Paul argues in her forthcoming book, assuming a self-coordinating market and working out special exceptions leaves no independent referent to decide which exceptions should be allowed or when they go too far.[83] In any case, logic requires first specifying normative criteria and *then* allocating coordination rights toward those ends.[84]

Similarly, Bork's notion of competition cannot ground allocative decisions.[85] Competition as a social process can only happen after the basic forms of coordination are specified. Before drawing firm boundaries, one must first decide whether a given form of coordination should be governed by rivalry, cooperation, or command.[86] Moreover, competition relies on the "contestability criterion"—that the threat of entry by new

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of prior *legal* allocations of economic coordination rights."); Tankus & Herrine, supra note 25, at 81. In other words, as soon as one associates a theoretical equilibrium with real price and output values, they admit endogeneity into the system because all real price and output values depend on prior allocations of coordination rights and other forms of market governance. See infra text accompanying note 83.

82. Bork writes, for example:

> [Equilibrium] has never been and can never be achieved. . . . But the forces of competition in open markets cause the actual allocation of resources to be ever shifting in pursuit of the constantly moving equilibrium point. And the more closely the economy approximates this limiting condition, the more closely do we approach the maximization of consumer welfare.

Bork, supra note 75, at 98.

83. See Paul, Solidarity, supra note 38 (manuscript at 16).

84. Id. This method appeared in common law antitrust cases, the early antimonopoly movement, and the work of Louis Brandeis. See Sanjukta Paul, Recovering the Moral Economy Foundations of the Sherman Act, 131 Yale L.J. 175, 183–204 (2021) [hereinafter Paul, Sherman Act]; Sanjukta Paul, The First New Deal: Planning, Market Coordination, and the National Industrial Recovery Act of 1933, Phenomenal World (Mar. 28, 2024), https://www.phenomenalworld.org/analysis/the-first-new-deal/ [https://perma.cc/DM3M-F6QD] ("Brandeis understood competition as rivalry, and he had no interest in welfare maximization in the technical sense, preferring to directly articulate the normative goals of policy. He also understood economic rivalry to be necessarily conditioned by legal rules . . . to ensure that competition actually served pro-social aims.").

85. For one, as just shown, its content relies on the circular notion of "consumer welfare."

86. Paul, Allocator, supra note 10, at 382. This makes sense considering firms themselves suppress competition. Id. at 420; Paul, Firms, supra note 38, at 597. But see Alchian & Demsetz, supra note 60, at 795 (countering that firms are defined by intrafirm competition between inputs).

firms prevents existing firms from charging supracompetitive prices.[87] Yet as Paul notes, the criterion applies "as forcefully or more forcefully" to forms of horizontal coordination, like cartels, as to forms of vertical coordination, like firms.[88] So even on its own terms, contestability—and thus Bork's theory of competition—provides no basis for allocating coordination rights in any particular way.[89] Like consumer welfare, then, drawing firm boundaries based on competition begs the question.

Paul also shows that other forms of coordination can solve the same problems intrafirm hierarchy is predicated on solving. Holdup problems, for example, can be solved "[i]f instead we disperse decision-making rights to the same numerical extent but *across* those [complementary] assets,"[90] as in the case of internally democratic organizations. Also sufficient are market governance measures such as "fair contracting and even pricing norms (enforced by law, regulation, or a public-private governance body)."[91] And as Paul points out, when facing demand or supply shocks in intermediate input markets (e.g., during the COVID-19 pandemic), overreliance on firm-based coordination can "worsen holdup problems by encouraging firm-level hoarding (that in turn intensifies bottlenecks)."[92]

In sum, the neo-institutionalist theory of the firm—and with it, the Borkian allocation of coordination rights—overrates hierarchy as a form of economic organization. On its own terms, the analysis excludes important costs of hierarchy and benefits of dispersed control while overstating the costs of dispersed control and the historical benefits of hierarchy. Its theoretical argument generates circular and inadequate answers to the question of how to allocate coordination rights. And, as Paul's work shows,

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87. See Paul, Allocator, supra note 10, at 396 & n.59 (internal quotation marks omitted) (quoting John E. Davies & Frederic S. Lee, A Post Keynesian Appraisal of the Contestability Criterion, 11 J. Post Keynesian Econ. 3, 22 (1988)) ("[L]ogic demands that acceptance of the usefulness of perfect competition implies acceptance of its more generalized form—the contestability criterion." (alteration in original) (internal quotation marks omitted) (quoting John E. Davies & Frederic S. Lee, A Post Keynesian Appraisal of the Contestability Criterion, 11 J. Post Keynesian Econ. 3, 22 (1988))).

88. See id. at 395–96 ("On the logic of contestable markets, a cartel ought to respond to potential competitors in exactly the same manner as would a large corporation of the same size and the same market share.").

89. Bork acknowledged as much: "Bork freely and repeatedly told us that [competition as an ideal state] is not what the consumer welfare standard meant, and also admitted that this sense of competition could not explain or generate the preference for top-down, ownership-based coordination." Id. at 422–23.

90. Paul, Firms, supra note 38, at 617.

91. Paul, Firms, supra note 38, at 617. Indeed, such measures are common in the law of networks, platforms, and utilities, of which banking is a part. See Ricks et al., NPU, supra note 51, at 24–30 (including in the NPU regulatory toolkit: price and profit rules (e.g., nondiscrimination, rate setting, and profit sharing rules), access and service rules (e.g., equal access, universal service, exit, interconnection, and quality of service rules), and industry structure rules (e.g., structural, entry, and ownership and control rules)); infra note 138.

92. See Paul, Firms, supra note 37, at 617.

it fails to consider how different allocations of coordination rights can solve the same problems that centralized control is predicated on solving.

Productive efficiency, consumer welfare, and competition are insufficient decision criteria for allocating coordination rights, and there are good reasons to be skeptical of hierarchical firms as the default form of economic organization. How should law allocate coordination rights instead?

4. *Alternative Criteria.* — Undertaking a normative reconstruction of the Sherman Act, Paul argues that the landmark antitrust law aimed to *disperse* economic coordination rights.[93] Contrary to Bork's account, the legislation did not "aim primarily at consumer welfare, nor productive efficiency, nor even competitive markets in an abstract sense."[94] Instead, it adopted a moral economy approach to social coordination, prioritizing fair dealing, just price, and an overall goal of fair competition.[95] As Paul recovers, Congress focused on defending the coordination of small players while attacking domination by centers of "aggregated wealth."[96] Importantly, concerns about domination and concentrated control extended to intrafirm coordination.[97]

Rather than treat coordination as a simple optimization problem, Paul foregrounds law and political economy.[98] Hence the values relevant to economic organization include "fairness, democratic governance, [and] economic security . . . *alongside* an appropriate conception of productive efficiency."[99] Law should operationalize those aims, Paul

93. Paul, Sherman Act, supra note 84, at 205. For a meta discussion of this method, better described as a "broad[] normative reconstruction" than narrow statutory interpretation, see id. at 225–26.

94. Id. at 204–05. Further, Congress did not delegate a broad policymaking authority to the judiciary or seek to establish a per se rule against horizontal price coordination. See id. at 213, 238 & n.284.

95. See id. at 203–04.

96. See id. at 212–13 (quoting 21 Cong. Rec. 1768 (1890) (statement of Sen. George)).

97. See id. at 214 ("The point for us is to consider whether . . . it is safe in this country to leave the production of property, the transportation of our whole country, to depend on the will of a few men sitting at their council board . . . ?" (alterations in original) (emphasis omitted) (quoting 21 Cong. Rec. 2570 (statement of Sen. Sherman))); id. at 215–16 (noting Senator Hoar's concern with "large corporations who are themselves but an association or combination or aggregation of capital" (internal quotation marks omitted) (quoting 21 Cong. Rec. 2728 (statement of Sen. Hoar))). Senator Sherman adopted Senator Hoar's view about the legislation's animating concerns as his own. See id.

98. To the extent that law exists in the neo-institutionalist theory, it involves only basic contract and property concepts. Unlike the neo-institutionalists, Bork draws on law, albeit by ahistorically projecting a bespoke consumer welfare standard onto the Sherman Act. See Paul, Sherman Act, supra note 84, at 204 ("As Christopher Leslie put it, a 'clear consensus exists among economic historians and legal scholars that Bork misconstrued the legislative history of the Sherman Act.'" (quoting Christopher R. Leslie, Antitrust Made (Too) Simple, 79 Antitrust L.J. 917, 924 & n.47 (2014))); infra section I.A.4.

99. Paul, Firms, supra note 38, at 621; see also Paul, Sherman Act, supra note 84, at 179, 183, 185, 186 n.36, 220–22. For the pre-Sherman Act antimonopoly movement,

argues, by containing domination, promoting democratic coordination, and setting rules of fair competition.[100]

To recap, antitrust law allocates coordination rights to construct entities with concentrated ownership or control—firms—as its basic units. It justifies this pattern by arguing that top-down firms generate cost savings that are passed on to consumers in the form of lower prices or more resources available to satisfy consumers' wants. But recent scholarship casts doubt on the coherence of this argument, including its purported analytical, theoretical, and legislative support. Paul, for example, rejects the top-down firm as necessarily superior to other forms of coordination and instead proposes that antitrust law disperse coordination rights.

B. *Banking*

Understanding bank resolution and its relationship to coordination rights first requires attention to the broader banking law of which it is a part. What is a bank? Why can banks create money? How does banking law view concentration? And is it attentive to coordination rights?

1. *Banks and Bank Charters.* — The term "bank" can refer to all depository institutions: national and state commercial banks, thrifts, and nonprofit banks such as credit unions.[101] Banks are monetary institutions. By virtue of its charter, a bank can create highly receivable money in the form of notes and deposits.[102] A variety of public governance measures facilitate the receivability of bank money,[103] as well as the liquidity, solvency, and stability of the banking system and its periphery.[104]

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containing domination and promoting democratic association were two sides of the same coin. At once, they strove to reduce the extractive power emanating from the centralized control of the trust, and instantiate horizontal, egalitarian cooperative governance. See id. at 200.

100. See Paul, Sherman Act, supra note 84, at 247.

101. See Richard Scott Carnell, Jonathan R. Macey, Geoffrey P. Miller & Peter Conti-Brown, The Law of Financial Institutions 172 (7th ed. 2021); Ricks et al., NPU, supra note 51, at 836–40.

102. Banks do not need pre-accumulated deposits to make loans. They perform credit analysis to determine whether a loan meets their strategic objectives. If it does, the bank seeks funding (on an ongoing basis at scale) afterward.

103. See, e.g., Stephanie Bell, The Hierarchy of Money 14–18 (Jerome Levy Econ. Inst., Working Paper No. 231, 1998), https://ssrn.com/abstract=96845 [https://perma.cc/EE94-RM9L] ("It is because bank money is accepted at State pay-offices that it, along with State-issued currency, is considered . . . the 'decisive' money of the system."); Nathan Tankus, Banks as Payment Plumbing Monetary Policy 101, Notes on the Crises (May 6, 2020), https://www.crisesnotes.com/banks-as-payment-plumbing-monetary/ [https://perma.cc/SM5L-GDEW] ("What's valuable about a bank deposit, or a bank note, is that it can be used to make a payment to another individual, a financial institution or the government.").

104. See Tim Barker & Chris Hughes, Bigger Than *Penn Central*: The Financial Crisis of 1970 and the Origins of the Federal Reserve's Systemic Guarantee, 5 Capitalism: J. Hist. & Econ. 14, 17 (2024) (documenting the Federal Reserve's shift toward supporting the "*entire* financial system" as early as the 1970 Penn Central Railroad crisis); Lev Menand & Joshua

Banks, in turn, provide a variety of public goods and services,[105] such as meeting commercial demand for money[106] and processing payments.[107] Thus, the basic bank balance sheet consists of loan assets, deposit liabilities, and longer-term debt and equity funding. To operate, a bank needs information technology (IT), labor, and some brick-and-mortar.

For simplicity, this Note focuses on national commercial banks. Like most corporations, national commercial banks are internally hierarchical

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Younger, Money and the Public Debt: Treasury Market Liquidity as a Legal Phenomenon, Colum. Bus. L. Rev. 224, 269–88 (2023) (examining how the Federal Reserve supports the moneyness of nonbank liabilities); Policy Tools, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/monetarypolicy/policytools.htm [https://perma.cc/PLX2-KDV8] (last updated May 20, 2024) (listing monetary policy tools such as open market operations, the discount window, interest on reserve balances, the overnight reverse repurchase agreement facility, the term deposit facility, central bank liquidity swaps, and the foreign and international monetary authorities (FIMA) repo facility).

105. See Ricks et al., NPU, supra note 51, at 813 ("Money is an infrastructure on which all other infrastructure depends."); Saule T. Omarova, Bank Governance and Systemic Stability: The "Golden Share" Approach, 68 Ala. L. Rev. 1029, 1035 (2016) ("Banks are said to be special in that they perform certain important public functions: they provide transactional accounts, operate payment systems, and serve as channels for transmission of monetary policy.").

106. Commercial banks create money for loan applicants who are liable to repay the loan. Grant funding and appropriations are a better fit for money creation aimed principally at social good. (That said, all money creation should be consistent with the public interest.) Nevertheless, grant-making and other monetary institutions could evolve alongside loan-making institutions, whether as standalone or federated entities, subsidiaries, or through asset-specific public backstopping. See Nathan Tankus, The New Monetary Policy: Reimagining Demand Management and Price Stability in the 21st Century 19–21 (Michael Brennan ed., 2022), https://publicmoneyaction.org/wp-content/uploads/2023/07/M3F000001.pdf [https://perma.cc/6RCL-88CJ] [hereinafter Tankus, The New Monetary Policy] (seeking to return "banks to their core role of doing proper underwriting to ensure the borrower's likelihood of repayment" and tie all money creation to "specific social purposes"); Rohan Grey, Financial Regulation, Price Stability, and the Future, LPE Blog(Mar. 22, 2022), https://lpeproject.org/blog/financial-regulation-price-stability-and-the-future/ [https://perma.cc/L3HJ-PRUN] ("Decisions about how to extend liquidity support, to whom, and under what conditions necessarily implies value decisions—i.e. picking winners or losers—in much the same way as traditional fiscal and budgetary policy."); Nathan Tankus, Do We Have Alternatives to Public Governance of Resources in a Crisis?, Notes on the Crises (May 25, 2020), https://www.crisesnotes.com/do-we-have-alternatives-to-public/ (on file with the *Columbia Law Review*) ("The ability to create money could be franchised to democratic grant-making institutions rather than hierarchical loan-making institutions."); The Uni Currency Project: Resource Page, Money on the Left, https://moneyontheleft.org/the-uni-currency-project-resource-page/ [https://perma.cc/2S5H-HFVK] (last visited Mar. 7, 2025) (proposing university-based money creation); Vaheesan, Selling Power, supra note 70 (noting the public benefits of grant finance and contrasting energy sector grantmaking in the Inflation Reduction Act and the New Deal's Rural Electrification Administration).

107. See Nathan Tankus, Banks as Payment Processors. Monetary Policy 101, Notes on the Crises (May 13, 2020), https://www.crisesnotes.com/banks-as-payment-processors-monetary/ [https://perma.cc/AJ5A-EK8Q].

with boards of directors elected by shareholders.[108] The board appoints executive officers, and the officers typically appoint senior management. Bank charters are thus controlled by hierarchical firms. Unlike corporate charters, however, bank charters do not allow banks to engage in "any lawful business" but rather limit banks to a specific set of powers.[109] A bank charter, then, bestows a unique set of unilateral coordination rights on those who control it.[110]

The core bank powers come from two sources: the Constitution and the National Bank Act of 1864. The Constitution authorizes Congress to coin money and regulate its value.[111] It forbids states from coining money or emitting bills of credit.[112] Together with the Necessary and Proper Clause,[113] these powers laid the groundwork for a federal monopoly on money creation.[114] Soon after the Constitution was ratified, Congress chartered a national bank—the Bank of the United States—delegating, in part, the authority to create money to a hybrid public–private corporation.[115] As Professors Lev Menand and Morgan Ricks argue, dispersing control of money creation in this way was not done "out of a desire to create private businesses and generate shareholder returns . . . but rather as a governance mechanism . . . to insulate the monetary framework from the danger of political interference."[116] Eventually, Congress opened national bank charter applications to the public,

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108. See 12 U.S.C. § 71 (2018) ("The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders . . . .").

