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The End of Banking History?

Finishing the Unfinished Business of Financial Reform

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About the Author

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Executive Summary

When the Biden administration took office, the United States government had a long to-do list for financial regulation. Part of it entailed reversing the Wall Street–friendly policies instituted by the previous administration (Steele 2019a). Another part consisted of unfinished business from the aftermath of the Global Financial Crisis (GFC) of 2007–09. However, more than three years into the administration's term, despite a crypto crash, a regional banking panic, and a climate-driven crisis in home insurance markets, financial policy issues haven't been at the top of the progressive economic policy agenda—but they should be.

Financial crises caused by an unstable financial system derail economic progress and devastate communities by causing millions of bankruptcies, foreclosures, and job and income losses—particularly for low-income communities and communities of color (Steele 2024a). The economic misery that the GFC and its aftermath caused so many Americans offers a recent and vivid example of the devastating impacts of financial crises. Making the financial system fairer and less extractive will also help advance other economic policies that rely on the capital and services provided by the financial sector, including climate policy, financial inclusion policy, industrial policy, and antitrust policy (Steele 2020a; Omarova and Steele 2024). Finance is often described as the "lifeblood of the economy," and financial markets and institutions play a vital role in determining whether resources are channeled to all communities or only the wealthiest ones, to giant multinational monopolies or emerging small businesses, to productive research and development or to lavish executive pay and stock buybacks, and to clean energy innovation or fossil fuels that pollute the planet. This is why ensuring that the financial sector is safe, stable, and healthy is an essential part of a broader economic policy agenda.

This brief provides a framework for regulating the banking system, as well as for regulating some financial companies that seek to replicate banking without being subject to the full suite of legal restrictions that apply to banks. Specifically, this agenda includes:

- Increasing risk-based capital and leverage requirements for Global Systemically Important Banks (GSIBs) and tightening existing concentration restrictions;
- Creating a classification and accompanying regulations for Domestic Systemically Important Banks (DSIBs);
- Using resolution planning to reverse the trend of banking sector consolidation;
- Reducing the risk of bank runs by regulating volatile deposits;
- Limiting banks' powers to engage in risky activities like crypto assets and commodities trading; and
- Providing for consolidated regulation and supervision of all financial institutions that engage in banking or bank-like activities.

These are not the only items on the financial reform agenda. The Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act contained more than 300 provisions that either expressly required or permitted agency rulemaking (Copeland 2010). As of 2016, the previous high-water mark for implementation, 70.3 percent of the required rulemakings had been finalized, 9.2 percent were in the proposal stage, and 20.5 percent had not yet been proposed (Davis Polk 2016). For example, regulators still need to finalize incentive-based compensation rules required under section 956 of the Dodd-Frank Act (FDIC et al. 2024).[1] Regulators are also overdue in updating the federal guidelines applicable to bank mergers to address growing consolidation and financial stability risks (EO 14036; FDIC 2024a).

To be sure, there have been areas of progress, including the Securities and Exchange Commission's (SEC) work on the risks to investors posed by climate change and the Consumer Financial Protection Bureau's (CFPB) initiative to address excessive "junk fees" like credit card late fees (SEC 2024; CFPB 2024).[2] These efforts have progressed because they benefited from a combination of single-agency rulemaking jurisdiction, political guidance from the White House and its administration, and an overarching affirmative economic vision into which they can fit.[3]

The proposals provided in this brief offer a unified agenda for the three banking agencies—the Federal Reserve (Fed), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC)—that can be adopted by an administration looking to offer a vision for a democratic and equitable financial system. They directly respond to the unfinished reforms from the GFC, the deregulation that occurred during the Trump administration, the recent stresses in the banking sector in 2023, and the increasing move of finance to digitally based businesses.

Post-Crisis Financial Reform, Regulatory Tailoring, and the Digitization of Financial Services

Prior to the GFC, the prevailing view among policymakers in Washington was that financial institutions and markets allocate resources efficiently and would deliver economic growth that would trickle down from the top echelons to the rest of society. Regulators and legislators treated banks as if they were sophisticated risk managers that could be trusted to self-regulate so long as some of their incentives were properly aligned (Grynbaum 2008). As Randal Quarles, then a senior official at the Treasury Department, said at the time:

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[1] 12 U.S.C. § 5641

[2] But note that the industries regulated by both agencies have challenged rules resulting from these efforts in court.

[3] For example, these initiatives came pursuant to provisions contained in two executive orders, EO 14036 and EO 14030.

