

1999

## Financial Institution Merger Enforcement: The Historical Context

Don Allen Resnikoff

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>

 Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Don A. Resnikoff *Financial Institution Merger Enforcement: The Historical Context*, 10 Loy. Consumer L. Rev. 296 (1998).

Available at: <http://lawcommons.luc.edu/lclr/vol10/iss4/5>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# Financial Institution Merger Enforcement: The Historical Context

*by Don Allen Resnikoff*

## Introduction

This Article discusses past government merger enforcement and bank regulation relevant to financial institution mergers, focusing on hotly contested policy debates. Such past debates provide insight into the future course of bank merger regulation if for no reason other than that new debates may be similar to the old. Political sentiments hostile to large financial institutions dominate these past debates, and may continue to do so in the future.

The first part of this Article will provide a brief overview of recent governmental agency and Congressional activity and financial institution mergers. This Article will next discuss the great debate of antitrust merger policy of past decades: whether merger enforcement should be a political tool to be used against big business, or a means of assuring economic efficiency. The third part of this Article briefly considers the history of American regulation of financial institutions, which frequently included controversial policies devised by politicians reacting to public antipathy to large financial institutions. This Article continues by taking up the debate concerning the federal government's aid to large and troubled financial institutions considered "too

big to fail." Such government aid has occasionally put a burden on taxpayers, and aroused public concern. Finally, this article concludes that old policy debates over political antipathy to large business entities are sure to rise again.

## **An overview of recent governmental agency and Congressional activity and financial institution mergers**

Several federal agencies review financial institution mergers. Review standards applied by the Antitrust Division of the U.S. Department of Justice are contained in the generally applicable Merger Guidelines issued jointly by the Antitrust Division and the Federal Trade Commission. Bank Merger Screening Guidelines, issued by the Antitrust Division of the U.S. Department of Justice, The Federal Reserve Board and the Office of the Comptroller of the Currency, clarify the agencies' processes and, in a single document, set out the ground rules for the agencies' review of mergers.<sup>1</sup> The federal agencies can challenge those mergers perceived as threatening competitive harm and do, in fact, challenge a small percentage.<sup>2</sup> State's Attorney Generals may also have authority to challenge bank mergers. Congressional legislation affecting

financial institutions includes the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,<sup>3</sup> ("Riegle-Neal Act"), which provides that national banks and authorized state banks are able to branch nationwide, except in states that opted out of interstate branching.<sup>4</sup> Thus, the Reigle-Neal Act permits banks to operate throughout the country, something non-bank financial institutions have always been able to do.

Much Congressional effort has been directed to the repeal of statutes dating from the Great Depression that prohibit banks from commercial activities such as sales of securities and insurance. This effort has, for the most part, been unsuccessful. The target of the repeal effort is the Glass-Steagall Act, which sharply limits the types of business banks can conduct. For example, securities underwriting by banks is constrained by the Act.<sup>5</sup>

The stated purpose of the Glass-Steagall Act is to provide for the safety and more effective use of the funds provided to banks by the Federal Reserve system and to prevent the undue diversion of bank funds into speculative business investment. The Act's separation of banking and other business activity has been weakened by regulatory agencies over the years. Recent Federal Reserve and Comptroller of the Currency announcements further liberalize bank participation in the securities industry.<sup>6</sup>

Congress recently considered bills repealing the Glass-Steagall Act and

expanding the business banks can do. However, as of May, 1998 Congressional efforts were at stalemate, with banking interests unable to work out a compromise with securities and insurance business interests trying to protect their turf.<sup>7</sup> Consumer groups and small thrifts also oppose the proposed legislation.<sup>8</sup>

However, commentators suggest that legislation repealing the Glass-Steagall Act and expanding bank businesses will pass some time in the next few years.<sup>9</sup>

Against this backdrop of government agency merger enforcement and Congressional activity, some commentators believe large financial institution mergers are beneficial.<sup>10</sup> Recent Congressional legislation permitting interstate branching is one cause of an increase in merger activity, as mergers provide a way for banks that develop interstate operations to show greater earnings.<sup>11</sup> A reason for recent mergers of multiregional banks is that governmental merger enforcement tends not to penalize merger partners simply because they are multiregional: relevant markets are generally local for the purpose of antitrust analysis. A merger partner's broad geographic reach is largely irrelevant to analysis of the effects of a merger in any particular locality.<sup>12</sup>

Some commentators believe repeal of the Glass-Steagall Act will also encourage merger activity. Repeal would reduce regulation by limiting banks to traditional businesses. Banks will be able to engage in a variety of

financial service activities, such as securities and insurance marketing. Financial institutions that are not chartered as banks will also be in these businesses. Now artificially fragmented markets for banking, securities underwriting, and insurance may converge. Various financial service institutions will provide an integrated array of financial services and have nationwide scope. The size of these financial institutions could become quite large, and their number few, as a result of merger activity.