109. See, e.g., Saule T. Omarova & Graham S. Steele, Banking and Antitrust, 133 Yale L.J. 1162, 1221 (2024) (highlighting the same distinction between bank and corporate charters). Compare Del. Code tit. 8, § 101(b) (2025) ("A corporation may . . . conduct or promote any lawful business or purposes . . . ."), with 12 U.S.C. § 24 (enumerating eleven bank powers, including the "business of banking").

110. As the Supreme Court has recognized, the special power of a bank charter lends itself to special restrictions. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 327 (1963) ("[T]he proper discharge of these [banking] functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal."). This Note focuses on control of the bank charter to avoid mistaking share ownership for ownership of the corporate entity and to avoid overstating the control rights vested in voting shares.

111. U.S. Const. art. I, § 8, cl. 5.

112. Id. § 10, cl. 1; see also Jakob Feinig, Moral Economies of Money: Politics and the Monetary Constitution of Society 14–68 (2022) (appraising the monetary politics of bills of credit before and after ratification of the Constitution).

113. U.S. Const. art. I, § 8, cl. 18.

114. See Gerald T. Dunne, Monetary Decisions of the Supreme Court 16–20 (1960).

115. See Ricks et al., NPU, supra note 51, at 821 ("[The First Congress] chartered a parastatal instrumentality, the Bank of the United States, to expand the money supply beyond [metal coins].").

116. Lev Menand & Morgan Ricks, Federal Corporate Law and the Business of Banking, 88 U. Chi. L. Rev. 1361, 1392 (2021); see also James Willard Hurst, A Legal History of Money in the United States, 1774–1970, at 31 (1973) (discussing the policy of dispersing control of money creation).

replacing the singular Bank of the United States with many national banks.[117]

2. *Outsourcing the Bank Charter*. — Like much of American law, banking in the United States began as an English import. Two features defined the English banking enterprise: delegation and separation.[118] Two more elements—supervision and diffusion—were added by the National Bank Act of 1864, forming the core of our present banking law.[119] Delegation moved intrafirm control of the bank enterprise from the government to the public.[120] Separation, supervision, and diffusion restrained that power, aiming to channel it toward the public interest.[121]

Separation aimed to prevent unfair competition between banks and their customers by keeping banks out of commerce.[122] While modern attention to separation focuses on stability, Professor Menand argues that "[t]his rationale . . . tends to take the distributional politics out of monetary system design."[123] He notes that "[u]ntil the Great Depression, the animating legislative purpose behind separation was to prevent unfair trade practices and the undue concentration of private power."[124] Meanwhile, supervision ensured a degree of public control over the delegated bank charter. It "allowed the government to influence bank note issuance, examine books and records, and revoke charters at any sign of trouble."[125] Thus, banks are always cooperatively governed by both bank

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117. See infra section I.B.2.

118. See Lev Menand, The Logic and Limits of the Federal Reserve Act, 40 Yale J. on Regul. 197, 207–09 (2023) [hereinafter Menand, Federal Reserve].

119. See National Bank Act of 1864, Pub. L. No. 38-106, 13 Stat. 99 (1864) (codified in scattered sections of 12 U.S.C. (2018)); see also Lev Menand & Morgan Ricks, Rebuilding Banking Law: Banks as Public Utilities, 41 Yale J. on Regul. 591, 597 (2024) ("The [National Bank Act] remains the core of U.S. banking law.").

120. The principal concern of government control was political overissuance of credit. See Menand, Federal Reserve, supra note 118, at 212–13 & nn.73–75. While delegation "limits the role of the government in credit allocation and the power of political majorities to redistribute resources[,] [i]t also entrenches elites, who tend to control banks and hence access to money and credit." Id. at 212. As this Note will uncover, however, elite entrenchment is contingent on the allocation of coordination rights.

121. See id. at 220 ("With the government no longer handpicking its franchisees, and with so many franchisees spread about the country, legislators commissioned officials to coordinate banks to ensure that they worked together and in the public interest.").

122. Because banks have the unique power to create and allocate credit, business rivalry with commercial enterprise is inherently unfair.

123. Menand, Federal Reserve, supra note 118, at 215.

124. Id. (citing 133 Cong. Rec. 6805 (1987) (statement of Sen. Proxmire) ("At the foundation of American financial law is a longstanding tradition of separating banking and commerce. This separation has served to preserve the equal availability of credit in the United States and minimize the concentration of financial and economic power.")); see also Saule T. Omarova, The Merchants of Wall Street: Banking, Commerce, and Commodities, 98 Minn. L. Rev. 265, 274–78 (2013) (discussing the separation regime).

125. Lev Menand, Why Supervise Banks? The Foundations of the American Monetary Settlement, 74 Vand. L. Rev. 951, 984 (2021) [hereinafter Menand, Supervise]. That the

decisionmakers and government supervisors.[126] Finally, by diffusing the bank charter, Congress aimed to combat special privileges, prevent conglomeration, and disperse control over credit as well as its allocation.[127]

In terms of coordination rights, delegation advanced participatory control of bank charters, separation contained bank domination of commerce, supervision made the public grant of coordination rights subject to continued public oversight and control, and diffusion dispersed interfirm coordination rights within the monetary system as a bulwark against the concentration of private power and the subversion of republican government.[128] Putting together banking law's specific commands to delegate and diffuse bank charter coordination rights and antitrust law's general command to disperse economic coordination rights, banks are subject to a *double* dispersal command.[129]

3. *Bank Concentration.* — Banking law's attention to concentrated coordination rights extends beyond its focus on outsourcing and diffusing the bank charter.[130] For example, recognizing the potential for recursion between concentrated intrafirm control and concentrated credit flows, banking law limits lending to bank insiders.[131] Similarly, in part to limit

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government retained the ability to control banks was particularly important because Congress made bank charter applications open to all. See Menand, Federal Reserve, supra note 118, at 218 (citing 12 U.S.C. §§ 21, 26, 27 (2018)).

126. Cf. Menand, Supervise, supra note 125, at 965 n.56; id. at 982 n.136 ("As [Alexander] Hamilton put it, an incorporated 'bank is not a mere matter of private property, but a political machine of the greatest importance to the state.'" (quoting Alexander Hamilton, The Report of the Secretary of the Treasury, (Alexander Hamilton), on the Subject of a National Bank, reprinted in 7 Charles Brockden Brown & Robert Walsh, American Register, or General Repository of History, Politics, and Science 225, 243 (Philadelphia, G & A. Conrad & Co. 1811))).

127. See Menand, Federal Reserve, supra note 118, at 218 & n.112 (pointing to statutes "authorizing national banks to branch, but only to the extent permitted by state law and only within the state in which the bank is situated" and "prohibiting, among other things, a company that owned a bank in one state from acquiring a bank in another state"). This was an especially salient concern because one president of the Bank of the United States used his position to "curry favor with the press, influence elections, and support his allies, including lending to his family members and members of Congress." Ricks et al., NPU, supra note 51, at 833; see also Menand, Federal Reserve, supra note 118, at 209 (noting anti-oligarchy critiques of the Bank).

128. See Menand, Federal Reserve, supra note 118, at 210–22 (expanding on delegation, separation, supervision, and diffusion). Recall that the Sherman Act responded to a concentration of coordination rights in the legal forms of the trust and early corporation by commanding their dispersal. See supra notes 93–99 and accompanying text. Thus, decades before the Sherman Act, Congress had regulated coordination rights in banking.

129. Double refers to heightened normative force, not legal obligation. In other words, antitrust law aims to disperse coordination rights generally; banking law aims to disperse control of bank charters specifically.

130. See, e.g., Omarova & Steele, supra note 109, at 1169–71.

131. See 12 U.S.C. §§ 375a–375b (2018). The flipside of preventing concentrated credit flows is a command for their dispersal.

recursion between concentrated credit flows and firm concentration, it caps loans to one borrower.[132] Quantitative deposit caps also limit both national and state firm concentration.[133] And, although eroded over time, the National Bank Act sought to limit firm concentration by restricting banks to one geographic location, a regime known as unit banking.[134]

Banks are also subject to federal antitrust laws like the Sherman Act and the Clayton Act.[135] In fact, unlike other enterprises, banks must obtain preapproval from the relevant banking agency to consummate a merger.[136] Further, in response to the global financial crisis (GFC), Congress passed the Dodd–Frank Consumer Protection and Wall Street Reform Act ("Dodd–Frank"), requiring the relevant banking agency to consider how any bank acquisition might lead to greater or more concentrated systemic risk.[137]

Taken as a whole, banking law expresses a clear idea about how to govern the bank charter: disperse, regulate, and supervise control.[138] Yet

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132. See 12 U.S.C. § 84.

133. See 12 U.S.C. §§ 1831u(b)(2)(A), 1842(d)(2)(B). But see § 1842(d)(2)(A); Carnell et al., supra note 101, at 172 (noting exceptions to the ten percent deposit control cap contained in § 1842(d)(2)(A), such as "internal deposit growth, branching, acquiring a bank in its home state, and acquiring a thrift institution").

134. See Carnell et al., supra note 101, at 26–28, 40–42, 46–47 (documenting the origins and rollback of unit banking); Kathryn Judge, Response, Brandeisian Banking, 133 Yale L.J. Forum 916, 917–18, 935–36 (2024), https://www.yalelawjournal.org/pdf/JudgeYLJForumResponse_cqrz963m.pdf [https://perma.cc/54W4-DAEX] [hereinafter Judge, Brandeisian Banking] (noting Justice Louis Brandeis's and unit banking's coextensive focus on "decentralized power, small-scale enterprise, and community orientation"). Geographical restrictions suppressed competition qua rivalry between banks. See Jeffrey N. Gordon & Wolf-Georg Ringe, Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take, 115 Colum. L. Rev. 1297, 1317 (2015) ("The preexisting geographic restrictions that limited bank branching also protected local deposit gathering and loan-making from competitive encroachments."). Thus, competition qua rivalry is not a lodestar for bank coordination rights like it is for orthodox accounts of antitrust law.

135. See, e.g., Carnell et al., supra note 101, at 416.

136. This is required by both the Bank Merger Act, 12 U.S.C. § 1828(c), and the Bank Holding Company Act, 12 U.S.C. § 1842(c). Other enterprises, at most, must give notice under the Hart–Scott–Rodino Act. 15 U.S.C. § 18a (2018). This special regime is enforced by concurrent jurisdiction between the relevant banking agencies and the Department of Justice. Carnell et al., supra note 101, at 425–27.

137. An explicit goal of Dodd–Frank was "to end 'too big to fail.'" Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376, 1376 (2010); see also id. § 604(d), 124 Stat. 1601 (codified as amended at 12 U.S.C. § 1842(c)(7)) ("In every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system."); id. § 604(f), 124 Stat. 1602 (codified as amended at 12 U.S.C. § 1828(c)(5)) (providing that the responsible agency should consider "the risk to the stability of the United States banking or financial system" in merger cases).

138. Another way to think about banking's regulatory and supervisory regime, then, is one in which public and public–private institutions play a more important role than

in the last thirty years, banking has rapidly consolidated, in small part because purchase and assumption (P&A) transactions have dominated bank resolution.[139] In fact, even after Dodd–Frank, acquisitions made in bank resolution are exempt from banking law's concentration limits.[140] Case in point: A P&A transaction was the only way JPMorgan could acquire First Republic.[141]

C. *Bank Resolution*

Banks are special and so there is a special regime to deal with their failure: bank resolution. To understand the possibilities and limits of bank resolution—and ultimately, how bank resolution allocates coordination rights—this section examines its purpose, legal constraints, methods, and technical standards.

1. *Purpose.* — When commercial enterprises suffer financial distress, they often enter bankruptcy. Not so with banks.[142] Instead, for three

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hierarchical firms in coordination. So, to the extent the banking system would suffer coordination defects from alternative forms of organization, there is a sophisticated regime to pick up the slack.

Beyond the scope of this Note, but also important, are the ways that public institutions like the Federal Reserve, rather than dominant firms, coordinate prices. See generally Tankus & Herrine, supra note 25 (discussing price leadership by dominant firms and alternative coordination mechanisms).

139. See John Armour, Dan Awrey, Paul Davies, Luca Enriques, Jeffrey N. Gordon, Colin Mayer & Jennifer Payne, Principles of Financial Regulation 363 (2016); Omarova & Steele, Banking and Antitrust, supra note 109, at 1197. A P&A transaction effectively merges a failed bank with another bank. See infra section I.C.3. The authors identify two other driving forces: the elimination of federal hindrances to interstate mergers in the early 1990s, and Glass–Steagall's 1999 partial repeal, allowing commercial banks to affiliate with investment banks. See Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.); Gramm–Leach–Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.); see also Jeremy C. Kress, Reviving Bank Antitrust, 72 Duke L.J. 519, 551 (2022) ("[In] 2008 . . . the federal government encouraged a handful of comparatively strong banks to absorb weaker institutions flirting with insolvency. As a result, JPMorgan acquired Bear Stearns and Washington Mutual, Bank of America added Merrill Lynch and Countrywide Financial, and Wells Fargo merged with Wachovia." (footnote omitted)).

140. See 12 U.S.C. §§ 1831(e), 1842(d)(5). Note, however, that banking law's unit banking regime and its concern with bank concentration previously trumped bank resolution law. See infra note 191; infra section II.C.2.

141. Nupur Anand, Anirban Sen, David French & Isla Binnie, Insight: How JPMorgan's Dimon Won the First Republic Deal, Reuters (May 2, 2023), https://www.reuters.com/business/finance/how-jpmorgans-dimon-won-first-republic-deal-2023-05-02/ [https://perma.cc/GP3S-TCZL].

142. Although bank holding companies are eligible for bankruptcy, their bank subsidiaries are not. See, e.g., Hynes & Walt, supra note 17, at 993. Prior to 1933, banks were subject to the standard bankruptcy process and depositors were treated like unsecured creditors. Dan Awrey, Unbundling Banking, Money, and Payments, 110 Geo. L.J. 715, 742 (2022). The resolution regime began with the FDIC's creation in 1933. Id. at 743.

standard reasons, banks enter resolution.[143] First, bankruptcy is not well suited for dealing with the bank enterprise.[144] Bankruptcy freezes the bankrupt enterprise's balance sheet, undermining the legal essence of bank deposits, which are defined by their payment on demand.[145] Second, a bank's franchise value quickly declines, so lengthy legal proceedings are particularly costly for bank stakeholders.[146] Third, "negative externalities" from bank failure, also known as "contagion," threaten further bank failures, payments system disruptions, and a sharp decline in access to credit for individuals and businesses.[147]

2. *Legal Constraints.* — The FDIC's primary role in resolution is to act as a receiver of the failed bank.[148] In effect, the FDIC steps into the shoes of the failed bank, using a wide range of tools to marshal its balance sheet and operations.[149] As an insurer, the FDIC always pays claims to the failed bank's insured depositors first.[150] Only if asset disposition is sufficient to cover insured claims can it then pay claims to all other bank

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143. See Armour et al., supra note 139, at 341–42; see also Phoebe White & Tanju Yorulmazer, Bank Resolution Concepts, Trade-Offs, and Changes in Practices, Fed. Rsrv. Bank N.Y. Econ. Pol'y Rev., Dec. 2014, at 153, 156–58 (contrasting corporate bankruptcy and bank resolution).