> Markets are always ahead of the regulators, and frankly that's how it should be. It's analogous to the advice that my father provided me that "if you don't miss at least two or three planes a year, you're spending too much time in airports." If the regulators aren't a little behind the market in a few areas at any given time, they would be stifling innovation and evolution. (Quarles 2005)

Financial regulation appeared to be at the "end of history," the financial corollary to political scientist Francis Fukuyama's late-1980s theory that we had reached the "end point of mankind's ideological evolution" and that Western liberal democracy had become the "final form of human government" (Fukuyama 1989).[4] The prevailing view in finance was that the causes of and solutions to financial crises had been fundamentally solved through technocratic deregulation and publicly arranged bailouts (Ramo 1999).

Far from establishing a hegemonic consensus, the deregulation caused by Wall Street's political power and lobbying instead led to a buildup of financial risks that caused the GFC (Igan, Mishra, and Tressel 2012; Igan and Mishra 2014). The Wall Street–driven GFC upended the regulatory consensus—for a time. The initial post-crisis effort to improve regulation and resilience, through the passage of the Dodd-Frank Act and its implementing regulations, was followed by a few years—from about 2011 to 2018—of relative financial stability in the US.

Two trends interrupted the reform-minded consensus that was forming in the wake of the GFC, causing the pendulum to again swing toward financial deregulation: (1) the focus on regulatory "tailoring" to reduce the burden of post-crisis regulations that had been imposed on the banking system, and (2) the increasing digitization of finance that changed the delivery, if not the fundamental nature, of financial products and services. The common theme across these trends was a focus by regulators on maximizing "efficiency" and spurring "innovation" and "competition," to the exclusion of other goals. The weaknesses in the traditional banking sector—demonstrated by the failures of Silicon Valley Bank (SVB), Signature Bank, and First Republic Bank in the spring of 2023—that directly resulted from the tailoring project[5] and the instability in emerging digital finance markets underscore that we have not in fact reached the "end of banking history."

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[4] Financial regulation was not alone in this abiding sense that policymakers had arrived at a hegemonic understanding of economic policy. In antitrust, for example, the consumer welfare standard had prevailed for decades before recently being challenged by the New Brandeisian movement. See Khan 2020.

[5] Relevant tailoring changes that played a role in contributing to SVB's failure include the lengthy phase-in periods for more stringent standards as banks like SVB grew rapidly and exceeded relevant regulatory thresholds; exempting large banks like SVB from stress testing requirements; allowing some large banks like SVB to opt out of accounting for the unrealized gains and losses in their available-for-sale securities portfolios in their capital ratios; and exempting large banks like SVB from the most stringent standardized liquidity requirements (Steele 2023b).

The Era of "Tailoring"

In 2017, a change in political leadership ushered in a crop of financial regulators that adhered to a more financial industry–friendly ideology. Consistent with then-President Donald Trump's vow to do "a big number on Dodd-Frank" (Thrush 2017) and directives from both the White House and Treasury Department (EO 13772; Department of the Treasury 2017), the administration reimagined the post-crisis approach to financial regulation in several respects. A 2018 law known as the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) rolled back important provisions of the Dodd-Frank Act's financial reforms. The ensuing regulatory changes, some of which were consistent with EGRRCPA and some of which went beyond the law's mandates, were known as "tailoring" (OCC et al. 2019).[6] These changes sought to minimize "regulatory burden" and discarded some of the lessons learned during the GFC about potential sources of financial risks and the importance of robust regulation (Steele 2022). By this point, Quarles had become the Fed's vice chair for supervision and the chief architect of the tailoring project (Smialek 2019).

Tailoring made the US financial system less resilient and less capable of supporting the Main Street economy (Steele 2022). Banks' lending, as measured by their loan-to-deposit ratios, leveled off and at times declined from 2018 through 2020 (Duren and Sikander 2021). During the COVID-19 economic shock in 2020, banks required significant monetary and fiscal support and regulatory forbearance to support businesses affected by the pandemic-imposed shutdowns (Feldman and Schmidt 2021). Three years later, in 2023, the US experienced three of the four largest bank failures (by assets) in the nation's history, caused by a run by uninsured depositors at large regional banks (Adrian and Dobler 2024). Analysts expect further potential losses in the regional banking sector in the years to come, due to weaknesses in the commercial real estate market (Benitez 2024).

If tailoring was not beneficial for the public, this deregulation, accompanied by a massive corporate tax cut, was highly profitable for banks and their shareholders. The financial sector had record earnings in 2018 and 2019 (Hamilton 2019; Sweet 2020; Onaran 2020).[7] These windfalls translated into significant payouts for bank shareholders in the form of dividends and stock buybacks—from 2018 to 2020, shareholder payouts by the eight largest US GSIBs exceeded their net income (Financial Stability Oversight Council 2020; Lee and Nasiripour 2020).

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[6] For example, one notable area where Trump administration regulators arguably went beyond congressional intent was to eliminate or significantly reduce prudential liquidity requirements for banks below $700 billion in assets (OCC, Federal Reserve, and FDIC 2019).