Author Martin Mayer envisions "nationwide or nearly nationwide institutions, certainly no more than twenty of them. Some of these institutions will be banks, some will be brokerage houses, some will be data processors . . . . These nationwide institutions will be what the retail trade calls 'category killers.'"<sup>13</sup> The Citibank-Travelers's merger, combining banking and insurance powerhouses, adds weight to Martin Mayer's vision.<sup>14</sup>

### **How "big is bad" merger enforcement gave way to efficiency oriented enforcement**

Antitrust law does not fit easily into the orthodox mold of law as a science of universal and immutable principles. That view of law, associated with turn of the century Harvard Law Dean Christopher Langdell and traditional Socratic law school teaching, has given way to a more realistic and goal oriented antitrust jurisprudence.<sup>15</sup> Antitrust law is fluid and has evolved

dramatically in recent years.

Post-World War II antitrust enforcement was suspicious of businesses with large market share. This suspicion, however, went beyond pure economics and included a fear of the the political power and social leadership of large market share businesses.<sup>16</sup> Anti-big business suspicion may have come from experience with business cartels associated with harsh World War II governments in Germany and Japan. The domestic political struggles that led to the New Deal policies of the 1930's may have also influenced post-war federal antitrust enforcers. In 1959, Karl Kaysen and Donald Turner theorized the then-current goals of federal antitrust enforcement:

The goal of a 'proper' distribution of power, [including political power and general social leadership], between large and small business is rationalized in terms of certain Jeffersonian symbols of wide political appeal and great persistence in American life: business units are politically irresponsible, and therefore large powerful business units are dangerous. [When it passed the Sherman Antitrust Act, Congress] desired to protect equal access and equal opportunity for small business for noneconomic reasons: concentration of resources in the hands of a few was viewed as a social and political catastrophe ...<sup>17</sup>

In 1945, in *United States v. Aluminum Company of America*,<sup>18</sup> Judge Learned

Hand wrote, "[w]e have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based on the belief that great industrial consolidations are inherently undesirable, regardless of their economic results."<sup>19</sup>

Congress amended the antitrust laws in 1950 to include the Clayton Antitrust Act in an effort to plug the dike against a perceived rising tide of industrial mergers. Clayton Act Section 7 prohibits acquisition of stock or assets "where in any line of commerce or any activity affecting commerce in any section of the country, the effect of such acquisition may. . . be substantially to lessen competition, or to tend to create a monopoly."<sup>20</sup>

Merger cases brought by the United States government in the 1950s and 1960s frequently involved companies which had relatively small shares of properly defined markets, and where anticompetitive effects were obscure. For various reasons, the Government's opposition to the mergers generally prevailed in the courts. Justice Stewart quipped in a now famous dissenting opinion, "The sole consistency I can find is that in [merger] litigation under Section 7 [of the Clayton Act], the Government always wins."<sup>21</sup>

Perhaps the most noted bank merger case of the 1960s was *United States v. Philadelphia National Bank*.<sup>22</sup> In blocking the merger, the Supreme Court relied heavily on broad policy considerations. The Court did offer economic analysis of market power in a defined product and geographic area, although the

analysis does not meet today's rigorous standards.<sup>23</sup>

The *Philadelphia Bank* Court's economic analysis found that merger prospects Philadelphia National Bank and Girard Trust were the second and third largest regional banks based on such criteria as deposits, assets, and loans. The Court accepted the Government's evidence that the relevant product market was "commercial banking," including various kinds of services, and that a four county metropolitan area was the relevant geographic area for determining market power. The Court found that merger would leave a single bank controlling 30% of commercial banking. The Court discounted evidence that the merger would have no significant competitive effects, and put great weight on the 30% market share figure.<sup>24</sup>