144. See Armour et al., supra note 139, at 341. Bank resolution, by contrast, can transfer deposit liabilities in addition to assets. See John Armour, Making Bank Resolution Credible, *in* The Oxford Handbook of Financial Regulation 453, 461 (Niamh Moloney, Ellís Ferran & Jennifer Payne eds., 2015).

145. See 11 U.S.C. § 362 (2018) (automatic stay); Banking Act of 1933, Pub. L. No. 73-66, § 21(a)(2), 48 Stat. 162 (1933) (commonly known as the "Glass–Steagall Act") (codified at 12 U.S.C. § 378) (prohibiting engaging in the business of receiving deposits subject to repayment at the request of the depositor without a bank charter).

146. See Armour et al., supra note 139, at 341.

147. Id. at 341–42; see also Awrey, supra note 142, at 742–44.

148. The FDIC also acts an insurer and conservator. See Carnell et al., supra note 101, at 369–70 (focusing primarily on the FDIC's receivership function in resolution for simplicity). For a description of receivership powers and processes, see 12 U.S.C. § 1821(c). Additional grounds for receivership include probable or unacceptable risk of failure; violations of a statute, regulation, or cease-and-desist order; unsafe and unsound condition; consent; and more. See id. § 1821(c)(5). This Note uses "failure" to capture all the above receivership triggers.

In practice, almost all depository institutions are resolved by the FDIC except for credit unions, which are resolved by the National Credit Union Administration (NCUA). Carnell et al., supra note 101, at 87.

149. See 12 U.S.C. § 1821(d)(2)(A)(i) ("The [FDIC] shall . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . ."); id. § 1823(c)(1) (authorizing the FDIC, "in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured depository institution").

150. See id. § 1811. For the statutory priority of unsecured claims, see id. § 1821(d)(11)(A).

stakeholders, including uninsured depositors, other general creditors, and shareholders.[151]

The FDIC's broad receivership authority has a few key constraints.[152] In selecting and administering a resolution method, the FDIC must comply with the least cost test.[153] Added via amendment to the FDIA by the Federal Deposit Insurance Corporation Improvement Act (FDICIA) in 1991, the least cost test forbids using a resolution method if it is more costly to the FDIC's Deposit Insurance Fund (DIF)—the account from which depositors are paid[154]—than any alternative method.[155] As commonly understood, FDICIA sought to deter moral hazard and thus combat the rise of "too-big-to-fail" banks.[156] By guarding against losses to

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151. Secured claims are paid first from the value of the underlying collateral. Any remaining claim becomes unsecured. See id. § 1821(d)(5)(D)(ii).

152. For example, in disposing of the failed bank's assets, the FDIC must comply with five statutory factors: maximizing net present value, minimizing loss, ensuring adequate competition and fair treatment of offerors, prohibiting discrimination in the disposition process, and maximizing affordable housing. See id. §§ 1821(d)(13)(E)(i)–(v), 1823(d)(3)(D).

153. See id. § 1823(c)(4).

154. See id. § 1821(a)(4). Banks pay "risk-based assessments" or insurance premiums into the DIF. See id. § 1817(b). These assessments are functionally a tax. For more on the accounting treatment of deposit insurance premiums and the DIF, see Nathan Tankus, The Dizzying Array of Accounting Gimmicks Preventing Silicon Valley Bank's Failure From Affecting the Debt Ceiling, Notes on the Crises (Mar. 19, 2023), https://www.crisesnotes.com/the-dizzying-array-of-accounting-gimmicks-preventing-silicon-valley-banks-failure-from-affecting-the-debt-ceiling/ [https://perma.cc/2JM7-NLW5].

155. See 12 U.S.C. § 1823(c)(4)(A)(ii). Between 1982 and the passage of FDICIA, the FDIC could use any resolution method less costly than an insured deposit payout and asset liquidation. See Garn–St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 U.S.C.) (adding an explicit cost test to the FDIA); see also FDIC, The First Fifty Years: A History of the FDIC 1933–1983, at 86–87 (1984) [hereinafter FDIC, 1933–1983] (discussing the regimes predating FDICIA: the 1951–1982 de facto cost test and the Garn–St. Germain explicit cost test); infra section I.C.3 (discussing the payout and liquidation (PO) method).

FDICIA responded to the Savings and Loan (S&L) crisis of the 1980s, during which the FDIC routinely provided direct financial support to distressed institutions and protected noninsured claimants. Jeffrey N. Gordon & Christopher Muller, Confronting Financial Crisis: Dodd–Frank's Dangers and the Case for a Systemic Emergency Insurance Fund, 28 Yale J. on Regul. 151, 186 (2011); Randall S. Kroszner & Philip E. Strahan, Obstacles to Optimal Policy, The Interplay of Politics and Economics in Shaping Bank Supervision and Regulation Reforms, *in* Prudential Supervision: What Works and What Doesn't 233, 243–44 (Frederic S. Mishkin ed., 2001).

156. See Carnell et al., supra note 101, at 67, 368; 1 FDIC, History of the Eighties, 104–05 (1997). Yet many legislators "were more offended by the disparate treatment of large banks—whose depositors were commonly fully protected—and small banks—where protection was commonly limited to insured depositors—than they were by the moral hazard issues of 'too big to fail.'" Gordon & Muller, supra note 155, at 188 n.107. Rather than solve that problem, however, FDICIA's systemic risk exception entrenched it. See infra notes 160–163.

the DIF, the least cost test seeks to impose more losses on noninsured stakeholders such as uninsured depositors, other general creditors, and shareholders.[157]

The least cost test nevertheless affords the FDIC "substantial discretion" in implementing the resolution process.[158] Determining the least cost resolution method necessarily relies on a counterfactual, so the statute only directs the FDIC to document its evaluation of alternatives, and the assumptions on which the evaluation is based, on a present-value basis, using a realistic discount rate.[159]

In addition, the least cost test can be suspended upon invocation of the "systemic risk exception."[160] The exception is invoked when the FDIC, the Board of Governors of the Federal Reserve, and the Treasury Secretary in consultation with the President agree that adherence to the least cost test "would have serious adverse effects on economic conditions or financial stability."[161] Most recently, the systemic risk exception was used to resolve SVB and Signature Bank.[162] Bypassing the least cost test, the

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Moral hazard refers to the diminished incentive of a party with insurance to prevent losses they are insured against. Carnell et al., supra note 101, at 205. In regulating monetary and financial institutions, too much downside support is said to create moral hazard. Id. But see, e.g., Maziar Peihani, Resolution of Small and Medium-Sized Deposit-Taking Institutions: Back to Basics?, 60 Am. Bus. L.J. 419, 466–68 (2023) (finding the moral hazard problem overstated).

157. Gordon & Muller, supra note 155, at 188–89 ("Over the 1986–1991 period, the height of open bank assistance, uninsured depositor losses in resolution cases averaged approximately 12%; in the period immediately following, 1992–1994, the average losses were 65%."). The FDIC recounts that:

> [T]here had been a general opposition to [temporary unlimited] deposit insurance because of moral hazard, but . . . during the [2008] crisis, expansion of the insurance guarantee was thought to be warranted because, without it, there could be rapid deposit outflows from smaller banks into banks that were perceived to be too big to fail.

See FDIC, Crisis and Response: An FDIC History, 2008–2013, at 38 (2017) [hereinafter FDIC, 2008–2013].

158. Memorandum from Jonathan McKernan, Member, FDIC Bd. of Dirs., on Board Approval of Midsized-and-Large Failed-Bank Sales, to the FDIC Board of Directors 3 (Aug. 23, 2023) (on file with the *Columbia Law Review*).

159. 12 U.S.C. § 1823(c)(4)(B)(i). The legislative history, Professor Michael Ohlrogge argues, suggests documentation with a mandated retention period of five years was intended to make the FDIC's analysis available by FOIA. Ohlrogge, supra note 4 (manuscript at 43) (citing 138 Cong. Rec. 3114 (1992)).

160. See 12 U.S.C. § 1823(c)(4)(G)(i).

161. Id. The FDIC and Federal Reserve must approve with a supermajority vote of their boards. Id. Invoking the exception must "avoid or mitigate" the least cost test's harm. Id. And subsequent DIF losses must be recovered with a "special assessment" (i.e., a one-time tax) on banks. Id. § 1823(c)(4)(G)(ii).

162. See Press Release, Bd. of Governors of the Fed. Rsrv. Sys., FDIC, & Dep't of the Treasury, Joint Statement by the Dep't of the Treasury, Fed. Reserve, and FDIC (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23017.html [https://perma.cc/43SD-TS2Q]. The systemic risk exception authorities based their decision on anticipated

FDIC—aiming to discourage further bank runs and payments system disruptions—made whole every SVB and Signature depositor.[163]

3. *Methods.* — In the post-FDICIA era, the FDIC uses two primary methods to resolve failed banks: purchase and assumption (P&A) transactions and payouts (PO).[164] In P&A, an acquiring institution "purchases" the assets and "assumes" the liabilities of the failed bank. It is, in essence, a merger.[165] P&A has two permutations depending on which deposit liabilities the acquirer assumes. It either assumes "all" deposits (PA) or only "insured" deposits (PI). In PO, on the other hand, assets are sold on a secondary market, insured deposits are paid by check, and all other claims are paid their pro rata share if liquidated assets exceed insured deposits.[166] Empirically, there is a clear hierarchy to the FDIC's post-FDICIA methods.[167] PA transactions are used seventy-five percent of the time, resolving ninety-two percent of bank assets; PI transactions are used fifteen percent of the time, resolving six percent of assets; and PO is

"contagion" risk from further bank runs and failures as well as broader economic effects, including sensitivity to the fact that SVB's customers included several payroll companies. U.S. Gov't Accountability Off., GAO-23-106736, Bank Regulation: Preliminary Review of Agency Actions Related to March 2023 Bank Failures 29–31 (2023), https://www.gao.gov/assets/gao-23-106736.pdf [https://perma.cc/QPG4-4M78].

Unlike the other two major failures in March 2023, First Republic Bank did not receive a systemic risk exception and so was bound by the least cost test. Yet it was resolved with a type of P&A transaction that makes whole all uninsured depositors. See Bid Summary for First Republic Bank, San Francisco, CA, FDIC, https://www.fdic.gov/bank-failures/bid-summary-first-republic-bank-san-francisco-ca [https://perma.cc/F9MT-YF4Y] [hereinafter FDIC, First Republic Bid Summary] (last updated May 31, 2023); infra section I.C.3.

163. See Press Release, FDIC, FDIC Acts to Protect All Depositors of the Former Silicon Valley Bank, Santa Clara, California (Mar. 13, 2023), https://www.fdic.gov/news/press-releases/2023/pr23019.html [https://perma.cc/TU6V-HY77] [hereinafter FDIC, SVB Bridge Bank].

164. In assistance transactions—a popular method in the 1980s that has fallen out of favor post-FDICIA—the FDIC makes loans, contributions, or deposits; purchases assets; or assumes bank liabilities. See 12 U.S.C. § 1823(c)(1); 1 FDIC, Managing the Crisis: The FDIC and RTC Experience 20 & n.17 (1997), https://www.fdic.gov/resources/publications/managing-the-crisis/documents/managing-the-crisis.pdf [https://perma.cc/75MV-CUCX] [hereinafter FDIC, Crisis]. Assistance transactions were first authorized in 1950 but sat unused until 1971. See Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, 64 Stat. 873 (codified at 12 U.S.C. §§ 1811–1835a); FDIC, Crisis, supra, at 66 (citing FDIC, 1933–1983, supra note 155, at 94). The most famous assistance transaction resolved Continental Illinois in 1984, popularizing the "too-big-to-fail" moniker. See FDIC, Crisis, supra, at 560.

165. In fact, when Congress added the P&A authority to the FDIA in 1935, "most banking observers felt that there were too many banks in operation and that it would be desirable if the FDIC could facilitate an orderly reduction in their number through increased mergers." FDIC, 1933–1983, supra note 155, at 81.

166. See FDIC, 2008–2013, supra note 157, at 185. Uninsured depositors and other general creditors may receive advanced dividends if the FDIC forecasts recoveries for them in liquidation. See FDIC, Resolutions Handbook, supra note 19, at 28.

167. See, e.g., Ohlrogge, supra note 4 (manuscript at 41) ("FDIC resolution methods have shifted dramatically, to essentially always favor whole-bank or all-deposit P&A deals that rescue uninsured depositors.").

used only five percent of the time, resolving one percent of assets.[168] PA is the favored method, while PI, and especially PO, are disfavored alternatives.[169]

The FDIC begins a P&A transaction by marketing the failed bank franchise to a pre-approved list of third-party institutions.[170] The FDIC offers at least one preselection of assets, liabilities, and contractual provisions—together known as the conforming bid criteria.[171] The acquirer's bid consists of naming its desired assets and liabilities and the cash it will pay or receive to complete the transaction.[172] A more competitive bid purchases more assets, assumes fewer uninsured deposits, and pays more cash to the FDIC. The assets not acquired in P&A are liquidated—sold in a secondary market—in separate transactions.[173]

168. See BankFind Suite: Bank Failures & Assistance Data, FDIC, https://banks.data.fdic.gov/bankfind-suite/failures [https://perma.cc/BMV4-GADJ] [hereinafter FDIC, Bank Failures Data] (last visited Oct. 15, 2024) (filtering for post-FDICIA resolution data from January 1, 1992, to January 1, 2025). Post-FDICIA, the same hierarchy in terms of assets exists both before 2008—PA: 57%; PI: 39%; PO: 2%—and after— PA: 95%; PI: 3%; PO: 1%. In terms of the number of banks resolved, PI outnumbers PO before 2008—PA: 146, or 48%; PI: 114, or 37%; PO: 24, or 8%—but not after—PA: 500, or 91%; PI: 12, or 2%; PO: 18, or 3%. See id. (filtering for resolution data from January 1, 1992, to December 31, 2007, and January 1, 2008, to January 1, 2025; excluding two GFC assistance transactions involving Bank of America and Citibank). PO, however, has not been used since 2013; PI was most recently used in 2024, 2019, and 2017. See id (filtering for resolution data by "Pay Out" and "Purchase and Assumption (PI)" transaction types).

169. See id. (filtering for data showing post-FDICIA use of PA, PI, and PO in ninety-five percent of all resolution transactions, resolving over ninety-nine percent of assets, excluding two GFC assistance transactions involving Bank of America and Citibank); see also White & Yorulmazer, supra note 143, at 159–60 (describing bank resolution methods).

170. See FDIC, 2008–2013, supra note 157, at 187. Most often, the third-party acquirer is another bank. But in late 2008, the OCC and FDIC opened P&A bidding to private equity firms. Id. at 198. Between 2008 and 2013, excluding Washington Mutual, private equity purchased twenty-two percent of the FDIC's receivership assets. Id. at 199.

171. See id. at 185, 187 n.30. Because the FDIC's methods for setting conforming bid criteria and selecting the winning bid are secret, banks are incentivized to submit conforming bids. Ohlrogge, supra note 4 (manuscript at 19). But submitting a conforming bid is not a necessary condition for winning a P&A auction. See, e.g., Bid Summary for Republic First Bank dba Republic Bank, Philadelphia, PA, FDIC, https://www.fdic.gov/bank-failures/bid-summary-republic-first-bank-dba-republic-bank-philadelphia-pa [https://perma.cc/4FE4-XMN2] (last updated May 3, 2024) (showing a winning bid that was not a conforming bid).

172. If assets exceed liabilities, the acquirer pays the FDIC for the difference; if liabilities exceed assets, as is typical, the FDIC pays the acquirer instead. Therefore, for a given amount of deposits assumed, the cash difference reflects both the quantity and valuation of assets acquired. See FDIC, 2008–2013, supra note 157, at 187. In addition, bidders may make multiple bids. See, e.g., FDIC, First Republic Bid Summary, supra note 162 ("There may be more bids than bidders because one or more bidders submitted more than one bid.").

173. When the acquirer assumes at least ninety percent of assets (implying at most ten percent are liquidated) the transaction is called "whole-bank" P&A. See FDIC, 2008–2013, supra note 157, at 199 & n.57.