[7] Wall Street profits briefly declined during the early onset of the COVID-19 pandemic in 2020 before quickly recovering early in 2021 (Economist 2021).

The Digitization of Finance

At the same time that traditional banks were benefiting from deregulation, an entire new digital ecosystem for financial services was emerging. New technologies and increasing technological adoption led to the transformation of financial services into digital products offered by a range of traditional financial institutions, including by financial technology ("fintech") companies (Steele 2023a).

As the Treasury Department noted in 2022, fintech companies are "unbundling" financial products and have therefore largely not been subject to the kind of comprehensive regulation and supervision to which banks are. Fintech companies have added complexity to the financial system by leveraging data and technology to offer digital financial products or services as both direct competitors and collaborators with incumbent banks. This, in turn, creates risks by allowing them to engage in regulatory arbitrage, conducting activities that evade traditional safety and soundness and consumer protection laws and regulations (Department of the Treasury 2022).

During the Trump administration, regulators "prioritized establishing a regulatory approach that encourages, rather than stifles, innovation." They sought to "remove regulatory hurdles to innovative partnerships between banks and nonbanks" and made it easier for banks to do business with crypto platforms and use crypto assets (McWilliams 2019).

The digital finance landscape now consists of a range of banks, fintechs, nonbank financial companies like asset managers, and Big Tech firms offering financial products and services, ranging from cryptocurrencies to consumer data to online financial platforms. In the "crypto winter" of 2022, there were at least seven different runs on crypto assets that resulted in at least five crypto platforms declaring bankruptcy, with more than four million customers filing claims to recover their lost or frozen funds (Patel and Rose 2023). The rapid growth of the nonbank financial sector, the recent bankruptcies of fintech companies like the firm Synapse (Son 2024), and the role of crypto bankruptcies in contributing to the 2023 banking stresses (GAO 2023) highlight the potential safety and soundness, financial stability, and consumer protection risks presented by the digital financial services ecosystem. The implications will only become more profound as financial companies expand their use of digital infrastructure like artificial intelligence/machine learning and cloud services (Department of the Treasury 2023; 2024).

The Unfinished Business of Wall Street Reform

Despite the fragility of the banking system demonstrated by the COVID-19 financial instability, the crypto bankruptcies of 2022, the 2023 regional banking stress, the recent failures of prominent fintech companies, and the growing importance of banks and nonbank financial companies in our economy, there has been little momentum for a sustained effort for further financial reform (Steele 2024a). Instead, financial industry trade associations and their political allies are challenging regulators' attempts to improve regulations and seeking to undermine long-standing regulatory authority through a combination of lobbying and legal challenges (Steele 2024c). At the same time, Congress is considering legislation that would deregulate the crypto-asset sector (Steele 2024d). Far from living at the end of banking history, we instead seem not to have learned from our recent history, and may therefore be destined to repeat it.

This section offers an alternative path to help us right our proverbial ship. It offers a series of proposals to address the fragility of the banking system caused by the twin developments of regulatory tailoring and the digitization of finance, and addresses:

1. Reforms to mitigate the existence of Too Big to Fail (TBTF) financial companies;
2. Regulations to make large banks more financially resilient;
3. An improved game plan for dealing with the failure of large banks;
4. Reducing the risks from unstable and runnable deposit funding;
5. Limiting the risky activities that banks can engage in; and
6. Improving the regulation of so-called "shadow banks."

The vast majority of these proposals can be accomplished using existing regulatory authorities, but some may require legislative amendments in order to be fully effective.

I. Addressing Too Big to Fail: Measuring Implicit Subsidy and Mitigating Through Regulation

The banking industry is currently concentrated in a handful of giant banking conglomerates—a trend that has accelerated over the past 20-plus years. The four largest US banks account for more than 40 percent of banking assets, 40 percent of deposits, and 45 percent of quarterly industry profits (DiSalvo 2023; Gandel 2023). Research has shown that greater banking industry concentration implicates a variety of potential harms for customers, the financial system, and the broader economy. This includes reduced small business formation and access to credit, greater income inequality, increased reliance on predatory financial products due to the reduced availability of traditional banking services, increased crime and evictions, and decreased economic growth (Azar, Raina, and Schmalz 2022). Bank consolidation has also led to the closure of large swaths of preexisting bank branch networks, decreasing the quality and convenience of the banking services available to affected communities (Omarova and Steele 2024).