The Court cited *Brown Shoe v. United States*<sup>25</sup> case for the proposition that "Congressional concern with the trend toward concentration [evidenced in Clayton Act Section 7] warrants dispensing, in certain cases [involving large market share], with elaborate proof of market structure, market behavior, or probable anticompetitive effects."<sup>26</sup> The Court said that the high market share percentages presented an "inherently anticompetitive tendency."<sup>27</sup> *Philadelphia Bank* further refused to rationalize the anticompetitive merger on the basis of an alleged benefit to consumers, observing that Congress, in enacting the Clayton Act, barred "anticompetitive mergers, benign and

malignant alike..."<sup>28</sup>

The late 1970s and early 1980s, critics stepped forward to attack a process of federal antitrust enforcement, and judicial reasoning, that relied less and less upon pure market-share analysis. Richard Posner, among others, proclaimed the science of economics as the antidote to "big is bad" prosecutions. "The antitrust field is in need of a thorough rethinking. [T]o the extent that efficiency is the goal of antitrust enforcement . . . [there is no] justification for using the antitrust laws to attain goals unrelated or antithetical to efficiency, such as promoting a society of small tradespeople."<sup>29</sup>

*The Antitrust Division currently analyzes particular product markets, such as loans to small businesses, and determines the relevant geographic market for each such product.*

William Baxter, the first U.S. Assistant Attorney General in charge of antitrust enforcement under President Ronald Reagan, heeded the calls for a new enforcement grounded in efficiency based economics. Baxter, himself the author of learned articles on economics and antitrust, in 1982 initiated Antitrust Division Merger Guidelines which were significantly different from the Guidelines the agency had issued in 1968. The 1982 Guidelines attempted to balance the Congressional mandate to interdict competitive problems in their incipency with a desire to "avoid

unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral." The 1982 Guidelines, along with subsequent versions, provide detailed formula for determining when a merger will create anticompetitive market power. The 1982 Guidelines provided formula for determining, among other things, product and geographic market, potential for anticompetitive effects, and relevant efficiencies.<sup>30</sup>

Some aspects of the Department of Justice's current bank merger analysis differ markedly from the market share driven analysis of *Philadelphia Bank*.<sup>31</sup> The Antitrust Division currently analyzes particular product markets, such as loans to small businesses, and determines the relevant geographic market for each such product. The Division focuses on particular customer groups, and has, for example, evaluated "the potential effect of bank mergers on middle-market banking customers. Such customers have banking needs that are different from small businesses."<sup>32</sup> The Division then "look[s] at the possibility of entry and expansion." The overall goal is to prevent "anticompetitive effects from bank mergers, . . . while at the same time permitting most of the efficiencies associated with those

mergers."<sup>33</sup> To this end, the ultimate test is if, or how, different classes of consumers might be harmed by the proposed bank merger. Examples of such consumer injuries include higher interest rates, or even a lack of available funds from banks in the given community.<sup>34</sup>

Some commentators suggest that efficiency-oriented economic analysis, as a source of deductive reasoning by courts, continues to evolve. This evolution, is the heart of the transition from "Chicago school" antitrust enforcement to "post-Chicago school" antitrust economics. The older Chicago school style may have tended to be rigidly deductive, while the newer economic style leaves more opening for analysis of the particular facts of each case.<sup>35</sup>

### **A brief look at the history of bank regulation and the role of political opposition to large financial institutions**

Regulation of financial institutions in the United States has a unique political history. Persistent public opposition to great banking power has had the important effect of crating a central bank system that is weaker than that of other major countries, and producing a more fragmented system of financial institutions.