The disfavored alternative to P&A is PO. On the liability side, the FDIC pays insured depositors by check.[174] Then they liquidate the failed bank's assets, just like unpurchased P&A assets. Unlike P&A, PO extinguishes the franchise value of the failed bank. This loss puts PO at an asset-side cost disadvantage to P&A. But in the absence of a systemic risk exception, PO is as or less costly than P&A on the liability side because no uninsured deposits are paid from the DIF.[175]

The FDIC has two additional authorities to facilitate smooth resolution: deposit insurance national banks (DINBs) and bridge banks.[176] These are best considered instrumental or intermediate resolution methods because they stabilize the failed bank until one of the primary resolution methods is viable.[177] A DINB is a temporary bank with a limited charter.[178] It makes insured deposits immediately available for withdrawal or transfer.[179] Bridge banks are like DINBs but with a broader scope.[180] Instead of merely making insured deposits available, they are chartered to continue normal bank operations for up to five years.[181] Bridge banks are typically used when a P&A transaction is not immediately viable, like in the case of SVB.[182] No matter which intermediate method the FDIC uses, the

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174. Checks typically arrive by Monday or Tuesday following a Friday bank closure, so depositors lose access to their funds over the weekend. FDIC, 2008–2013, supra note 157, at 185 n.a.

175. Uninsured deposits paid from the proceeds of asset liquidation are not a net cost to the DIF.

176. See 12 U.S.C. § 1821(m)–(n) (2018).

177. Until falling out of use in 1995, the FDIC also prevented depositor disruption with an "insured deposit transfer" (IDT) method in which a third-party bank would assume all the failed bank's insured deposits. IDT disappeared from the FDIC's primary resolution methods as P&A—and PA, in particular—became dominant. See FDIC, Crisis, supra note 164, at 44, 75; FDIC, Bank Failures Data, supra note 168.

178. FDIC, 2008–2013, supra note 157, at 184.

179. Soon after SVB's failure, the FDIC determined there were too many uninsured deposits and too much uncertainty about SVB's assets to implement any of its primary resolution methods. It chartered the DINB of Santa Clara to give depositors immediate access to their insured deposits. Press Release, FDIC, FDIC Creates a Deposit Insurance National Bank of Santa Clara to Protect Insured Depositors of Silicon Valley Bank, Santa Clara, California (Mar. 10, 2023), https://www.fdic.gov/news/press-releases/2023/pr23016.html [https://perma.cc/6EM7-BXDW].

180. In effect, the failed bank is temporarily nationalized. See Hyman P. Minsky, Stabilizing an Unstable Economy 52 n.5 (2008) [hereinafter Minsky, Stabilizing] (calling the resolution of Continental Illinois a "covert nationalization").

181. A bridge bank charter has an initial lifespan of two years, but it can be renewed for three additional one-year periods. 12 U.S.C. § 1821(n)(9).

182. One day after invoking the systemic risk exception, the FDIC disbanded the DINB of Santa Clara and chartered the Silicon Valley Bridge Bank (SVBB). See FDIC, SVB Bridge Bank, supra note 163. Thirteen days later, SVBB was sold to First-Citizens Bank by loss-share PA at a projected loss of $20 billion. See Press Release, FDIC, First-Citizens Bank & Trust Co., Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html [https://perma.cc/WWH8-Z4DB].

Agency appoints its own board of directors after firing the failed bank's directors, officers, and senior management.[183]

The FDIC also draws on its broad disposition powers to create additional tools as needed.[184] For example, loss-share agreements—in which the FDIC commits to share in the acquirer's downside risk—were deployed during the GFC.[185] They enabled greater P&A asset transfers to a single acquirer by reducing the risk of loss from acquiring low-quality assets.[186] The FDIC quickly paired loss-share agreements with "true-up" payment provisions.[187] These provisions allow the FDIC to share in the asset's upside in addition to its downside.[188] When an asset returns greater

183. See 12 U.S.C. § 1821(n)(1)(D), (2)(D), (4)(A) (2018); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . ."). By contrast, bankruptcy does not reflexively fire corporate controllers, instead retaining them as the "debtor in possession." See Barry E. Adler, Anthony J. Casey & Edward R. Morrison, Baird and Jackson's Bankruptcy: Cases, Problems, and Materials 32 (5th ed. 2020).

184. For example, in the 1980s, the FDIC created income maintenance agreements to assist merger transactions. See FDIC, Crisis, supra note 164, at 72. If the acquirer's return on acquired assets fell short of the average cost of savings bank funds, the FDIC would pay them for the difference. See id. If the acquired asset return exceeded the cost of funds, the acquirer would pay the FDIC. See id. This arrangement was a precursor to the tandem of loss-share agreements and true-up provisions later developed to share in losses and gains more broadly with acquirers. See infra notes 185–189 and accompanying text. Similarly, net worth certificates buttressed assistance transactions as a direct source of equity. See FDIC, Crisis, supra note 164, at 74.

185. Loss-shares date to 1991. FDIC, Crisis, supra note 164, at 80. The FDIC's default loss-share agreements during the GFC covered eighty percent of losses on acquired assets and went as high as ninety-five percent. FDIC, 2008–2013, supra note 157, at 195. The FDIC stopped offering loss-share agreements in their conforming bid criteria at the end of 2013, id. at 196, but they appear to have reemerged. See, e.g., FDIC, First Republic Bid Summary, supra note 162; Bid Summary for Heartland Tri-State Bank, Elkhart, KS, FDIC, https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/heartlandtristate-bid-summary.html [https://perma.cc/Q8ZV-CJKJ] (last updated Aug. 8, 2023) (showing a "Commercial Shared-Loss Tranche" bid category and categorizing the transaction as "All Deposits Whole Bank with Shared-Loss").

186. See FDIC, Crisis, supra note 164, at 16. Because P&A transactions come together very quickly, acquirers often do not have time for thorough due diligence and thus are at a significant information disadvantage. See FDIC, 2008–2013, supra note 157, at 185; infra note 314. Mitigating this risk reduces the risk premium demanded by acquirers. See FDIC, 2008–2013, supra note 157, at 190. This results in a "higher" bid and thus a lower cost to the FDIC up front, even as it increases costs on the back end as losses are incurred. Id. at 191. Often, these agreements enable P&A transactions that otherwise would not be viable, saving the cost of liquidating. And on cost terms, a loss in the future is preferable to a loss today because the least cost test is calculated in present value terms. See 12 U.S.C. § 1823(c)(4)(B)(i)(I), (d)(3)(D); id. § 1821(d)(13)(E)(i).

187. Loss-share P&A became the FDIC's dominant resolution method by the middle of 2009; true-up payments were added that October. There were 304 loss-share transactions between 2008 and 2013, and 215—or seventy-one percent—used true-up provisions. FDIC, 2008–2013, supra note 157, at 195, 200.

188. Id. at 191.

than its expected value, the acquirer pays part of the gain to the FDIC.[189] Shelf charters are yet another modern resolution law innovation.[190] They allow a nonbank entity to bid on and acquire a failed bank in a P&A transaction.[191] The Office of the Comptroller of the Currency (OCC) grants preliminary approval of a national bank charter to the nonbank, and the charter remains inactive, or "on the shelf," until the nonbank wins a P&A auction.[192]

The FDIC's primary resolution methods—PA, PI, and PO—give it flexibility to prevent insured deposit losses and dispose of failed bank assets within the bounds of the least cost test. Its intermediate methods—DINBs and bridge banks—fill the gap between failure and primary method viability. And to strengthen its favored method, the FDIC draws on broad powers to create tools such as loss-share agreements, true-up provisions, and shelf charters.

4. *Technical Standards.* — What makes one resolution method better than another? Answering that question requires enumerating technical standards for the resolution process: administrative burden, speed, orderliness, scale, and resilience.

Administrative burden refers to staffing, expertise, and management costs.[193] Speed means minimizing customer disruption without triggering fire-sale or asset overhang dynamics.[194] Orderliness refers to a smooth

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189. Like loss-share agreements, true-up provisions appear to have recently reemerged. See FDIC, First Republic Bid Summary, supra note 162 (showing an "Equity Appreciation Offer" bid feature).

190. See supra note 170.

191. The modern shelf charter is predated by ad hoc chartering of new banks. Ad hoc chartering may have been a workaround for a unit banking regime in which bank acquisitions were not allowed. See FDIC, 1933–1983, supra note 155, at 86 ("[Between 1945 and 1953,] there were 24 assumptions, including cases in Illinois, Missouri, Texas, and Wisconsin—all essentially unit banking states. The FDIC was able to arrange assumption transactions with newly chartered banking groups in several of these cases."); supra note 134 and accompanying text (referencing unit banking).

192. Press Release, OCC, OCC Approves First Use of "Shelf Charter" to Acquire Failed Bank (Jan. 22, 2010), https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-8.html [https://perma.cc/7XFZ-BFMW] (internal quotation marks omitted); see also FDIC, 2008–2013, supra note 157, at 135 & n.60 ("A shelf charter is a conditional banking charter granted to an organizing group for the specific purpose of acquiring one or more failing banks. It is conditional on the organizing group's being selected as the winning bidder for the failing bank or banks."). This also means that a pre-existing firm exemption is not necessary to win a P&A auction.

193. Cf. Armour et al., supra note 139, at 349–50 (enumerating speed, purpose, administrative process, and subordinated creditor and shareholder rights as "core characteristics of a resolution procedure"). The FDIC's desire to minimize administrative burdens stems from the S&L crisis of the 1980s and early 1990s. During that crisis, "[t]he FDIC retained and managed a large share of the assets and found the experience to be both costly and operationally complex." FDIC, 2008–2013, supra note 157, at 179.

194. For a discussion of fire-sale and asset overhang dynamics, see FDIC, 2008–2013, supra note 157, at 207–08 (noting that optimal resolution speed is a balancing act).

process that minimizes bank runs, broader disruptions to the community, and financial instability.[195] A scalable resolution method works well with small, medium, and large bank failures alike. And a resilient method works well in times of both financial market calm and stress. All else equal, a resolution method that minimizes the FDIC's administrative burden, works faster, is more orderly, can be scaled up and down, and is resilient to financial market stress is a more technically proficient method. How technically proficient are the FDIC's primary methods?

The two P&A transactions—PA and PI—are administered by the same, relatively easy processes of asset auctions and liquidations, and deposit transfers and payouts. Their speed is contingent on financial market conditions: In times of stress, bidders are scarce, so P&A may not be viable, and an intermediate method may be required. In terms of orderliness, PI transactions give uninsured depositors essentially the same incentive to run as PO transactions, while PA transactions eliminate that incentive entirely.[196] However, P&A causes longer-term disruptions because acquirers tend to reduce lending to the failed banks' former customers, lower their deposit rates, and close their branches.[197] Further, P&A does not scale well with bank size.[198] Generally, only other large banks can afford to purchase and quickly integrate the assets of another large bank. Thus, the largest banks are poor candidates for P&A because there are few, if any, bidders available.[199]

195. See, e.g., FDIC, Crisis, supra note 164, at 211 ("To maintain confidence in the banking system and to maintain stability of the financial system . . . resolution of failed depository institutions was designed to promote the efficient, expeditious, and orderly liquidation of failed banks and thrift institutions.").

196. Collectively, uninsured depositors have a greater incentive to run in PO transactions when PI asset sales generate greater receipts than PO asset liquidations (or vice versa). Still, they are unlikely to be made whole in either case. So, an ex ante commitment to PA resolution can reduce the incentive for an uninsured depositor to run from a failing bank prior to resolution.

197. See Siddharth Vij, Acquiring Failed Banks 2–4, 24, 26–27 (Oct. 9, 2020) (unpublished manuscript), https://papers.ssrn.com/abstract=3234435 [https://perma.cc/F7JD-5MJJ].

198. See Armour supra note 144, at 466 ("[A] purchase and assumption transfer requires that a transferee be found with the financial resources to underwrite the liabilities that have been transferred. The bigger—and consequently, more systemic—the firm that has been resolved, the more difficult it will be to find a suitable transferee.").

199. "Hence, bank size can lead to a systemic crisis" because "larger and more complex [banks are] . . . more difficult to resolve." White & Yorulmazer, supra note 143, at 160 n.13, 163.

Finally, P&A is not resilient.[200] Empirically, P&A transactions are more costly than liquidation in times of industry distress.[201]

On the other hand, PO transactions may require prolonged receivership management if assets cannot be sold quickly. But they are primarily burdened only by liquidating assets and mailing deposit checks.[202] PO can be inferior in terms of speed because funds are not immediately available without use of an intermediate method.[203] On the liability side, PO is administratively scalable, although larger bank failures will magnify deposit access disruptions. On the asset side, PO scales poorly with bank size because large asset sales can depress market prices.[204] Indeed, because liquidation relies on a secondary market for bank assets, PO shares an important resilience deficiency with P&A.[205] Nevertheless, PO asset liquidations are more resilient than P&A because piecemeal asset sales are less complex and draw on a larger pool of bidders, including many from outside the banking system.[206]

In sum, the FDIC's primary methods are relatively good at minimizing administrative burden and balancing resolution speed. They can prevent the most serious disruptions such as bank runs, but they tend to hurt the failed bank's customers over time. Further, they do not scale well with

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200. "Because of uncertainty about the value of the failed-bank assets, the whole-bank [P&A] option was rarely cost-effective at the height of the crisis: the risk premiums demanded by potential acquirers were simply too great." FDIC, 2008–2013, supra note 157, at 190.

201. See Rosalind L. Bennett & Haluk Unal, Understanding the Components of Bank Failure Resolution Costs, 24 Fin. Mkts., Insts. & Instruments 349, 382 (2015) (finding P&A more costly than liquidation in periods of industry distress even after adjusting for selection bias); Jason Allen, Robert Clark, Eric Richert & Brent Hickman, Banking Fragility and Resolution Costs 14 (April 29, 2023) (unpublished manuscript), https://ssrn.com/abstract=4434353 [https://perma.cc/E8PS-BEHX] (finding "during crises resolution costs can spiral as the set of unconstrained bidders shrinks" due to health-of-bidder restrictions on P&A auctions).

202. The FDIC also estimates noninsured claimant recoveries to determine whether advanced dividends are viable, and if so, how much to pay. See FDIC, Crisis, supra note 164, at 20 & n.14, 44–45; supra note 166.

203. On the other hand, PO may allow more time for due diligence on the part of both the FDIC and buyers in secondary markets.

204. See FDIC, 2008–2013, supra note 157, at 185.

205. See Minsky, Stabilizing, supra note 180, at 86 (discussing the need for secondary markets in position-making instruments for normal functioning of the banking system); Hyman P. Minsky, Suggestions for a Cash Flow-Oriented Bank Examination 150, 152 (1967), https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1174&context=hm_archive (on file with the *Columbia Law Review*) ("[A] bank's viability . . . depends upon the normal or proper functioning of some financial markets. . . . Thus . . . whenever cash flows from operations are insufficient to meet financial commitments: a unit can be in a cash flow bind . . . because it cannot sell assets . . . to raise cash.").

206. FDIC, 2008–2013, supra note 157, at 185; see also supra note 170. Smaller asset purchases also require less due diligence. See FDIC, 2008–2013, supra note 157, at 191.

larger bank failures, and they are not resilient to financial market stress.[207]

These technical standards, together with resolution's core purpose and legal constraints, form resolution law's criteria. Missing from this set are competition, consumer welfare, and productive efficiency. Thus, resolution law does not adopt antitrust law's orthodox criteria. So when it comes to allocating coordination rights, one would expect resolution to allocate coordination rights independently from antitrust, independently justify its allocation, or benefit from antitrust's criteria.[208]

II. CONTESTING RESOLUTION'S DEFAULT ALLOCATION OF COORDINATION RIGHTS

This Part argues that resolution law's allocation of coordination rights mirrors antitrust law's allocation without good reason. First, resolution allocates coordination rights like antitrust. All else equal, resolution prefers to preserve concentrated intrafirm control and expand a given instance of the firm exemption. That resolution chooses to mirror antitrust's default allocation is noteworthy because antitrust does not command the FDIC to allocate intrafirm coordination rights or draw firm boundaries in a particular way.[209] As Part I showed, the FDIC has broad authority to marshal the failed bank's balance sheet, including creating new tools out of broad powers as desired. The Agency can merge the failed bank to sustain its franchise value, liquidate the bank, charter a new entity to run the bank, or run the bank on its own for up to five years.[210] And it can fire management and appoint its own board of directors who can write new bylaws governing enterprise operations.[211] Crucially, then, the FDIC defines the "single entit[ies]" or firms that emerge from resolution.[212] It plays an active role in allocating post-resolution bank coordination rights.