This consolidation has exacerbated the "Too Big to Fail" (TBTF) dynamic in banking.[8] The perception among financial market participants that the government will provide large banks with support during times of financial stress is accompanied by explicit and implicit subsidies, including the ability of TBTF banks to borrow more cheaply than they otherwise would given their risk profiles.[9] Financial regulators have found that this funding disparity creates "competitive distortions" that are "unfair to smaller companies, damaging to fair competition, and [tend] to artificially encourage further consolidation and concentration in the financial system" (OCC, Federal Reserve, and FDIC 2013). As the movement of deposits during the banking panic that followed the failure of SVB demonstrated, depositors still generally view TBTF banks as safe havens for their money in times of market stress (Luck, Plosser, and Younger 2023). The widespread presumption of guaranteed safety attached to the TBTF status for large, diversified banks reduces competitive pressures to pass interest rate increases on to their depositors and allows them to capture outsized profits relative to smaller banks (Gandel 2023).

Section 165 of the Dodd-Frank Act requires the Fed to craft so-called "Enhanced Prudential Standards" for the largest bank holding companies (BHCs) in order to "prevent or mitigate risks to the financial stability of the United States."[10] Among these standards, large banks are subject to a more stringent leverage ratio requirement and additional capital buffer requirements. These rules measure banks' total assets to shareholder equity and risk-adjusted assets to shareholder equity, respectively, and apply higher requirements for large banks than for smaller banks (OCC, Federal Reserve, and FDIC 2013; 12 C.F.R. § 217.403). Banks that have been identified as GSIBs are subject to the highest capital and leverage requirements.[11]

Designed properly, capital and leverage regulations should help to recapture the implicit subsidy enjoyed by TBTF banks—provided by US taxpayers—and should decrease the likelihood and economic cost of future financial crises. But available evidence suggests that these rules are not yet achieving their intended purpose.

Table 1 proposes a new holding company–level enhanced capital and leverage framework that the agencies could implement using Section 165, to better internalize GSIBs' systemic footprints, reduce the likelihood and external costs of failure, and

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[8] TBTF is defined as "the receipt of discretionary government support by a bank's uninsured creditors who are not automatically entitled to government support" (Stern and Feldman 2004).
[9] There is a body of literature attempting to quantify the borrowing advantages enjoyed by TBTF banks (Roe 2014; Gudmundsson 2016).
[10] 12 U.S.C. § 5365(a)(1)
[11] A list of the eight US bank holding companies that have been designated as GSIBs can be found here: https://www.federalreserve.gov/supervisionreg/large-institution-supervision.htm.

offset the TBTF funding advantage. The proposed framework recommends further increasing the risk-based capital ratios and leverage ratios for GSIBs as their systemic footprints increase. The new framework would increase GSIBs' lowest minimum capital requirement from 8 percent to 13.5 percent, and the highest risk-based capital requirement bucket to 18.5 percent. The new framework would replace the static 5 percent enhanced supplementary leverage ratio that all US GSIBs are currently subject to at the holding company level with a progressive leverage ratio between 6 percent and 10 percent.

Table 1. Proposed Progressive Framework for Tiered Bank Regulation

Bank Type (total assets)	Risk-Based Capital Requirement	Leverage Ratio	Resolution Plan
Global Systemically Important Banks (GSIBs)			
8 Bank Holding Companies	13.5%–18.5% (standard 7% plus updated progressive surcharge of 6.5–11.5%)	6–10% Supplementary Leverage Ratio (SLR)	Annual Federal Deposit Insurance Act (FDIA) & Dodd-Frank Act (DFA)
Domestic Systemically Important Banks (DSIBs)			
>$700 billion	10%–13.5% (7% + 3.0–6.5%)	5% SLR	Annual FDIA & DFA
$250-700 billion	8%-10% (7% + 1–3.0%)	4% SLR	
$100–$250 billion		3% SLR	
Non-DSIB Banks			
$50–100 billion	7%	4%*	Annual FDIA
$10–50 billion			None
All			
• 10% of nationwide deposit limit • 10% of financial system liability limit			

* = does not include off-balance-sheet exposures

The proposed ranges are consistent with research finding that the optimal risk-based capital ratio is between 13 percent and 26 percent (Firestone, Lorenc, and Ranish 2019), that the GSIB capital surcharges should be significantly higher (Passmore and von Hafften 2019), and that a more robust leverage ratio would help to address the TBTF problem (Federal Reserve Bank of Minneapolis 2017). The ratios proposed in Table 1 are slightly below the midpoint of the optimal range to account for (1) the fact that banks tend to operate with a capital buffer in excess of their regulatory minimums and (2) the complementary benefits of the other policies included in this agenda.