Politicians colorfully expressed their opposition to big banking interests as early in the American Republic as Jefferson's presidency<sup>36</sup> and the Jacksonian period.<sup>37</sup> Popular

discontent with banking influenced development of the country's banking structure.<sup>38</sup> The first Bank of the United States was formed through the efforts of Alexander Hamilton in 1791, but Congress refused to renew its charter in 1811.<sup>39</sup> The second Bank of the United States was established in 1817, but in 1832 Andrew Jackson vetoed legislation to give the bank a new charter. "Jackson's belief in state's rights, his concern for agrarian issues, and his distrust of banks in general and the economically and politically powerful Bank of the United States in particular had predisposed him to oppose the bank . . ."<sup>40</sup>

The Federal Reserve Act of 1913 gave the United States an imperfect central bank:

While the Federal Reserve Act was a step in the right direction, it contained flaws that were largely a result of the political compromises that had to be made to get any central bank at all. Regional interests opposed establishing a single central bank, such as existed in other industrialized nations, and states' righters resisted a substantial federal presence in the affairs of the central bank. These groups feared that a central bank would be controlled by the interests of Wall Street or Washington D.C.<sup>41</sup>

The Great Depression of the 1930s tested the abilities of the Federal Reserve System, which performed poorly.<sup>42</sup> The result was a revamping of the regulatory structure of banking.<sup>43</sup>

The revamped structure provided the banker's "safety net" that provided federal insurance for bank depositors, limited the scope of bank activities, and protected banks from competitive forces.<sup>44</sup>

Certainly political pressures prompted legislative action during the Great Depression. An interaction between popular discontent and political action is described in Robert Litan's retelling of the story of how the Glass-Steagall Act was passed.<sup>45</sup> Senator Glass repeatedly proposed that Congress pass legislation to separate commercial and investment banking. He was unsuccessful until 1933, when the political climate had changed, in part because Senator Glass held Congressional hearings revealing various abuses by banks and their securities affiliates. The hearings helped "fan public sentiment against the banking community, which not surprisingly intensified as the bank failure rate accelerated into 1933."<sup>46</sup> Thus the Glass-Steagall proposal became part of the legislative package passed to rescue the banking system.

Congress's adoption of the Clayton Act in 1950 was directed at the perceived problem of business mergers generally, not just bank mergers. The passage of the Act reflected the continuing political pressures concerning mergers of large businesses.

The federal bail-out of savings and loans and commercial banks in the 1970's and 1980's clearly caught the attention of the public and became a political issue. There is a likely

connection between public concern and the Federal Deposit Insurance Corporation Improvements Act of 1991, which established more rigorous regulation of banks, and the 1994 federal legislation which limited Government bail-out of banks beyond paying off insured depositors.<sup>47</sup>

In short, there is a rich American history of political hostility toward large financial institutions, leading to legislative and regulatory limits on banking, often of arguable merit.

### **Banks "too big to fail"**

It is useful to tease out from the broad story of financial institution regulation the narrower story of government rescues of floundering banks considered "too big to fail." These rescues have imposed costs on the taxpayers, and are an example of government action having a politically significant tendency to arouse public ire toward large financial institutions.

Government aid to troubled banks may be viewed as in two categories; payment to depositors within the stated per-deposit federal deposit insurance limit (currently \$100 thousand), and aid beyond that limit.<sup>48</sup> In 1994 Congress enacted legislation stating that Government bail-out of banks should be restricted to paying the losses of insured depositors to the extent of the prescribed \$100,000 payment limit.<sup>49</sup> Nevertheless, in the past government regulators have felt a need to aid troubled banks beyond the prescribed insurance limits and uninsured deposits were treated as if

insured. It is a matter of debate whether the 1994 statute will preclude extraordinary aid in the future. If Congress and the regulatory agencies believe that particular large financial institution failures threaten the stability of the economy, arguably means could be found to save the "too big to fail" institutions. Indeed, some critics think the U.S. Government has recently been too quick to come to the aid of large U.S. banks that made unfortunate investments in the Asian markets.<sup>50</sup>

Among the "too big to fail" banks that the Government bailed out in the past was Continental Illinois. That bail out reportedly caused the FDIC a loss of \$1.7 billion in 1984.<sup>51</sup> In 1988, the FDIC rescued the nation's 13th largest bank holding company, First Republic Bank Corp., in a package reportedly worth \$5 billion.<sup>52</sup>

IN *THE BANKERS: THE NEXT GENERATION*, Martin Mayer provides an account of U.S. Government "too big to fail" policies.<sup>53</sup> He explains that financial problems hit commercial banks in the late 1980s because, like the savings and loans before them, banks face a long term decline in their ability to compete. Banks have reduced ability to control low interest deposits as a source of capital, and a reduced ability to compete profitably with non-bank sources of capital. As a result the sense developed that commercial banks were in a precarious situation.<sup>54</sup>