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207. This is particularly troubling because bank failures tend to be clustered. See White & Yorulmazer, supra note 143, at 156.

208. In other words, given the distinct policy rationales of antitrust and resolution law, it makes sense that the two fields might differently support their allocation of coordination rights. But if resolution law can't articulate a reason for its allocation based on criteria internal to resolution or banking, then it should at least find support from antitrust's criteria.

209. See infra section II.A.1.

210. The least cost constraint is addressed in section II.A.3.

211. See 12 U.S.C. § 1821(n)(2)(E) (2018) ("The board of directors of a bridge depository institution shall adopt such bylaws as may be approved by the Corporation."); Del. Code tit. 8, § 109(b) (2025) ("The bylaws may contain any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . .").

212. See Paul, Allocator, supra note 10, at 401; see also supra note 35 and accompanying text.

Second, despite replicating antitrust's allocation,[213] resolution's allocation does not derive from the criteria of antitrust, banking, or resolution law itself. In particular, preserving concentrated intrafirm control and expanding a given instance of the firm exemption are not necessary for a technically proficient resolution process, nor are they necessary to comply with the least cost test.[214] Further, both intrafirm concentration and a broader firm exemption disturb the double dispersal command of antitrust and banking law.[215]

A. *Resolution*

This section argues that resolution defers to antitrust's allocation of coordination rights even though that allocation does not fulfill the criteria internal to resolution law. As a preliminary matter, it is important to distinguish between how a particular resolution *method* may or may not fulfill resolution's criteria, and how that method's *particular allocation of coordination rights* may or may not do so. The FDIC's default allocation is only derivable from resolution's criteria if the *allocation* is what fulfills the aim. If its criteria are fulfilled by something other than the allocation—such as the method's administrative process—then they owe to the method, not the allocation.

1. *Resolution Mirrors Antitrust.* — First, the FDIC's resolution method hierarchy—PA > PI > PO—proceeds in order of the most concentrated intrafirm control to the least.[216] PA transfers the greatest amount of assets and deposits to a single enterprise. PI necessarily transfers fewer deposits and often fewer assets. And PO disperses both assets and liabilities wider and so transfers the least amount to a single enterprise.[217] Because bank enterprises are internally hierarchical,

213. Recall antitrust's deference to ownership- and control-based coordination rights. See Paul, Allocator, supra note 10, at 406–07 (observing how antitrust law takes existing property rights and allocates a new right to economic coordination). Resolution law takes pre-failure relations defined by employment and antitrust law and allocates a new right: reconstitution in the image of antitrust's firm.

214. Although preserving or reducing the number of firms that emerge from resolution can help satisfy the least cost test, it is not clear that preserving intrafirm concentration does the same. See infra section II.A.3.

215. See supra notes 129, 137 and accompanying text.

216. Resolution law prefers P&A transactions to all other resolution methods nine to one, and PA to PI five to one. See supra notes 167–169 and accompanying text.

217. Depositors of the failed bank are free to redeposit their money with any bank they choose, or even no bank at all. In practice, most deposits flow back to centers of concentrated control. See Steven Kelly, Where Was the Last Place You Saw the Deposits?, Without Warning (July 18, 2023), https://www.withoutwarningresearch.com/p/where-was-the-last-place-you-saw [https://perma.cc/NW69-T9KL]. Still, PO necessarily disperses the failed bank balance sheet more than PA or PI.

resolution's default allocation tends to concentrate intrafirm control.[218] In other words, resolution creates fewer and larger internally hierarchical banks than before, channeling control of bank charters into fewer hands at the top of firms.

Second, resolution's hierarchy proceeds from greatest expansion of a given instance of the firm exemption to smallest.[219] Again, because PA transfers the greatest amount of the failed bank's balance sheet to a single firm, and because it alone can transfer the failed bank's franchise value, it expands a given instance of the firm exemption more than PI and PO. And again, PO's dispersal of the failed bank balance sheet is the least likely to expand an instance of the firm exemption.[220]

In sum, resolution's hierarchy mirrors the ability of each method to concentrate intrafirm control and expand the firm exemption. PA sits atop the hierarchy because merging two firms into one expands the firm exemption and concentrates intrafirm control more than PI and PO.[221]

2. *Non-Least-Cost Criteria.* — Neither preserving intrafirm hierarchy nor expanding the firm exemption is necessary to serve resolution's core purpose or fulfill its technical standards. Although resolution's *methods* may serve those non-least-cost criteria, resolution's *allocation* does not.

First, recall resolution's core purpose: avoiding bankruptcy.[222] Resolution as a process, not resolution's allocation of coordination rights, serves that aim. Intrafirm hierarchy and a broader firm exemption are irrelevant to keeping banks out of bankruptcy.

Similarly, the degree to which the resolution method hierarchy fulfills resolution's technical standards owes to its process, not its allocation. For example, the fact that P&A transactions are less burdensome, faster, and more orderly than PO transactions owes somewhat to P&A's ability to move a large chunk of the failed bank's balance sheet to a single entity.[223] But that does not depend on the entity's degree of intrafirm hierarchy or the existence of a pre-existing firm exemption.[224] A P&A transaction that transferred the balance sheet to an internally horizontal entity would not

218. If there were previously two decisionmaking centers, after an all-asset PA, there is only one. After all other P&A transactions, there are between two and one decisionmaking centers, varying inversely with the number of deposits assumed and assets liquidated.

219. See supra notes 28–30 and accompanying text. If one wants to curtail the firm exemption and promote other forms of coordination, a narrower firm exemption should be preferable to a broader one.

220. See supra note 217 and accompanying text.

221. See supra note 45 and accompanying text.

222. See supra section I.C.1.

223. Resilience and scale are not analyzed here because P&A transactions, and thus resolution's default allocation, have resilience and scale deficiencies and so cannot justify the default allocation.

224. See supra note 192 and accompanying text. An alternative resolution method that does not require or expand a given instance of the firm exemption is proposed in section III.A.

necessarily perform worse in terms of those same technical standards of burden, speed, or orderliness. Nor would a transaction that transferred the balance sheet to a newly chartered entity (i.e., one without a pre-existing firm exemption). Thus, intrafirm hierarchy and a firm exemption are not necessary to serve resolution's technical standards. The only remaining justification for resolution's default allocation in terms of its own criteria could be that it better fulfills the FDIC's least cost obligation.

3. *Least Cost Criterion.* — Recall that cost to the DIF depends on the receipts from disposition of the failed bank's balance sheet.[225] It depends on asset bids and the amount of deposits assumed, not the productive efficiency of the acquirer.[226] Only if, holding balance sheet size constant, less hierarchical or newly chartered enterprises necessarily made less competitive bids would the FDIC's default allocation be justified on least cost terms. One might further argue that expanding an existing firm exemption is necessary to generate funds from the private sector.[227] A close review of the FDIC's resolution powers, however, admits another option.

True-up provisions allow the FDIC to trade payments now for payments later, reducing the cost of P&A transactions to the DIF.[228] And shelf charters allow entities without a pre-existing firm exemption to submit P&A bids.[229] So, for example, employees of the failed bank could obtain a shelf charter from the OCC and bid on the bank's balance sheet, promising to remit future profits to the DIF with a true-up provision in exchange for recapitalization.[230] It's true that an empirical determination of least cost must be done on a case-by-case basis, and a large enough enterprise could outbid the shelf charter enterprise's true-up provision.[231] Still, this example shows that intrafirm hierarchy and a pre-existing firm exemption are not necessary to comply with the least cost test.

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225. See supra section I.C.3.

226. While both insured and uninsured deposits count as costs to the DIF, only the assumption of uninsured deposits matters for determining the least cost resolution method because insured deposits are a cost common to all resolution methods.

227. In other words, so the argument might go, because least cost requires another actor to acquire the failed bank's balance sheet, expanding the acquirer's balance sheet and thus the resources over which it can legally coordinate is necessary to satisfy the least cost test.

228. See supra section I.C.3. Not inconsistent with FDIC practice, this tool could be expanded such that payments are made to the DIF regardless of the rate of return on the acquired assets.

229. See supra section I.C.3.

230. This is the essence of the intrafirm reallocation transaction (IRT). Section III.A.2 elaborates its prospects for least cost test compliance.

231. For example, given JPMorgan's desire to integrate First Republic's high net worth customer base into its wealth advisor operations and its inability to make acquisitions outside of bank resolution, it may have been willing to pay a premium over the net present value of profits a new enterprise could generate and thus pay to the FDIC with a true-up provision. See First Republic Deal Beefs Up JPMorgan's Affluent Customer Ecosystem, PYMNTS (May 1, 2023), https://www.pymnts.com/news/banking/2023/first-republic-deal-beefs-up-jpmorgans-affluent-customer-ecosystem/ [https://perma.cc/6GXY-CAQE].

Therefore, a merger between a failed bank and a less hierarchical or newly chartered entity is not necessarily more costly than a merger with a more hierarchical entity of the same size.[232] The least cost test, then, does not command a particular allocation of intrafirm coordination rights, nor does it require a pre-existing firm exemption, even if P&A merger tends to be the least cost alternative among the FDIC's existing methods.[233] Just like resolution's technical standards do not explain the FDIC's preference for hierarchical firm-based coordination, neither does the least cost test.

B. *Antitrust*

Resolution law struggles to explain its allocation of coordination rights in terms of its own criteria. Yet it is not clearly supported by antitrust's criteria either.

1. *Orthodox Criteria.* — Antitrust law allocates coordination rights with "a preference for economic coordination that is accomplished by means of the concentration of ownership, control, or both."[234] Productive efficiency, consumer welfare, and competition ostensibly justify that allocation. Yet resolution law's preferred method—the P&A transaction—may be the least likely to produce benefits along those dimensions.

First, recall that there is good reason to doubt that the theory of productive efficiency can explain intrafirm hierarchy.[235] In practice, it is even more difficult to isolate *hierarchy-justifying* productive efficiencies—that is, cost savings owing to hierarchy itself rather than merely scale of production.[236] And, as in the case of Citibank, hierarchy (and conglomeration) can make for feckless executives, internal committees, and external consultants.[237]

A closer look at P&A transactions further puzzles productive efficiency as a resolution criterion. To start, the P&A acquirer does not bid on the failed bank because of an a priori belief that it can more efficiently organize and manage its balance sheet and operations. Empirically, acquirers bid on failed banks primarily to assume their deposits and

232. Section III.A discusses how to implement a resolution method that results in deconcentrated intrafirm control and complies with the least cost test.

233. It is uncertain whether P&A, in fact, tends to be the least cost method of resolution. See Ohlrogge, supra note 4 (manuscript at 42) (noting the FDIC's secrecy regarding asset valuations and conforming bid criteria). Although it may not be a conscious commitment of the resolution authorities, the firm exemption and intrafirm hierarchy are deeply embedded in thinking about economic and market governance, and so it is worth considering the degree to which antitrust's default allocation unconsciously structures the resolution method hierarchy. A parallel claim explains, in part, why the antitrust problems posed by Uber and Lyft are so difficult to see. See Paul & Tankus, supra note 10, at 50.

234. Paul, Allocator, supra note 10, at 405.

235. See supra section I.A.3.

236. See infra note 243.

237. See supra notes 63–68 and accompanying text.

associated customers and goodwill, as well as boost their stock price.[238] None of these are hierarchy-justifying efficiencies, nor can they distinguish PA from PI or PO.[239] Moreover, P&A transactions are often consummated within a few weeks after failure, if not within a single day or weekend.[240] Thorough due diligence is difficult, if not impossible, so identifying pre-bid cost-saving synergies is unlikely.[241] If such cost savings exist, then, they must be necessary consequences of P&A mergers rather than intentional business plans.

In general, mergers are typically defended on grounds that they can improve productive efficiency and discipline bad management.[242] But empirical support for the efficiency claim is suspect, including in the context of bank consolidation.[243] Perhaps the most intuitive efficiency—

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238. Vij, supra note 197, at 4–5, 29; see also supra note 231. Deposits, though not required for making loans, are a common funding source for banks. They are particularly attractive because banks can pay very little interest without losing them to another bank and they create no additional capital requirements. See 12 C.F.R. § 3.32 (2014) (classifying a deposit as a "sovereign exposure" with a zero-percent risk weight); John C. Driscoll & Ruth A. Judson, Sticky Deposit Rates 2–3 (Fin. & Econ. Discussion Series, No. 2013-80, 2013), https://ssrn.com/abstract=2357993 [https://perma.cc/PL3L-KASA] (finding deposit rates "upwards-sticky" but "downwards-flexible," especially for larger bank branches). Thus, P&A allows a bank to acquire cheap funding that is inexpensive to retain.

239. See supra section I.A.2.

240. See, e.g., Press Release, FDIC, Iowa Trust & Savings Bank, Emmetsburg, Iowa, Assumes All of the Deposits of Citizens Bank, Sac City, Iowa (Nov. 3, 2023), https://www.fdic.gov/news/press-releases/2023/pr23091.html [https://perma.cc/7B6F-77Z4] (announcing a bank closure and consummated P&A transaction in the same day).

241. See FDIC, 2008–2013, supra note 157, at 186.

242. See, e.g., Holger Spamann & Jens Frankenreiter, Corporations 181–82 (3d ed. 2023) ("Takeovers have a direct effect on governance when a better-governed firm takes over a worse-governed firm. After the takeover, both firms' assets will be managed under the former's better governance structure.").

243. See Kress, supra note 139, at 561 ("Empirical analyses of larger bank mergers generally 'fail to find any significant cost savings' from consolidation." (quoting Joel F. Houston & Michael D. Ryngaert, The Overall Gains From Large Bank Mergers, 18 J. Banking & Fin. 1155, 1155 (1994))); Paul, Firms, supra note 38, at 620 ("[C]ontrol groups within firms [may] engage in merger and acquisition activity not in order to realize pure operational efficiencies, but in order to realize the pecuniary benefits to themselves (and shareholders) that so often flow from merger activity but do not (necessarily) reflect any particular operational business reality . . . ."); Melissa A. Schilling, Potential Sources of Value From Mergers and Their Indicators, 63 Antitrust Bull. 183, 186 (2018) ("[A] substantial body of research on whether mergers create value for the firm's shareholders concludes that most mergers do not create value for anyone, except perhaps the investment bankers that have negotiated the deal."); J.W. Mason, Acquisitions as Corporate Money Hose, The Slackwire (Sept. 26, 2018), https://jwmason.org/slackwire/acquisitions-as-corporate-money-hose/ [https://perma.cc/62XX-GDJH] (finding cash mergers a more substantial way to disperse corporate income to shareholders than share repurchases). But see Anna Kovner, James Vickery & Lily Zhou, Do Big Banks Have Lower Operating Costs?, Fed. Rsrv. Bank N.Y. Econ. Pol'y Rev., Dec. 2014, at 1, 22 (finding that larger bank holding companies tend to have lower noninterest expense ratios, possibly from economies of scale in some but not all categories of noninterest expense). The analysis by Kovner et al., however, does not distinguish between cost savings due to scale and cost savings due to intrafirm hierarchy.

reducing redundant IT systems—in fact creates a significant downside risk. Over the past few decades, bank mergers have entrenched vulnerable IT systems running programming language dating to 1959 (COBOL) on mainframe computers.[244] These Frankenstein systems are vulnerable not only because they are old, but also—crucially—because as "legacy" systems, they require "deep contextual knowledge."[245] Integrating them to effect a bank merger takes time and system-specific expertise. This is a particularly acute problem with P&A transactions because they often arise with little advance notice.[246] Thus, in addition to direct integration costs, P&A creates and magnifies systemic IT risk.[247]

Further, even if P&A mergers reduce "redundant" systems or employees, PO should be preferred on that score. In PO, the FDIC permanently closes the failed bank, leading to the termination of the remaining employees and the retirement of the IT system.[248] Yet preferring PO to P&A would *reverse* the resolution method hierarchy. Productive efficiency, therefore, can't explain the FDIC's preference for P&A over PO, nor how it allocates coordination rights.