Banking law also imposes limits on the ability of the largest US banks to grow through mergers and acquisitions, prohibiting any single bank from accumulating more than 10 percent of the nation's deposits.[12] The Dodd-Frank Act instituted an additional limit on any financial company merging with or acquiring another financial company if the resulting company would constitute more than 10 percent of the liabilities in the financial system.[13] Neither provision is an outright prohibition—by their terms, each permits organic growth and both contain exceptions for mergers or acquisitions involving failing institutions.[14]

The banking agencies should include provisions in their bank merger statements of policy that establish a presumption against any failed bank transactions that would result in a bank having more than 10 percent nationwide deposits, or with any bank that already has more than 10 percent of nationwide deposits. Congress could also pass a law closing the loopholes in both concentration limits or require the FDIC to accept the next least costly bid for a failed bank where the least-cost bid would result in a transaction that exceeds the 10 percent threshold (SAFE Banking Act of 2012; RECOUP Act of 2023). Improving bank resolvability could also help address the TBTF problem, and will be discussed more below.

II. Regulating Domestic Systemically Important Banks: Putting More Skin in the Game

The tailoring framework that weakened, and in some cases removed, large banks' regulatory and supervisory requirements was undergirded by a misplaced belief that failure of large regional banks in particular would not have broader systemic effects (Steele 2022; 2023b). The 2023 banking stress refuted this flawed theory, highlighting the risks to financial stability posed by banks with more than $100 billion in assets but not considered globally significant. The failures of two banks between $100 billion and $250 billion in assets—Silicon Valley Bank and Signature Bank—were accompanied by systemic risk determinations that allowed the FDIC to provide federal deposit insurance for all of the banks' deposits—not just those below the statutory $250,000 threshold (Yellen, Powell, Gruenberg 2023). A third bank, First Republic—with approximately $200 billion in assets—was resolved without another systemic risk determination, mainly because it was purchased by the largest US GSIB, JPMorgan Chase, thereby further increasing the concentration of the US banking system and the

[12] *See* 12 U.S.C. §§ 1828(c)(13), 1831u(b) & 1842(d).
[13] *See* 12 U.S.C. § 1852.
[14] This provision was enacted as part of the 1994 law that removed the restrictions against interstate bank branching, to address concerns that banks could accumulate outsized market concentration and financial power (Omarova & Steele 2024). The original rationale for limiting the restriction only to mergers and acquisitions, rather than organic growth, has been weakened by the experiences over the past 30 years with increasing banking sector concentration and the competitive advantage provided by the TBTF subsidy.

systemic importance of the most systemically important GSIB in the US and globally.[15] This was not the first time that regional banking institutions experienced widespread distress—it happened during the GFC, requiring $148 billion in government support (Steele 2022).

The US banking regulation regime currently does not comprehensively address the risks of US Domestic Systemically Important Banks (DSIBs). While the Fed has implemented the international GSIB framework, it has not created a separate DSIB framework as required by the Basel III capital accord, and therefore uses the GSIB factors to evaluate DSIBs (Basel Committee 2016). But because US DSIBs have no, or very little, cross-border footprint, they score extremely low on this scale and are therefore not subject to a capital surcharge that reflects their systemic risk to the US economy.[16]

The capital requirements for large regional banks are relatively static, meaning that many of the largest non-GSIB banks have the same risk-based capital requirements as much smaller and less complex banks (Migliorato 2022). Specifically, the capital requirements contained in the existing tailoring framework do not accurately reflect the risks posed by regional banks—particularly as they increase in asset size without exceeding other thresholds contained in the tailoring framework (Steele 2023b). As a result, banks are not internalizing their financial stability risks as they grow larger and more domestically systemically important.

Table 1 proposes a tiered DSIB framework for capital and leverage requirements using size, in the form of total assets, as the relevant thresholds. Establishing such a framework is consistent with research finding a link between bank size and the systemic impact of failure (Lorenc and Zhang 2020). Ensuring that DSIBs are better capitalized would have addressed one of the factors that contributed to depositor runs in 2023—namely, banks with greater losses in their investment securities portfolios relative to their regulatory capital (Cipriani, Eisenbach, and Kovner 2024; Jiang et al. 2023). SVB had been forced to sell its entire portfolio of available-for-sale securities to meet depositor withdrawals, in turn forcing it into a failed attempt to raise additional capital (Steele 2023b). Depositors then lost confidence in SVB's ability to meet further withdrawal demands, given that its unrealized losses on its remaining securities portfolio exceeded its capital (Steele 2023b). Requiring these banks to have more capital and stable funding will make them more reliable financial intermediaries throughout the ups and downs of the economic cycle (Mora 2010; Sun and Hong 2015). Creating a

[15] Because JPMorgan Chase has more than 10 percent of US deposits, it was only able to purchase First Republic through the failing bank exception to the Riegle-Neal deposit concentration limit, discussed above (Eisen and Ackerman 2023).
[16] Most but not all of firms between $100 billion and $1 trillion in assets are domestically focused. However, one notable exception of an internationally active bank in this cohort was SVB, which based on international liabilities at the time of its failure was the 10th largest among US banks. Still, its systemic importance score was 17 basis points as of the end of 2022—well below the 130 basis point threshold that would qualify a bank as a GSIB (Steele 2023b).

more comprehensive DSIB framework would also help regulators to better assess the financial stability implications of regional bank mergers (Kirkel 2023).