According to Mayer, the government's solution for the large commercial banks' predicament included some direct bailout activity

and promotion of mergers that reduced the number and capacity of banks.<sup>55</sup> Mayer concludes that "by keeping the big banks alive to buy each other out after the government had restored them to profitability, the Fed achieved the necessary results with the least shock to the system."<sup>56</sup> This is not to say that the solution was without costs to taxpayers. The most obvious was the direct cost to the Federal Deposit Insurance Corporation, ("FDIC"). Absorbing the losses of one bank alone, First Republic, eventually cost the FDIC \$3 billion. Additional taxpayer burden took the form of special tax breaks provided to facilitate the quiet absorption of First Republic into another bank by merger.<sup>57</sup>

### **Conclusion: The significance of political antipathy toward large financial institutions**

Past bank regulation and merger enforcement policy was to some extent influenced by political debate involving public hostility to large financial institutions. The extent to which such public concerns will be relevant in the future is a matter of speculation, but review of the daily press suggests that there is already some escalation of political debate based on public concerns. The consequences of significant escalation could include reducing the influence of economic analysis while increasing emphasis on broad political issues are brought into play. Policy debates could reopen between advocates of broadly

based "big is bad" political thinking and advocates of economic efficiency.

That political give and take affects merger policy is a simple point, but it is an important one. Policy makers will need to deal actively with antipathy toward large financial institutions as a political issue. A lesson from the past drawn by some observers is that politicians' reaction to public hostility to large financial institutions has often been demagogic, leading to less than optimal public policy.<sup>58</sup> Hopefully there will be no such dire consequences in the future, and excellent policies serving the public interest will prevail.

## Endnotes

<sup>1</sup> See Constance K. Robinson, *Bank Mergers and Antitrust*, Address Before the 31st Annual Banking Law Institute (May 30, 1996) [hereinafter Robinson1].

<sup>2</sup> "The Division has been extraordinarily active in this [bank merger] area, dealing with the unprecedented merger wave, which has included a large number of very large bank mergers. During Fiscal Year 1995, the Division screened almost 1,900 bank mergers, and issued 1,211 competitive factor reports, and so far in 1996, we have screened 1,659 mergers and issued 1,096 competitive factor reports. In 1995, we required divestitures in five cases. So far in 1996, we have required divestitures in six cases." Constance K. Robinson, *Bank Mergers and Antitrust*, Address Before the Association of the Bar of the City of New York (Sept. 30, 1996) [hereinafter Robinson2].

<sup>3</sup> Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, 108 STAT. 2338 (1994) (codified as amended in

scattered sections of Title 12, United States Code).

<sup>4</sup> See 12 U.S.C. § 1842(d) (1994).

<sup>5</sup> See 12 U.S.C.A. §§ 24, 78, 221, 335, 377, 378(a) (West Supp. 1998). 12 U.S.C.A. § 24 provides, "The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . ." 12 U.S.C.A. § 78 provides, with certain exceptions, "No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve at the same time as an officer, director, or employee of any member bank . . ." 12 U.S.C.A. § 377 makes the provisions of 12 U.S.C.A. § 24 applicable to state bank members of the Federal Reserve System. Participants in the securities business are ineligible to participate in banking. See 12 U.S.C.A. § 378(a).

Glass-Steagall is supplemented by the Bank Holding Company Act, which prohibits bank holding companies or their non-bank subsidiaries from many non-bank activities. See 12 U.S.C.A. § 1843(c)(8)(West Supp. 1998). The Bank Holding Company Act was amended in 1970 to close a loophole in the Act that seemed to permit a special one-bank category of holding companies the power to engage in securities dealings. Congress closed this apparent loophole by means of the Bank Holding Company Amendments Act of 1970, which instructed the Federal Reserve Board to limit bank

holding companies to certain "proper" banking activities. This Congressional instruction is found at 12 U.S.C.A. § 1843(c)(8). The Federal Reserve's implementation of the loophole closing legislation is called Regulation Y.

<sup>6</sup> In October 1996, the Fed issued regulations continuing a policy of removing restrictions on the activities between a firm engaged in securities underwriting and dealing covered under Section 20 of the Glass Steagall Act and an affiliated state member bank. The Fed also raised the limit on bank securities activities to 25 percent of revenue in their securities affiliates from 10 percent previously allowed. In November 1996, the Office of the Comptroller of the Currency ("OCC") similarly revised its regulations concerning operating subsidiaries of national banks. The OCC now permits national banks to use their own subsidiaries to underwrite and deal in securities.