Thus, it does not provide evidence of hierarchy-justifying efficiency. See id.; see also supra section I.A.3.

244. See Mar Hicks, Built to Last, Logic(s) (Aug. 31, 2020), https://logicmag.io/care/built-to-last/ [https://perma.cc/9END-F5K4]; Odd Lots, Why Corporate America Still Runs on Ancient Software That Breaks (Jan. 26, 2023), https://www.bloomberg.com/news/articles/2023-01-26/odd-lots-podcast-how-software-explains-the-southwest-airlines-outage (on file with the *Columbia Law Review*) ("[I]f you look at what a big bank is, it's . . . a series of mergers and acquisitions. . . . [E]very time they acquire a new bank, they have to integrate another [IT] system into their own [IT] system."); Yves Smith, COBOL and Legacy Code as a Systemic Risk, Naked Capitalism (July 19, 2016), https://www.nakedcapitalism.com/2016/07/cobol-and-legacy-code-as-a-systemic-risk.html [https://perma.cc/T7KE-E8HW] ("Major banks run their transactions on mainframes, and significant portions of the software is both ancient and customized.").

245. Nathan Tankus, Day Five of the Trump–Musk Treasury Payments Crisis of 2025: Not "Read Only" Access Anymore, Notes on the Crises (Feb. 4, 2025), https://www.crisesnotes.com/day-five-of-the-trump-musk-treasury-payments-crisis-of-2025-not-read-only-access-anymore/ [https://perma.cc/J8U5-SL2V].

246. See Michael Roddan, A Tangled Mess of Tech: JPMorgan's Tall Task to Integrate First Republic, The Info. (Aug. 31, 2023), https://www.theinformation.com/articles/a-tangled-mess-of-tech-jpmorgans-tall-task-to-integrate-first-republic (on file with the *Columbia Law Review*) ("The [First Republic] business JPMorgan bought was hamstrung by a tangle of old tech systems that held together a patchwork of hundreds of individual applications enabling basic tasks such as depositing and lending."); Melanie Woodrow, Former First Republic Bank Customers Say They Can't Access Chase Accounts Online After Migration, ABC 7 News (June 4, 2024), https://abc7news.com/post/small-business-owners-access-chase-accounts-online-after/14911383/ [https://perma.cc/XHJ6-G9GS] ("Some products like business lines of credit won't transition to JPMorgan Chase systems until later this year."). This raises the question whether resolution law needs a process for "IT receivership," and, more broadly, whether banking law would benefit from standardizing IT across firm boundaries—thus distinguishing administrative from legal boundaries of the firm.

247. See Roddan, supra note 246; Smith, supra note 244. Consider, too, how this creates an independent conflict with Dodd–Frank. See infra section II.C.2.

248. See supra text accompanying notes 174–175.

Next, recall the common definition of consumer welfare: substantive gains to consumers as a class from lower prices or greater output compared to some benchmark.[249] Neither resolution authorities nor scholars defend P&A transactions on grounds of lower prices or greater output. In general, consolidation in the banking industry has harmed consumers.[250] In P&A specifically, acquirers tend to reduce lending to the failed banks' former customers, lower their deposit rates, and close their branches.[251] And as established, the theoretical link between consumer welfare and productive efficiency is weak.[252] So without clear empirical gains to consumer welfare, that criterion does not justify resolution's method hierarchy either.

Finally, the ideal state sense of competition is especially weak in the field of banking.[253] Recall that competition as an ideal state relies on the contestability criterion.[254] Contestability relies on entry—or the threat of entry—to discipline prices set by existing firms. While weak in general, this criterion is particularly weak in banking because unlike corporate law's free-chartering regime, entry into banking is restricted.[255] In the six years from 2011 to 2016, for example, only two new banks were chartered.[256]

The FDIC's resolution hierarchy also runs counter to the business rivalry sense of competition. P&A results in one bank where previously there were two. In fact, shareholders of losing bidders "react positively to the potential anticompetitive effects" of "increased market power as a result of the resolution process."[257] Further, in PO, banks must compete to

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249. See supra section I.A.2.

250. See Kress, supra note 139, at 555–57 ("Under the current bank merger framework, consolidation has increased the cost and reduced the availability of consumer loans, inflated the fees banks charge for basic financial services, and depressed the interest rates banks pay to their accountholders.").

251. See supra note 197.

252. See supra section I.A.3.

253. Recall that competition is not a lodestar for banking law anyway. See supra note 134.

254. See supra notes 87–89 and accompanying text.

255. See Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (upholding the Comptroller's denial of a national bank charter); Ricks et al., NPU, supra note 51, at 843 ("In banking law today, *Pitts* stands for the proposition that the Comptroller enjoys wide ranging discretion to deny applications for national bank charters.").

256. Carnell et al., supra note 101, at 107. The FDIC received only nine applications for deposit insurance between 2013 and 2016. See Bank Application Actions, FDIC, https://www.fdic.gov/regulations/applications/actions.html [https://perma.cc/VUK3-T7QL] (last updated Jan. 13, 2025) (filtering for dates January 1, 2013, through December 31, 2016, and application type: Deposit Insurance–New Bank). Application data prior to 2013 is not publicly available. Between 2013 and 2023, the FDIC received 148 applications for new bank deposit insurance; sixty-six were approved, an approximately forty-five percent approval rate. See id. (filtering by date for January 1, 2013, through December 31, 2023, and by application type for "Deposit Insurance–New Bank").

257. Tim M. Zhou, Auctions of Failed Banks: An Analysis of Losing Bidders, 61 Rev. Quantitative Fin. & Acct. 155, 156, 174; see also Vij, supra note 197, at 4–5 ("[T]he acquiring

attract the failed bank's depositors. They may do so by offering more attractive rates, products, services, stability, or brand recognition. Conversely, the FDIC's favored PA method transfers deposits by fiat rather than by choice of the depositor.[258] Thus, the resolution method that best promotes business rivalry is PO, the second best is PI, and the worst is PA. Like productive efficiency, this *reverses* the resolution method hierarchy—so competition cannot justify it.

In sum, none of antitrust's three orthodox justifications for channeling coordination into top-down firms (productive efficiency, consumer welfare, and competition) support that same allocation in bank resolution.

C. *Banking*

Neither the criteria of antitrust nor the criteria of resolution justify resolution law's allocation of coordination rights. Yet neither does the broader banking law of which resolution is a part.

1. *Diffusion.* — The core of American banking law can be characterized as an outsourcing of the bank charter paired with its separation, supervision, and diffusion.[259] The FDIC's resolution methods have little or no impact on outsourcing, separation, and supervision.[260] They do, however, play a role in diffusion.

Recall that diffusion instructs credit to be controlled and allocated in many (rather than few) hands.[261] Another way to read diffusion, then, is as a command to disperse bank charter coordination rights.[262] And yet, once again, this criterion clashes with resolution's preference for hierarchical, firm-based coordination. P&A concentrates control over credit creation, as well as its allocation,[263] in few—rather than many—hands, harming diffusion. Thus, just as the resolution method hierarchy runs in reverse to antitrust's criteria, it similarly frustrates banking law's structural focus on diffusion.

2. *Dodd–Frank.* — Resolution's default allocation has an additional deficiency: It conflicts with Dodd–Frank with respect to bank

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bank is able to reduce deposit rates more than in unconsolidated markets, reflecting the acquirer's increased market power.").

258. First Republic depositors automatically became JPMorgan depositors. See supra note 231. But see supra note 217 (noting that deposits tend to flow back to centers of concentrated control).

259. See supra section I.B.2.

260. P&A and PO do not change the ability of banks to create ad hoc credit or engage in commercial activity, and they do not change the ability of the government to exercise public oversight. Dispersing coordination rights, however, may have separation and supervision benefits. See infra section III.B.1.

261. See supra section I.B.2.

262. See supra notes 128–129 and accompanying text.

263. See supra notes 197, 251 and accompanying text.

conglomeration. Dodd–Frank cautions against bank mergers that might magnify or concentrate systemic risk.[264] Meanwhile, resolution law says the best way to resolve a crisis is to facilitate a bank merger.[265]

Some argue that conglomeration is a net positive for financial stability because gains to "diversification, profitability, and regulatory stringency . . . offset . . . systemic costs."[266] But that argument ignores the "more concentrated" clause of the statute.[267] "Greater" systemic risk may be offset by stability gains, but concentration cannot be offset. Dodd–Frank, consistent with the broader aim of diffusion, recognizes concentration as a harm unto itself.[268]

One might also argue that no conflict exists because resolution is exempt from banking law's concentration limits.[269] But that imprudently fails to recognize how concentration dynamically harms the resolution process.[270] It also reveals a deeper conceptual insight: Resolution's allocative preference is so strong that it trumps Dodd–Frank's concerns with conglomeration and systemic risk.[271] Importantly, resolution law did not always trump banking law's concern with concentration. The reverse was often true during the unit banking regime, when standard P&A transactions were disfavored.[272] Instead of merging failed banks with unit banks, the FDIC chartered new banking entities on an ad hoc basis.[273]

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264. See supra note 137 and accompanying text.

265. See supra section I.C.3.

266. See Greg Baer, Bill Nelson & Paige Pidano Paridon, Bank Pol'y Inst., Financial Stability Considerations for Bank Merger Analysis 13 (2022), https://bpi.com/wp-content/uploads/2022/05/Financial-Stability-Considerations-for-Bank-Merger-Analysis.pdf [https://perma.cc/K4Z3-7QUJ].

267. See 12 U.S.C. § 1842(c)(7) (2018) ("In every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system.").

268. Further, Dodd–Frank explicitly aimed to prevent too-big-to-fail. See supra note 137 and accompanying text. And it added language to bank merger provisions to give banking agencies a new ground for denying mergers: concentrated systemic risk. See supra note 137 and accompanying text. It is hard to reconcile this statutory structure with the argument that mergers should be approved because of net benefits to stability. See supra note 137 and accompanying text.

269. See supra note 140 and accompanying text.

270. See supra note 199 and accompanying text; see also Fin. Stability Bd., 2023 Bank Failures: Preliminary Lessons Learnt for Resolution 29 (2023), https://www.fsb.org/uploads/P101023.pdf [https://perma.cc/XWQ9-V4V6] (noting that in P&A, "the risk of large systemic banks becoming more systemic should also be considered").

271. Resolution's concentration exemption is based on administrability: Without the exemption, bank resolution would be impracticable. But that is only true if no resolution methods can reallocate coordination rights to counter concentration. As Part III shows, such a method is possible. See infra note 311 and accompanying text.

272. See supra notes 140, 191 and accompanying text.

273. See supra notes 140, 191 and accompanying text.

To recap, in reconstituting failed banks, the FDIC sets new firm boundaries and governs their intrafirm relations. The Agency is under no command from antitrust law to draw firm boundaries or direct intrafirm relations in a particular way, yet it defers to antitrust's default allocation of coordination rights.[274] It does so without justification from the criteria of antitrust, resolution, or banking law. In fact, those three sets of criteria prescribe *reversing* the FDIC's resolution method hierarchy, preferring PO to PI to PA rather than the other way around.

III. (RE-)ALLOCATING COORDINATION RIGHTS AFTER BANK FAILURE

This Note identifies a problem with the practice of bank resolution: It incoherently allocates coordination rights. This Part considers alternative allocations of coordination rights after banks fail. Accounting for the aims and constraints of antitrust, banking, and resolution law, it finds that a new resolution method—the intrafirm reallocation transaction (IRT)—may be the most promising.

A. *How to Disperse Coordination Rights*

Currently, bank resolution creates one top-down firm where previously there were two. Instead, it could reconstitute the failed bank with a different charter or draw firm boundaries such that the total number of banks emerging from resolution remains constant or increases. It could also reshape intrafirm relations such that bank decisionmakers are spread out throughout the enterprise rather than concentrated at the top. This section briefly considers each approach. Then it proposes a new resolution method, IRT, that can reconcile these aims with the various goals of antitrust, banking, and resolution law.

1. *Resolution Methods*

a. *Charter Conversions.* — First, resolution could reconstitute the failed bank with a different type of charter under new leadership.[275] For example, a commercial bank could become a credit union with an FDIC-appointed board. This method prevents a contraction in the number of firms that exist after failure while changing the set of permissions and restrictions vested in hierarchical control.[276] For instance, credit unions are nonprofits, they are exempt from nearly all federal and state taxation,

274. See supra section II.A.1.

275. See Carnell et al., supra note 101, at 174 (discussing charter conversions). Further modulation of unilateral coordination rights—such as new restrictions on bank powers—may be desirable too. But those changes should apply to the entire banking system rather than only post-failure banks. Otherwise, inter alia, post-failure banks will be at a competitive disadvantage.

276. Changing, in other words, the set of unilateral coordination rights vested in the hierarchical bank-firm. See supra text accompanying notes 110, 128.

they are regulated and supervised by the National Credit Union Administration, and their members must share a common bond.[277]

Technical challenges may arise, however, as the new enterprise manages the failed bank's commercial loan portfolio at the same time as it reorients its lending toward households.[278] This method also does worse in terms of scale and resiliency because a larger portfolio, especially in times of stress, is more difficult to quickly transition. Moreover, it does not resolve the various problems with intrafirm hierarchy.[279]

b. *Breakups.* — Alternatively, the FDIC could disperse interfirm coordination rights by breaking up a failed bank into multiple banks while retaining intrafirm hierarchy. Indeed, the FDIC has done so in the past.[280] This method, consistent with a neo-Brandeisian approach to antitrust and banking law, can stall or reduce conglomeration in the banking system.[281] Like the charter conversion method above, however, it fails to address intrafirm coordination rights, replicating the problems with firm hierarchy.[282] In addition, it may have trouble complying with the least cost test because the franchise value of the failed bank is extinguished for at least one of the multiple new firms.

c. *Cooperatives.* — Third, the FDIC could disperse intrafirm coordination rights by reconstituting a failed bank as a single new bank

277. See 12 U.S.C. § 1759(b) (2018); Carnell et al., supra note 101, at 83–84; see also Letter from Debbie Matz, Chair, NCUA, to All Federal Credit Unions (Sept. 2013), https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/potential-violations-common-bond-advertising-requirements [https://perma.cc/8N3V-DNQC] ("Advertisements that include language to the effect that 'anyone can join' or 'membership is open to everyone'—without any qualifying language—can give the impression that the Federal Credit Union Act's single or multiple common bond requirements do not apply. When this occurs, the advertisements are inaccurate or deceptive."). But see 12 U.S.C. § 1759(d)(2)(B) (creating exceptions to the membership requirement for multiple common-bond credit unions when created through a merger with another credit union).

278. See Carnell et al., supra note 101, at 81–84 (describing the differences between commercial banks, thrifts, and credit unions).

279. See supra section I.A.3.

280. See FDIC, 1933–1983, supra note 155, at 93 (noting two such examples: "Banco Credito in Puerto Rico in 1978 and American City Bank in California in 1983").