The delayed application of enhanced prudential standards under the tailoring framework also allows banks to grow rapidly without rules commensurate with their systemic footprints (Steele 2023b).[17] The rules should be phased in more quickly than currently permitted as banks cross into new tiers, by requiring banks to come into compliance with applicable requirements by the time they have crossed the relevant thresholds on an average quarterly basis. Regulators should also take a more active approach to restricting banks' dividends and stock buybacks and requiring banks to raise capital (Steele 2022), and take remedial steps to require banks to employ their capital buffers during times of financial stress (Woodall 2020).

III. Resolving Failing Institutions: Living Wills and Bank Breakups

Realizing the full potential of the orderly bank resolution process and advanced resolution planning will also help to address the TBTF problem, as well as to increase financial stability more broadly and prevent greater industry consolidation. The bank resolution playbook created after the GFC is intended to move away from the types of emergency bank sales that occurred during the GFC and resulted in a more concentrated banking system (Wilmarth 2011). But the bank resolution framework has not lived up to its potential (Adrian and Dobler 2024). US authorities have never successfully resolved a bank larger than $100 billion without a systemic risk determination, public assistance, or a transaction that made the banking system more concentrated through an acquisition by a GSIB (Steele 2022; Steele 2023b).

The Dodd-Frank Act requires large BHCs to report periodically to the Fed and FDIC on their plan for rapid and orderly resolution through the bankruptcy process in the event of material financial distress or failure—often referred to as a "living will."[18] The FDIC also requires living will submissions for subsidiary banks under the Federal Deposit Insurance Act. If regulators determine that a bank's living will is "not credible or would not facilitate an orderly resolution" after reviewing its submission, the institution may be subject to more stringent prudential standards or forced to divest itself of assets or

[17] SVB grew by 412 percent from 2018 to 2022, while Signature Bank grew almost 175 percent from 2017 to 2022—from $43 billion to $110 billion. To illustrate the magnitude of the delays involved, SVB's total consolidated assets first exceeded $100 billion in December 2020, but it did not exceed $100 billion in *average* total assets until June 2021. In addition to this six-month delay, SVB would not have been subject to regulatory stress testing until 2024, with the associated stress capital buffer requirement applying in the fourth quarter of 2024 (Steele 2023b). In other words, there would have been a four-year lag between the bank reaching a particular threshold and the application of capital requirements commensurate with that threshold.
[18] *See* 12 U.S.C. § 5365(d).

operations.[19] Resolution planning provides a potential impetus for structural changes to large and complex banks, including by forcing greater subsidiarization or an increase in capital requirements for riskier business lines or legal entities (Avgouleas, Goodhart, and Schoenmaker 2013).

After EGRRCPA made the living will submission requirement "periodic" as opposed to annual, Trump administration regulators weakened living wills' substantive requirements and instituted a longer submission cycle for large, non-GSIB BHCs. The submission cycle is now nominally every three years, but the vast majority of large banks are only required to file full resolution plans every sixth year—an eternity for financial institutions that can rapidly grow and change their operations. The FDIC froze its bank resolution planning requirement during the Trump administration before announcing reduced requirements for submissions and lifting the threshold for filing from banks with $50 billion to $100 billion in total assets (FDIC 2021a; 2021b).[20]

In 2023, all three of the large banks that failed went through traditional receivership without using Dodd-Frank's special resolution process—again, requiring the use of a systemic risk exception to guarantee all deposits. Any bank whose failure could undermine financial stability should have been subject to resolution planning, and Dodd-Frank's resolution process should have been used if the traditional bank receivership would have undermined financial stability. Due to the banks' rapid growth and the lag in application of enhanced prudential standards implemented through the tailoring changes, however, SVB and First Republic had filed their first and only living wills just a few months before their failures, while Signature Bank was scheduled to file its first living will in June 2023—three months after it failed (FDIC 2023). This is an implicit indictment of how the tailoring project has undermined the effectiveness of the resolution planning process.

To realize the original goal of resolution planning, regulators must devise strategies wherein large banks can be resolved through breakups or public securities offerings, without needing to further industry consolidation through whole-bank transactions with other large or systemically important banks (FDIC 2023; Kupiec 2014). To facilitate better resolution planning for the traditional bank receivership process, some statutory amendments may be needed to modify the role of the FDIC's least-cost test relative to other relevant considerations. But there are reasonable arguments that some reforms could be achieved by updating the FDIC's administration of the least-cost analysis to account for its imprecision, to clarify the banking agencies' merger guidelines, and to make the interpretation of the 10 percent concentration limit, discussed above, more

[19] *See* 12 U.S.C. § 5365(d)(4), (5).
[20] Because this process was established pursuant to the Federal Deposit Insurance Act and not the Dodd-Frank Act, this change was not required by EGRRCPA and was instead made at the FDIC's discretion.

stringent.[21] Taken together, these changes would reset the default option for resolution and make whole-bank sales to GSIBs a last resort.