<sup>7</sup> Recent Republican sponsored compromise legislation displeased banking interests. The American Bankers Association ("ABA"), which represents 90 percent of the nation's banks, said it could not support a compromise bill offered by House Republican leaders. The ABA's view was that the bill would burden the banking industry with unnecessary regulation. Banking interests considered the legislation too protective of securities and insurance business interests. The Clinton Administration opposed the Republican compromise proposal, while Fed chief Alan Greenspan supported it. "Treasury Secretary Robert E. Rubin, in a letter to House Speaker Newt Gingrich (R-Ga.) last week, said the Clinton administration opposes [the proposal before Congress in April] because it would harm national banks and thrifts. But Federal Reserve Chairman Alan Greenspan endorsed the plan a day later, saying it

would update 'increasingly antiquated laws that constrain the development and competitiveness of our financial system.'" Peter Pae, *Bank Lobby Opposes Reform Bill; ABA Stance Another Setback for GOP Plan to Revamp Finance Laws*, WASH. POST, March 26, 1998, at C03.

<sup>8</sup> "The ABA join[ed] a powerful coalition of thrifts, community bankers and consumer groups in opposing the bill, albeit for different reasons. The thrift industry [was] against it because the bill would block corporations from gaining thrift charters. Consumer groups said allowing banks to sell insurance and investment products would create a situation 'ripe for abuse.'" *Id.*

<sup>9</sup> "The ABA opposition will slow it [Glass-Steagall reform legislation] down a bit, but it's hard to tell by how much," said Robert Litan, director of economic studies at the Brookings Institution." *Id.* While Citicorp participated in ABA opposition, John M. Morris, a Citicorp spokesman said "the odds are very strong that the laws are going to change." Richard Stevenson, *Shaping a Colossus: The Regulators; Financial Heavyweights Try Do-It-Yourself Deregulation*, N.Y. TIMES, Apr. 7, 1998, at A1 (quoting John M. Morris).

<sup>10</sup> According to Martin Lipton: The market has generally been receptive to these large [merger] transactions, and seems to accept the proposition that size can provide significant competitive advantages, enabling acquirors to achieve cost synergies by eliminating excess capacity, achieve revenue enhancements through cross-selling a broader product line, and manage the sizeable investments in technology needed to maintain a competitive advantage. Buoyed by a strong stock market and a rise in acquiror market

valuations, the multiples paid in recent transactions have reached record levels (ranging from approximately 3.5 to over 5 times book value, and from 20 to 25 times the latest 12 months earnings per share). Banks and non-bank financial service providers continued to expand aggressively across industry lines in hopes of diversifying revenues and increasing revenue growth through expanded product offerings. The sizeable market capitalizations of the leading bank holding companies, in particular, have provided such institutions with tremendous purchasing power.

Martin Lipton, *Merger and Acquisition Activity Continued at Record Pace in 1997; What Were the Contributing Factors?*, N.Y.LAW J., Feb. 2, 1998, at 7.

Many commentators think the Citibank-Travelers deal will trigger copycat mergers: "Merrill and other financial firms are expected [to be] looking for their own merger partners." Peter Truell & Laura M. Holson, *Shaping a Colossus: The Industry; Gigantic Showdown Over Wall Street*, N.Y. TIMES, Apr. 7, 1998, at D1 [hereinafter Truell & Holson].

<sup>11</sup> See Daniel Kaplan, *Expansion Outside Home Markets Seen Fueling Even Bigger Mergers*, AM. BANKER, June 2, 1995, at 20 (quoting report by First Manhattan Consulting Group, stating "large strategic deals . . . offer the potential to solve short-term earnings growth problems of the larger superregionals and national contenders").

<sup>12</sup> According to Richard Maroney, a bank consultant, the Justice Department and Federal Reserve will focus on a "a specific banking market or banking markets because the entire state of Louisiana is not a banking market. They'll look at Monroe or Baton Rouge or New Orleans... on a market-by-market basis." Dennis Camire, *How Agencies*

*Oversee Banking Mergers*, GANNET NEWS SERVICE, Jan. 29, 1998, available in 1998 WL 5620749 (quoting Richard Maroney).