281. See, e.g., Zephyr Teachout, Break 'Em Up: Recovering Our Freedom From Big Ag, Big Tech, and Big Money 15–16 (2020) (calling for the breakup of Citibank and Bank of America); Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age 104–06 (2018) (setting the neo-Brandeisian antitrust agenda to include firm breakups); Judge, Brandeisian Banking, supra note 134, at 918–19 (highlighting the Brandeisian character of unit banking and calling for neo-Brandeisian policymaking to enhance the viability of small banks and promote "small business and other community development lending"); Omarova & Steele, supra note 109, at 1243 (highlighting various ways banking and antitrust law cohere and proposing, inter alia, breakups of bank holding companies).

282. See supra section I.A.3.

(or multiple banks[283]) with a more horizontal or participatory decisionmaking structure. The remainder of Part III explores how resolution law could adopt this approach using a new resolution method: IRT.[284]

2. *The Intrafirm Reallocation Transaction (IRT).* — IRT would proceed as follows: After the FDIC is appointed receiver, the failed bank's officers and directors are fired and new directors are appointed.[285] The next business day, everyone shows up to the same building to do the same job they did when the bank was put into receivership.[286] The only difference is that after IRT, coordination rights are dispersed such that employees control the bank enterprise.

Before failure, banks will extensively plan for their IRT resolution. In fact, large banks already plan for their failure by filing living wills describing their "strategy for rapid and orderly resolution."[287] Next, at the time of resolution, the FDIC will keep the failed bank enterprise operating by

283. IRT can complement the neo-Brandeisian approach insofar as the least cost test permits. It may be desirable, for example, to split a failed JPMorgan into many new, internally participatory banks. At the same time, it may be undesirable to do so for the smallest banks. Of course—although beyond the scope of this Note—it may also be desirable to repeal the least cost test. See text accompanying infra notes 316–317.

284. In sum, the charter conversion method changes unilateral—but not interfirm or intrafirm—coordination rights; the neo-Brandeisian method changes interfirm—but not unilateral or intrafirm—coordination rights; and IRT changes intrafirm—while accommodating changes to unilateral or interfirm—coordination rights.

285. The FDIC uses the same process when it deploys a bridge bank. See 12 U.S.C. § 1821(n)(1)(D), (2)(D) (2018) (providing for at least five but no more than ten interim bridge bank directors); FDIC, 2008–2013, supra note 157, at 184 & n.25 ("The FDIC routinely replaces the failed bank's senior management . . . .").

286. This is not atypical for both bridge banks and P&A transactions. For example, SVB employees were guaranteed forty-five days of employment at 1.5x or 2x pay, according to reports. See Dan Primack, Silicon Valley Bank Paid Out Bonuses Hours Before Seizure, Axios (Mar. 11, 2023), https://www.axios.com/2023/03/11/silicon-valley-bank-paid-bonuses-fdic (on file with the *Columbia Law Review*); see also Your Bank Has Failed: What Happens Next?, 60 Minutes (May 31, 2009), https://www.fdic.gov/news/editorials/60minutes.html [https://perma.cc/854B-LSE7] (showing the bank closure process in action).

287. See Living Wills (or Resolution Plans), Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/supervisionreg/resolution-plans.htm [https://perma.cc/RY5Q-B7SN] (last updated Mar. 14, 2022); see also 12 U.S.C. §§ 5325, 5365(a), (d) (requiring, per Dodd–Frank section 165(d), living wills for "nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than $250,000,000,000"); 12 C.F.R. § 360.10 (2024) (amending the FDIC's 2012 resolution plan rule); Resolution Plans and Informational Filings Required for Certain Insured Depository Institutions, 89 Fed. Reg. 56,620, 56,621–22 (July 9, 2024) (codified at 12 C.F.R. pt. 360.10) (citing resolution planning shortcomings with SVB and Signature Bank, and contrasting the Dodd–Frank resolution planning regime with the FDIC's regime); see also White & Yorulmazer, supra note 143, at 166 (discussing living wills). IRT living wills would include detailed participatory bank management contingency plans.

chartering a bridge bank, like it did with SVB.[288] The FDIC will also appoint a board of directors whom it will instruct to write new bylaws.[289] Next, the bridge bank employees will obtain a shelf charter from the OCC, allowing them to participate in a typical P&A auction. If they win the auction, the bank's balance sheet will be recapitalized,[290] the bridge bank charter will terminate, and the employees will control a solvent national commercial bank.[291]

Because IRT can be agnostic with respect to the amount of uninsured deposits covered, it necessitates no liability-side subsidy beyond status quo resolution. And on the asset side, it is not necessarily more costly than the FDIC's preferred PA transaction because the IRT enterprise can include a true-up provision in their bid, trading recapitalization for the FDIC's claim on future profits.[292] Most importantly, since the FDIC appoints the bridge bank's board of directors and approves its bylaws, it can also reconfigure intrafirm coordination by vesting all employees with equal decisionmaking authority.[293]

Like other corporate enterprises, IRT employs a board of directors to oversee enterprise operations carried out by various committees.[294] The

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288. See supra note 182. Recall that a bridge bank is an intermediate resolution method in which the FDIC appoints a new board of directors while the failed bank's employees continue operations. See supra section I.C.3.

289. See supra note 183, infra note 292 and accompanying text.

290. In the favored PA transaction, the FDIC sells assets at a discount and pays cash to the acquirer, functionally recapitalizing the balance sheet while transferring control to a third party. In the disfavored PI and PO, the balance sheet is only recapitalized sufficient to pay insured deposits.

291. See 12 U.S.C. § 1821(n)(10).

292. For further discussion of IRT, true-up provisions, and the least cost test, see infra text accompanying notes 309–316.

293. See 12 U.S.C. § 1821(n)(1)(D), (2)(E); supra note 211 and accompanying text. Bylaws structure employee rights, permissions, and obligations. See Del. Code tit. 8, § 109(b) (2025) ("The bylaws may contain any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.").

294. See OCC, Director's Book: Role of Directors for National Banks and Federal Savings Associations 95–101 (2020), https://www.occ.gov/publications-and-resources/publications/banker-education/files/directors-book.html [https://perma.cc/4WYQ-G8AN]. Core to the bank enterprise are the credit, risk, and asset-liability committees. See id. Although one could imagine further intrafirm dispersal, national banks are required to have boards of directors. See 12 U.S.C. § 71 ("The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders . . . ."). One might further argue that § 71 implies an IRT enterprise must have shareholders. (Although one could then counter that the FDIC violates § 71 when it directly appoints bridge bank directors.) If so, one share can be assigned to each employee (or committee member) at the outset. Because IRT is agnostic with respect to income distribution decisions, the employees can collectively decide whether to issue additional shares and to whom. See infra notes 300–303 and accompanying text. If they issue shares to third parties, though, they must create a dual-class structure to retain full control. See, e.g., Spamann &

board's principal duties include achieving strategic objectives, risk management, and enterprise oversight. Meanwhile, committees focus on day-to-day operations and decisionmaking.[295] They take on special importance for the IRT enterprise as the core site of its participatory governance.[296] Each employee can participate in decisionmaking for one committee at a time.[297] Where participation by each employee is not feasible, committees can be selected by sortition.[298] The sortition pool might also include community members, especially to sit on the bank's credit committee.[299]

Employees will decide how to distribute enterprise income, just as firm controllers do in a hierarchical intrafirm regime.[300] Thus, IRT could

Frankenreiter, supra note 242, at 30 (discussing how dual-class shares allow founders to raise equity without diluting their voting power).

295. See OCC, supra note 294, at 22–23.

296. Participatory governance models have received scholarly and popular attention in the context of both enterprise and democratic governance. See, e.g., Bernard Harcourt, Cooperation: A Political, Economic, and Social Theory *passim* (2023) (articulating a new model for society based on cooperation); R. Trebor Scholz, Own This!: How Platform Cooperatives Help Workers Build a Democratic Internet 9–14 (2023) (referring to a "recent renaissance of cooperatives"); Paul, Firms, supra note 38, at 579 n.1 (noting a resurgence of corporate law scholarship interested in "workers' participation in intrafirm decision-making"); Alexander Kolokotronis, Three Ways to Design a Democratic Job Guarantee, Truthout (May 20, 2018), https://truthout.org/articles/three-ways-to-design-a-democratic-job-guarantee/ [https://perma.cc/X5XT-MKLY] [hereinafter Kolokotronis, Job Guarantee] (describing worker cooperatives as a "participatory institutional form[]" in which "workers have real voice, power and creativity alongside and with the communities they serve"); Alexander Kolokotronis, Towards an Anarchist Money and Monetary System: An Interview with Nathan Cedric Tankus, New Politics (Nov. 5, 2016), https://newpol.org/towards-anarchist-money-and-monetary-system-interview-nathan-cedric-tankus/ [https://perma.cc/63PQ-68XX] (noting that a distinctive feature of capitalism is hierarchy, which limits the agency of "ordinary people").

297. Employees may sit on multiple committees and rotate between committees, but they may only participate in decisionmaking for one committee at a time in accordance with the principle of one worker, one vote. See Sandeep Vaheesan & Nathan Schneider, Cooperative Enterprise as an Antimonopoly Strategy, 124 Penn St. L. Rev. 1, 41–42 & nn.241–243 (2019) (expanding on the cooperative principles of the Capper–Volstead Act of 1922, Pub. L. No. 67-146, 42 Stat. 388 (codified at 7 U.S.C. §§ 291, 292 (2018))); Kolokotronis, Job Guarantee, supra note 296 (discussing one worker, one vote cooperative governance).

298. See Kolokotronis, Job Guarantee, supra note 296 (discussing sortition governance).

299. See Michael Brennan, The Democracy Collaborative, Constructing the Democratic Public Bank: A Governance Proposal for the Los Angeles Public Bank 19–24 (Thomas M. Hanna & Isaiah J. Poole eds., 2021), https://thenextsystem.org/sites/default/files/2021-07/Constructing-democratic-public-bank-final.pdf [https://perma.cc/ZJ75-5JNF]. This would further disperse coordination rights beyond firm boundaries and concomitantly combat monetary silencing. See infra note 320.

300. Compare Hansmann, supra note 49, at 11, 35 (defining firm "ownership" as the formal rights to control the firm and "appropriate the firm's profits, or residual earnings"), with Lee, supra note 54, at 79 (identifying four principal decisions made by the going concern enterprise, including financial decisions, which concern "dividends, retained earnings, mergers and acquisitions, and financing real and monetary activities"), and Lynn

approximate a labor regime in which unions are "permitted . . . to coordinate not only regarding wages and working conditions but also regarding prices, operational decisions, and more."[301] In doing so, they have the same incentive as any other bank enterprise: meet strategic objectives and preserve their status as a going concern by making good loans.[302] At the same time, IRT is not limited to any strict form of intrafirm organization. Employees can decide which sets of people can make ad hoc decisions about what sorts of things and what needs broader involvement. In fact, sufficient business rivalry together with intrafirm experimentation can "push democratically constituted entities in the direction of operational efficiency, without the law micromanaging it."[303]

IRT is administrable, but is it legal? Yes. IRT is unlikely to incur antitrust liability, requires no new banking or resolution law, and can comply with the least cost test.

First, while participatory governance runs counter to antitrust's preference for concentrated coordination rights, it is unlikely to risk antitrust liability.[304] The best argument for antitrust liability would analogize to *American Needle, Inc. v. NFL*, arguing that antitrust law should recognize the IRT enterprise as multiple entities where corporate law sees one.[305] But unlike the individual NFL teams in *American Needle*, post-IRT bank employees do not have separate business interests or property rights.[306] Similarly, the IRT employees are unlike the hypothetical

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Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public 40–41 (2012) (noting that boards of directors are not required to pay dividends and can distribute firm income by "allowing accounting profits to increase" or by "raising executives' salaries, starting an on-site childcare center, improving customer service, beefing up retirement benefits, [or] making corporate charitable contributions"). See also supra note 35 (citing antitrust law's construction of the firm around concentrated decisionmaking).

301. Paul, Firms, supra note 38, at 599.

302. See Lee, supra note 54, at 79 ("[S]eeking profits is not an end in itself. Rather, profits are needed to maintain the going enterprise . . . . Consequently, business leaders are not seeking to maximize profits in the short-term but to generate a long-term flow of business income needed to meet their goals and access to social provisioning . . . .").

303. Paul, Firms, supra note 38, at 587. If we think this process applies to hierarchical firms, then it ought to apply at least as forcefully to dispersed forms of business organization, too. See supra notes 87–88 and accompanying text.

304. See Vaheesan & Schneider, supra note 297, at 34 ("[C]ooperatives that engage in more than collective bargaining and operate as integrated firms in production, distribution, or retail face much less antitrust risk. Indeed their risk of antitrust liability is comparable to that faced by investor-owned firms.").

305. See supra note 35.

306. See Paul & Tankus, supra note 10, at 50. Thus, the post-IRT bank is not an entity "controlled by a group of competitors [which] serve[s], in essence, as a vehicle for ongoing concerted activity." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010). Nor are the employees "independent centers of decisionmaking." Id. at 197 (internal quotation marks omitted) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

rideshare drivers' worker cooperative in which drivers coordinate their services while owning their own cars, paying their own expenses, and earning their own revenue.[307] Instead, bank employees centralize expenses and revenues and distribute profits based on collective decisions not derivable from individual property rights.[308]

Second, the banking agencies can implement IRT with three existing tools: P&A auctions, shelf charters, and bridge banks. Because bridge banks have a maximum life of five years,[309] one might counter that IRT violates the spirit of the FDIA's bridge bank provision by endowing going concern status on an enterprise intended to have a limited life. But the shelf charter divests both the bank and the FDIC from substantial bridge bank powers, changing the enterprise's legal character.[310] More importantly, the current resolution regime performs the same legal gimmick, assigning new corporate boundaries, bank powers, and coordination rights to the same balance sheet and set of employees.[311]

Third, IRT need not violate the least cost test. Recall that neither intrafirm hierarchy nor a pre-existing firm exemption is necessary to satisfy least cost.[312] Further, true-up provisions can compensate for recapitalization by remitting future profits to the DIF.[313] IRT also has a key structural cost advantage: The failed bank's employees do not need to revise their bids downward to account for uncertainty about asset quality and

307. See Paul & Tankus, supra note 10, at 47–48.

308. Thus, IRT creates a worker cooperative that qualifies for antitrust's firm exemption without being a mere "academic possibility" like a comparable rideshare drivers' cooperative. Id. at 49. The FDIC's ability to recapitalize the failed bank in its IRT transition solves a primary problem for worker cooperatives: access to finance. See id. at 51–53. Still, the FDIC cannot unilaterally permit horizontal coordination across firm boundaries. So to the extent that non-firm-based coordination is socially desirable, antitrust law must first change course.

309. See 12 U.S.C. § 1821(n)(9) (2018). At expiration of the bridge bank charter, it must be wound down or sold. See id. § 1821(n)(11)–(12).

310. These include the bank's exemption from capital requirements and the FDIC's ability to issue capital stock, purchase assets, and provide financial assistance. Id. § 1821(n)(1)(B), (5).

311. Carnell et al. describe the current regime:

> [T]he receiver can structure the sale so as to maintain substantial practical continuity with the failed bank: [A] different corporate entity may continue the failed bank's business at the same locations, with the same employees, and with many of the same assets and liabilities. Most people would, understandably enough, regard the new bank as a continuation of the old, yet a fundamental legal change would have occurred.

Carnell et al., supra note 101, at 376.

312. See supra section II.A.3.

313. See supra section II.A.3. Further, IRT enterprises are less likely to distribute income to shareholders, thus retaining more earnings capable of distribution to the FDIC without a comparative disadvantage in equity.

complexity.[314] With the balance sheet at their fingertips, employees already have the best available information about the remaining bank assets. Unlike P&A, then, IRT requires no risk premium to transfer complex assets.[315]

Over time, however, IRT may become more costly. If IRT enterprises push out other bidders, the shelf charter controllers may reduce their bids in response to the declining competitiveness of P&A auctions.[316] For example, they may reduce the amount of profits they are willing to remit to the DIF with true-up provisions. While it is beyond the scope of this Note to weigh the incommensurable goals of antitrust, banking, and resolution law against the social good of the least cost test—and therefore assess whether declining DIF receipts over time are a just price for dispersing coordination rights—IRT nevertheless shows that the least cost test is not an insurmountable barrier to reallocating coordination rights in bank resolution.