IV. Cooling "Hot Money": Stabilizing Brokered Deposits

The 2023 regional banking stress again highlighted the risks from deposits that can be withdrawn quickly, leading to bank runs. While SVB, Signature, and First Republic had high percentages of uninsured deposits, brokered deposits are another form of unstable deposit with a history of contributing to bank failures. A bank obtains brokered deposits, directly or indirectly, with the help of a third-party broker intermediary.[22] Because they are not sourced from a bank's local community or customer base, brokered deposits are less "sticky" and more likely to flee a bank, either to seek greater yield or in times of stress. Brokered deposits played a role in the failure of regional banks during the GFC (Steele 2022), and an increased concentration in brokered deposits is correlated with a higher likelihood of bank failure (FDIC 2011). Only banks that are considered "well capitalized" can accept, renew, or roll over brokered deposits, unless they receive a waiver from the FDIC.[23]

At the end of the Trump administration, in late 2020, the FDIC weakened its brokered deposit rules. One of the purposes of this deregulation was to encourage bank-fintech partnerships by excluding some bank partnerships with crypto and fintech companies from the brokered deposits rule's restrictions (FDIC 2021c; McWilliams 2019; Gruenberg 2020a; Williams 2023).[24] At the same time, the agencies' changes to liquidity rules made it easier for banks to accept brokered deposits. Brokered deposit liabilities of US banks increased dramatically prior to the regional banking stress of 2023, as some banks were pushed to pay more to source deposits as interest rates increased and thus other retail deposits left to seek better yield elsewhere (Steele 2023b).

With brokered deposits playing an increasingly important role in bank funding structures as banks look to attract deposits after the deposit runoff in 2023 (Heeb 2024) and in response to the risks presented by crypto and fintech deposits,[25] the FDIC

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[21] While it may be the case that, for example, GSIBs' bids will always be the least costly due to their ability to conduct whole-bank purchases as a result of their size and the funding advantages that come from the TBTF subsidy, ex ante least-cost estimates are just that—estimates—and can vary significantly from the ultimate cost. Clarification of both the imprecise nature of the estimates involved and the range of other relevant statutory factors would provide for more transparent and consistent outcomes.
[22] *See* 12 U.S.C. § 1831f; *also* 12 C.F.R. § 337.6(a)(2).
[23] See 12 C.F.R. § 337.6(b). Banks that receive an FDIC waiver are subject to certain limitations on their brokered deposit activities. The FDIC may grant adequately capitalized banks additional waivers on a case-by-case basis if such activities would not constitute an unsafe or unsound practice.
[24] Among the entities availing themselves of the legal exception from being classified as a deposit broker are the crypto platform Coinbase, the stablecoin issuer Paxos, the digital payment giant PayPal, and Evolve Bank, the bank partner to the bankrupt fintech Synapse (FDIC 2024b).
[25] Crypto poses the additional risk that the deposits are not just brokered but also uninsured—crypto firms were among the largest depositors at SVB (Chapman and Leopold 2023). For crypto deposits and

should undo the 2020 changes that weakened the brokered deposit rules. The standardized liquidity rules applicable to large banks, known as the liquidity coverage ratio (LCR), also underestimate the volatility of brokered deposits (Glasserman and Young 2024). The agencies should update the LCR's assumptions to more accurately capture the run risks from brokered deposits (Steele 2023b). By restricting the use of brokered deposits, regulators can take an important remedial measure to prevent future bank failures.

V. Reining in Risky Bank Activities

The National Bank Act limits national banks to the "business of banking": permissible activities identified in the "bank powers clause."[26] Over decades, without any changes to this statutory language, the Office of the Comptroller of the Currency (OCC), the national bank regulator, has unilaterally used interpretive letters and orders to broaden the meaning of "banking" and its "equivalent" activities under the National Bank Act to include increasingly complex financial products (Symons Jr. 1983; Omarova 2009). The broad interpretations of these powers were done through regulatory fiat, so they can also be restricted or reversed by agency interpretation.