<sup>13</sup> MARTIN MAYER, *THE BANKERS: THE NEXT GENERATION* 448 (1996) [hereinafter MAYER].

<sup>14</sup> See Turell & Holson, *supra* note 11, at D1.

<sup>15</sup> See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (1995). Part One of the book discusses Langdellian and other "modern" jurisprudential thinking. See *id.* at 13-80. Chapter 5 discusses law and economics generally. See *id.* at 83-105.

<sup>16</sup> See CARL CAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 17-19 (1959).

<sup>17</sup> *Id.*

<sup>18</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>19</sup> *Id.* at 428.

<sup>20</sup> 15 U.S.C.A. § 18 (West 1997).

<sup>21</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966).

<sup>22</sup> 374 U.S. 321 (1963).

<sup>23</sup> See, e.g., DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, *Horizontal Merger Guidelines*, in DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL II-99 (3d ed. Feb. 1998) [hereinafter Merger Guidelines]; Robinson1, *supra* note 2; Robinson2, *supra* note 3.

<sup>24</sup> Current Antitrust Division analysis gives weight to the issue of competitive effect, and would be more likely to tease out particular product and geographic markets

(such as loans to medium sized businesses in a defined area) rather than relying on a conglomeration of products and a broad geographic area to define a market. See *Merger Guidelines*, *supra* note 23, at II-99 - II-126.

<sup>25</sup> 370 U.S. 294 (1962).

<sup>26</sup> *Philadelphia Nat'l Bank*, 374 U.S. at 363.

<sup>27</sup> *Id.* at 366.

<sup>28</sup> *Id.* at 371.

<sup>29</sup> RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 3-4 (1978).

<sup>30</sup> See *Merger Guidelines*, *supra* note 23; *Robinson2*, *supra* note 3.

<sup>31</sup> See *supra*, notes 22-28 and accompanying text (discussing *Philadelphia Nat'l Bank*); *Robinson2*, *supra* note 3.

<sup>32</sup> *Robinson2*, *supra* note 3.

<sup>33</sup> *Id.*

<sup>34</sup> *Camire*, *supra* note 12.

<sup>35</sup> See Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 *ANTITRUST L.J.* 669, 669 (1995). Some antitrust subject areas involving anticompetitive conduct have resisted efficiency based economic analysis. See *id.* Sullivan offers as an example cases where a company leverages power in one market (like copy machines) into another (like copy machine repair). See *id.* (citing *Eastman Kodak v. Image Technical Services*, 112 S.Ct. 2072 (1992)); see also *FTC v. Staples, Inc.*, 970

F.Supp. 1066 (D.D.C.1997)(finding that the merged firm would be able to raise prices, because only one "office superstore" would remain in regional markets.) *Eastman Kodak* and *Staples* arguably show respective companies as "category killers" in the sense Martin Mayer uses that term to describe financial institutions of the future.

<sup>36</sup> A crony of Thomas Jefferson complained that American banking was "only a fraud whereby labour suffers the imposition of paying an interest on a circulating medium," and, later, "[W]e recognize three political beasts . . . hierarchical and feudal aristocracy, to say the worst of them, are now the instruments of the third — viz., of banks." GEORGE S. ECCLES, *THE POLITICS OF BANKING* 10 (Sidney Hyman ed.) (1982).

<sup>37</sup> Senator Thomas Hart Benson apparently represented the views of his constituents when he said about banks that "All the flourishing cities of the West are mortgaged to this money power. They may be devoured by it at any moment." *Id.*

<sup>38</sup> One commentator says that in the early days of the Republic the performance of banks "imposed enormous hardships on both farmers and workingmen, and fed a populist backlash which set back the development of the nation's banking industry by more than 50 years." VAUGHAN & HILL, *BANKING ON THE BRINK* 1 (1992) [hereinafter VAUGHAN & HILL]. In particular, Vaughan and Hill suggest that bad policy was caused by politicians who were "demagogues and hypocrites" who had "a peculiarly American genius for getting the details of banking wrong (and then dressing up the result as if it were a triumph for the common man). . . ." Demagoguery "soon led to the destruction of the Bank of the United States — an early form of central bank that might later have served to check abuses and

impose standards.”