B. *Fulfilling the Criteria of Banking and Resolution Law*

Given Paul's rebuttal to the orthodox antitrust criteria, resolution law should aim to disperse coordination rights.[317] Such an allocation, consistent with the cooperative decisionmaking structure outlined above, "permits *cooperation* with others, rather than favoring only economic coordination that is achieved by means of power *over* others."[318] Doing so takes advantage of both the affirmative benefits of participatory decisionmaking and the negative or prophylactic benefits of preventing concentrated control.[319]

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314. See FDIC, Crisis, supra note 164, at 87–88 ("Loans have unique characteristics, and prospective purchasers need to gather information about the loans to properly evaluate them. Such 'information cost' is factored into the price that the outside parties are willing to pay for the loans."); Rosalind L. Bennett & Haluk Unal, The Effects of Resolution Methods and Industry Stress on the Loss on Assets From Bank Failures, 15 J. Fin. Stability 18, 19, 23 (2014) [hereinafter Bennett & Unal, Loss on Assets] ("As the volume of non-performing loans and defaulted loans increases, bidders may be more risk-averse which results in lower bids."); White & Yorulmazer, supra note 143, at 162 ("[L]arge and complex assets held by the failed institution may lead to lower bids by potential successors, who incorporate large discounts to compensate for the uncertain asset value.").

315. See White & Yorulmazer, supra note 143, at 162.

316. For example, bidders "know that during periods of industry distress they face less competition and therefore offer lower bids." Bennett & Unal, Loss on Assets, supra note 314, at 19. Bidders are also incentivized to reduce their bids when there are fewer bidders. See Vij, supra note 197, at 9, 20 (finding that in first-price sealed bid auctions (e.g., P&A auctions), "the selling price should increase with the number of bidders").

317. See supra section I.A.3. While antitrust may be able to significantly accomplish dispersal on its own, it will always be incomplete without changes to bank resolution. And because resolution law allocates coordination rights, the banking agencies need not wait for antitrust reform.

318. Paul, Firm Exemption, supra note 30, at 96.

319. See supra section I.A.3.

Beyond reorganizing the firm itself, IRT may be the best way to disperse coordination rights after banks fail because it can also fulfill the criteria of banking and resolution law better than the FDIC's favored PA transaction.

1. *Banking Criteria.* — IRT creates participatory control of the bank enterprise and, thus, the credit provisioning process.[320] As a result, IRT coheres with the core structure of banking law in a way the FDIC's existing resolution regime does not. Specifically, IRT can advance the aims of diffusion, separation, and supervision without compromising outsourcing.

First, because the government does not take control of the bank enterprise any more than it already does in resolution, outsourcing is not compromised. Second, diffusion is strengthened by dispersing coordination rights. Recall that the goal of diffusion is to prevent the banking system from being controlled by only a few individuals.[321] That goal is thwarted by the FDIC's strong preference for vertical intrafirm coordination, which results in an "increased consolidation of control over the social provisioning process among a relatively small group of decision-makers."[322] By contrast, participatory control of bank charters puts provisioning decisions in many, rather than few, hands.

Further, IRT can remedy existing separation deficiencies.[323] To the extent that a failed bank was not sufficiently separate from commerce, IRT

320. Participation in money creation has a rich history that has been "silenced" in modern monetary politics. See Feinig, supra note 112, *passim*; Sandeep Vaheesan, Money as an Instrument for Justice, 71 UCLA L. Rev. Discourse 24, 36–38 (2023), https://www.uclalawreview.org/money-as-an-instrument-for-justice/ [https://perma.cc/9CDV-RZ93]. Dispersing intrafirm coordination rights can reinvigorate this tradition. It initially repoliticizes money creation by making it visible to bank employees, as well as to community members included in the credit committee sortition pool. See supra note 299 and accompanying text. Instead of merely accepting or rejecting the loan applicant put before them, employees (and community members) will have a say in which kinds of loan applicants are sought in the first place. For example, they might see their bank as a source of strength for other cooperatives, see infra note 333, or a site for immediate climate action, with the power to implement qualitative credit controls even if regulators do not. See Paul, Firms, supra note 38, at 595 n.55 (noting potential benefits to worker safety and the environment from worker participation in firm decisionmaking); Tankus, The New Monetary Policy, supra note 106, at 17, 19–20 (proposing a qualitative credit regulation regime and discussing its ability to achieve climate goals).

321. As of June 2024, the four largest banks control approximately forty-three percent of large commercial bank consolidated assets. See Large Commercial Banks, Fed. Rsrv. Stat. Release (June 30, 2024), https://www.federalreserve.gov/releases/lbr/20240630/default.htm [https://perma.cc/E8UM-VDWF]. Reallocating coordination rights is a modest bulwark against such consolidation. See supra note 139 and accompanying text.

322. Tankus & Herrine, supra note 25, at 80 (citing Paul, Allocator, supra note 10, at 419–25).

323. A post-IRT enterprise is also likely to seek less risk and thus less likely to expand beyond core banking activities in the first place. Although not a perfect analog, credit unions—which are owned by their members—seek less risk and fared better in the GFC. See Johnston Birchall, The Comparative Advantages of Member-Owned Businesses, 70 Rev. Soc. Econ. 263, 270, 282 (2012) ("The more members are involved in governance the more

can sell its unduly commercial lines of business to a nonbank enterprise.[324] Without IRT, separation issues will fester because P&A transfers the commercially entangled part of the balance sheet to another bank enterprise. IRT can also improve supervision. Enterprise-wide committee representation paired with director oversight makes it easier to identify and communicate issues in the first place.[325]

Beyond the banking law core, IRT solves the tension between banking law's concern with conglomeration and resolution law's conglomeration reflex. First, because multiple bridge banks can be created out of one failed bank, the bridge-bank-plus-shelf-charter IRT method can unwind bank conglomeration as desired.[326] And unlike P&A, there is no risk that IRT will produce a greater concentration of systemic risk because no existing firms are expanded and no IT systems are integrated. In fact, IRT can reduce excessive risk-taking.[327] Further, IRT intrafirm organization can

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likely it is that the organization will avoid excessive risk-taking."); Christine Naaman, Michel Magnan, Ahmad Hammami & Li Yao, Credit Unions vs. Commercial Banks, Who Takes More Risk?, Rsch. Int'l Bus. & Fin., Jan. 2021, at 1, 15 ("[I]n general, credit unions engage in less risk-taking than banks . . . .").

324. The FDIC can either separate the unduly commercial assets before creating the IRT bridge bank, or it can create two or more bridge banks: one for IRT and the others for the unduly commercial assets. See infra note 326. Either method would likely comply with the least cost test because both preserve the franchise value of the commercial lines of business. Both would be, in effect, a form of qualitative direct credit regulation. See Tankus, The New Monetary Policy, supra note 106, at 19–21.

325. For one, it eliminates the risk of control fraud. See William K. Black, The Best Way to Rob a Bank Is to Own One: How Corporate Executives and Politicians Looted the S&L Industry 2 (updated ed. 2013) (noting that CEOs can defeat internal and external controls to "optimize[] the firm as a fraud vehicle and . . . optimize the regulatory environment" for fraud).

326. See 12 U.S.C. § 1821(n)(13) (2018) ("[T]he [FDIC] may, in the [FDIC]'s discretion, organize 2 or more bridge depository institutions . . . to assume any deposits of, assume any other liabilities of, and purchase any assets of a single depository institution in default."). Thus IRT can also achieve interfirm dispersal as desired, such as in the forms contemplated at the beginning of section III.A.1. As previously noted, however, this approach makes compliance with the least cost test more difficult. See supra section III.A.1.b.

327. See Naaman et al., supra note 323, at 15; Vaheesan & Schneider, supra note 297, at 16–26. Participatory governance affirmatively reduces the likelihood of excessive risk-taking while also curtailing the perverse incentives from shareholders to take excessive risk (to the extent IRT banks rely less on equity financing). See Birchall, supra note 323, at 282; Da Lin & Lev Menand, The Banker Removal Power, 108 Va. L. Rev. 1, 58 (2022) ("In fact, a substantial body of empirical evidence suggests that investors were actually the culprits that pressured banks to take on high risk before 2008, not the victims."). In general, shareholders have an incentive to pursue riskier investments after interest rates on debt are locked in. Michael C. Jensen & Williams H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 334–35 (1976). "Investor-owned" banks are particularly prone to risk-taking because depositors are the primary bank creditors and they tend not to negotiate deposit rates.

build on a rich tradition of cooperative enterprise in American economic life.[328]

2. *Resolution Criteria.* — IRT is also promising in terms of the criteria internal to resolution law. First, IRT satisfies the core aim of avoiding bankruptcy. Next, IRT fairs just as well or better than both P&A and PO in terms of the technical standards of speed, resilience, and scale. Because it disposes of the failed bank balance sheet using the P&A mechanism, it is just as speedy. And IRT is more resilient than both P&A and PO because it less reliant on a secondary market for financial assets.[329] Also unlike P&A, IRT does not need to find a bigger enterprise to buy the failed bank, so it can scale from the smallest bank failures to the largest.[330]

IRT does pose some challenge in terms of administrative burden. Organizing participatory control of monetary institutions is no small feat. Still, while IRT requires FDIC-appointed directors and participatory governance planning, the FDIC has experience appointing directors and meeting staffing requirements in resolution.[331] In fact, previous resolution regimes saw the FDIC successfully manage exotic failed bank assets far outside their expertise with little preparation.[332] Moreover, the FDIC's administrative burden is mitigated by the planning done by the pre-IRT bank and the post-IRT labor of bank employees.[333]

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328. "[T]he cooperative model is arguably the oldest and most well-proven form of social enterprise." Vaheesan & Schneider, supra note 297, at 16. See Hansmann, supra note 49, at 66–69 ("[E]mployee ownership has long been the prevailing mode of organization in the service professions, including law, accounting, investment banking, management consulting, advertising, architecture, engineering, and medicine."); Harcourt, supra note 296, at 31–53 (surveying the study and organization of cooperatives in fields including banking); Vaheesan & Schneider, supra note 297, at 17–19 (finding successful cooperatives in industries such as insurance, agriculture, retail, public utilities, and nonprofit banks such as credit unions).

329. See supra note 205 and accompanying text. It is still somewhat reliant on secondary financial markets because undesirable assets will be liquidated rather than transferred in P&A with the rest of the failed bank's balance sheet. Nevertheless, this is also true of PA, PI, and PO.

330. Both P&A and IRT can resolve Iowa Trust & Savings, but only IRT can resolve JPMorgan.

331. See FDIC, 2008–2013, supra note 157, at 181, 205.

332. For example, the FDIC has managed failed bank assets such as an abandoned gold mine—which it converted to a "successful tourist attraction" and then sold—as well as "hotels, motels, condominiums, office buildings, restaurants, a bakery and a kennel." FDIC, 1933–1983, supra note 155, at 104.

333. See supra note 287 and accompanying text. The FDIC can also hire cooperative experts and station them on-site like other bank examiners. See Carnell et al., supra note 101, at 317–18 (discussing field examination); What We Do, UW Ctr. for Cooperatives, https://uwcc.wisc.edu/about-uwcc/what-we-do/ [https://perma.cc/8VAQ-SCFH] (last visited Jan. 7, 2025) (describing research, education, and outreach resources for new and existing cooperatives, including co-op member training). Federating with other cooperatives can also be a source of expertise and resilience. See, e.g., Emerging Cooperatives, Cooperation Jackson, https://cooperationjackson.org/prospective-coops [https://perma.cc/YLK6-TGX9] (last visited Jan. 29, 2025) (seeking to build a federated

Although IRT can provide immediate access to deposits without a check-mailing interruption like PO,[334] its primary technical weakness is uncertainty in terms of orderliness. IRT risks depositor flight, depending on how uninsured depositors are treated and how depositors view the prospect of banking with an IRT enterprise.[335] Yet new research casts doubt on the likelihood that a bank run would cause bank failure absent balance sheet deterioration—an outcome more likely after a P&A transaction than IRT.[336] In any case, IRT requires only officer, director, and management-level discontinuity, which is nearly universal among resolution methods. Plus, IRT does not risk the kinds of long-term customer disruptions imposed by P&A.[337] And to mitigate IRT's orderliness deficiencies, the FDIC can continue to set conforming bid criteria consistent with PA bids, simulate IRT transitions, and take seriously its obligation to supervise IRT before, during, and after resolution.

In sum, IRT has the potential to be a more technically proficient resolution process. P&A and PO may initially pose less of an administrative burden than IRT, but IRT fairs better in terms of scale and resiliency—important qualities for responding to sudden, massive bank failures, like the 2023 crisis. IRT's proficiency in resolving banks, at least, is not a major impediment to using it to reallocate coordination rights and harmonize resolution with the double dispersal command of antitrust and banking law.[338]

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network of cooperatives). Indeed, this makes Jackson, Mississippi, an especially attractive place to implement IRT.

334. Thus, it obviates the need for DINBs.

335. Congress, for example, could solve the problem once and for all by lifting the cap on deposit insurance. See Menand & Ricks, Deposit Insurance, supra note 4 ("Removing the [deposit insurance] cap would lessen large depositors' incentives to flock to the largest, 'too big to fail' banks . . . ."). Better yet, Congress can make deposit insurance obsolete by substituting the bank's liability to the depositor with a direct liability of the government. See Rohan Grey, Banking in a Digital Fiat Currency Regime, *in* Regulating Blockchain: Techno-Social and Legal Challenges 169, 177 (Philipp Hacker, Ionnis Lianos, Georgios Dimitropoulos & Stefan Eich eds., 2019).

336. See Sergio A. Correia, Stephan Luck & Emil Verner, Failing Banks 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32907, 2024) (finding bank runs a symptom, not a cause, of bank failures in all but the rarest cases). The post-PA bank enterprise might be vulnerable because it uses existing balance sheet space to finance an acquisition, whereas the IRT enterprise primarily finances its acquisition out of future profits. See, e.g., Stephen Gandel, Shares Plunge for Saviour of Failed Signature Bank, Fin. Times (Jan. 31, 2024), https://www.ft.com/content/858c4184-981d-49fb-b21c-31e6eaa1633d (on file with the *Columbia Law Review*) (describing the acquirer of Signature Bank—New York Community Bank—as one such case).

337. See supra note 197.

338. See supra note 129 and accompanying text.

CONCLUSION

If scholars and policymakers want to think clearly about reform in the wake of the 2023 banking crisis, they must start by recognizing that resolution law allocates coordination rights, and its allocation is unreasoned. Then, rather than sleepwalking into antitrust law's default allocation, bank resolution should self-consciously reallocate coordination rights to fulfill the various aims of antitrust, banking, and resolution law itself. Most promising is a new resolution method, IRT, which can disperse intrafirm coordination rights, pass the least cost test, reduce systemic risk, and effectively resolve failed banks.

More broadly, banking scholars should bring their work up to date by theorizing through the coordination rights lens. It is out of date to assume hierarchical firms are uniquely productively efficient or the only market governance institution capable of solving coordination problems. Worse still is the blinkered acceptance of productive efficiency as the sole aim relevant to economic organization. Doing so naturalizes the hierarchical bank-firm and represses normative criteria foundational to antitrust and banking law and political economy favoring dispersed bank coordination rights.

This Note uncovers extant resolution law as a tool to transition failed banks to participatory control. Beyond the moment of bank failure, it prescribes a positive vision for intrafirm bank coordination in general. Our choice is whether to proceed with the fragile and incoherent status quo or to disperse bank coordination rights to repair—or, better yet, forestall—the next crisis.