<sup>39</sup> See JAMES L. PIERCE, *THE FUTURE OF BANKING*, 33-34 (1991) [hereinafter PIERCE].

<sup>40</sup> See *id.* at 36. East v. West rivalries in banking matters were still important at the end of the 19th century, when an intense Western populist versus Eastern banker - big government battle raged over tight control of money supply. The populist view favored easy coinage of silver, while big banking/government interests favored a tight money standard based on scarce gold. That issue was colorfully addressed in the famous William Jennings Bryan “cross of gold” speech. (A commentator on Public Broadcasting’s evening News Hour for February 26, 1998 used clips of the Judy Garland movie to demonstrate that Frank Baum’s Wizard of Oz is a colorful parable of the “easy money” silver interests petitioning the powerful gold standard proponents just before the turn of the century.)

<sup>41</sup> See *id.* at 40-41.

<sup>42</sup> See *id.* at 43-45.

<sup>43</sup> See e.g. Don Allen Resnikoff, *Understanding Bank Regulations*, 6 LOY. CONSUMER L.R. 108 (1994).

<sup>44</sup> See *id.*

<sup>45</sup> See ROBERT E. LITAN, *WHAT SHOULD BANKS DO?* 27-28 (1987).

<sup>46</sup> *Id.*

<sup>47</sup> See Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1823(c)(4)(E)(i) (1994) (forbidding the FDIC from taking “any action ... with respect to any insured depository institution that would have the effect of increasing losses to any insurance

fund...”).

<sup>48</sup> Federal insurance protecting individual bank deposit accounts has been a key feature of the United States bank regulatory scheme since the Great Depression. See, e.g., 12 U.S.C.A. § 811 *et. seq.* (providing “[t]here is created a Federal Deposit Insurance Corporation . . . which shall insure . . . the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter [Chapter 16] . . .”). Bank, savings institution, and credit union accounts all benefit from similar insurance. The quid-pro-quo for banks is government regulation of banking that in some ways has recently become more restrictive. For example, in 1991 Congress enacted the Federal Deposit Insurance Corporation Improvements Act (FDICIA), a system of early regulatory intervention in the operation of banks with insufficient capital, intended to reduce the cost of failures to the FDIC.

<sup>49</sup> See Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1823(c)(4)(E)(i) (1994).

<sup>50</sup> “Here is a thumbnail sketch of the economic problems in Asia that will soon take a bite out of our economy. Bank loans to Indonesia, South Korea, Malaysia, Philippines and Thailand total the following: from banks in the United States, nearly \$24 billion . . . . They can’t pay those bank loans. That’s why the big push to nail [American] taxpayers for money for the International Monetary Fund. The way this scam works is this: Congress taxes us. Congress gives our tax dollars to the IMF. The IMF gives it to countries. Countries give it to banks. What’s missing in this scam? Any benefit at all to the taxpayers who are putting up the dough? Did we get any benefit from the loans made by New York banks to folks in Asia? No. Did we earn any of the profits from the

*Financial Institution Merger Enforcement*

interest charged those folks in Asia? No.” Charley Reese, *When the Elite Talk in Group Terms, Hang on to Your Wallet*, ORLANDO SENTINEL, February 15, 1998.

<sup>51</sup> See Winston Williams, *U.S. Puts Together \$7.5 Billion in Aid for Illinois Bank*, THE N.Y. TIMES, May 18, 1984.

<sup>52</sup> See Kathleen Day & John M. Berry, *FDIC Rescues Texas Bank With \$1 Billion Loan*, WASHINGTON POST, Mar. 18, 1988.

<sup>53</sup> See MAYER, *supra* note 14.

<sup>54</sup> See VAUGHAN & HILL, *supra* note 38.

<sup>55</sup> Of course, many small savings and loans and commercial banks were also bailed out by the U.S. Government.

<sup>56</sup> See MAYER, *supra* note 14, at 260.

<sup>57</sup> “Too big to fail” policies are one example involving a public issue where hostility toward large financial institutions is brought into play. ATM surcharges and other bank fees have, for another example, drawn the ire of Public Citizen and other consumer groups, and have been the subject of state laws and bills proposed to Congress.

<sup>58</sup> See VAUGHN & HILL, *supra* note 38.

CLR