1. Cryptocurrency

In 2020, the OCC permitted banks to engage in risky cryptocurrency activities, reasoning that this was analogous to other traditional banking activities, and, unfortunately, reaffirmed that view in 2021 (OCC 2020a; 2021). In early 2023, after the 2022 crypto winter demonstrated the volatility of holding crypto assets and deposits linked to crypto companies, the banking agencies released a joint statement that issuing or holding as principal crypto assets that are issued, stored, or transferred on an open, public, or decentralized network is highly likely to be to be inconsistent with safe and sound banking and warned against concentrated exposures to the crypto-asset sector (Federal Reserve, FDIC, and OCC 2023a). Shortly thereafter, three banks that engaged in crypto activities—Silvergate Bank, SVB, and Signature—all experienced runs and had to be placed into voluntary liquidation or receivership (Steele 2023b).[27]

fintech accounts (known as "for benefit of" accounts), it can be difficult, if not impossible, to make timely determinations about the identities of individual depositors that would be otherwise entitled to deposit insurance payouts.

[26] 12 U.S.C. § 24.

[27] Alameda Research, the trading affiliate of the bankrupt crypto firm FTX, and another party affiliated with the crypto industry had taken a substantial financial stake in a fourth bank, Farmington State Bank, which then grew substantially as a result of holding a substantial amount of Alameda's deposits (Steele 2023c). That bank placed itself into voluntary liquidation after being the subject of an enforcement action for violating the terms that accompanied regulators' approval of one of the crypto-related investments (In the Matter of Farmington State Bank 2023).

The banking agencies' 2023 guidance reminded banks that they can only engage in crypto activities to the extent that they are consistent with obligations to ensure that such activities can be conducted in a safe and sound manner and prohibitions against unfair, deceptive, or abusive acts and practices (Federal Reserve, FDIC, and OCC 2023a). There is now sufficient evidence that the vast majority of crypto activities are inconsistent with these two fundamental principles of banking law. The agencies should take appropriate steps to narrow the scope of bank-permissible crypto activities, including reversing the OCC's two interpretive letters. Crypto deposits should also be classified as brokered deposits, consistent with FDIC regulations and liquidity requirements, discussed above.

2. Commodities

In 1999, the Gramm-Leach-Bliley Act (GLBA) repealed the Glass-Steagall Act's separation of investment banking from commercial banking. GLBA also allowed banks to own and operate commercial businesses.[28] Wall Street banks promised that creating diversified financial conglomerates would allow them to offer conveniences like travel agencies to serve their credit card customers (Steele 2019b). Instead, they have used it to trade and own commodities like oil, gas, and electricity and own and operate commercial businesses like shipping, warehouses, and pipelines as "complementary" to financial activity (Omarova 2013). In one notable example, Goldman Sachs purchased an aluminum warehouse and was subsequently accused by industrial end users of creating bottlenecks that inflated the price of aluminum and increased the rents charged by the warehouse (Kocieniewski 2013).

Two Senate investigations in 2013 and 2014 revealed that banks were regularly exceeding legal limits on ownership and control of physical commodities (Permanent Subcommittee on Investigations 2014; Committee on Banking, Housing, and Urban Affairs 2014). These assets raise concerns about the separation of banking and commerce, anticompetitive market practices, and financial risk (Steele 2023c).[29] They are often difficult to value and do not have a readily available liquid market in the event that they need to be monetized (Moore 2015).

In 2014, the Fed reviewed banks' involvement with physical commodities (Federal Reserve 2014). In 2016, the Fed proposed new substantive regulations in response to recent catastrophic environmental events and lessons learned from the financial crisis (Federal Reserve 2016). Unfortunately, time ran out on finalizing these changes when Fed leadership changed following the 2016 election.

[28] *See* 12 U.S.C. § 1843(k).
[29] In reviewing a BHC's proposed activities, the Fed must consider whether such activity "can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system" (12 U.S.C. § 1843(j)(2)(A)).

Since the Fed issued that proposal, commodity markets have only become more volatile as a result of the COVID-19 pandemic, Russia's illegal invasion of Ukraine, and general supply chain disruptions (Gozgor, Khalfaoui, and Yarovaya 2023; Fang and Shao 2022). Among other provisions, the Fed's proposal would have increased the capital requirements associated with banks' physical commodities activities, making them more resilient during times of market turbulence. The Fed should update and finalize its proposed physical commodities regulations in light of these experiences.

3. Preemption

For decades, nationally chartered banks have appealed to federal law, and the agencies that enforce it, to preempt states from investigating or enforcing a variety of banking activities, including unfair, deceptive, and abusive acts and practices (UDAAPs) like predatory mortgage lending (Steele 2024a).[30] The Dodd-Frank Act sought to tip the balance back in favor of the states, but in 2011 the OCC ignored the intent of Congress and issued a sweeping rule that misinterpreted the law to preserve the pre-crisis status quo (Steele 2024a). In the waning days of the Trump administration, the OCC further expanded its previous erroneous interpretation (OCC 2020b). In May of this year, the Supreme Court issued a unanimous decision in *Cantero v. Bank of America*, rejecting the OCC's prior approach to preemption (*Cantero v. Bank of America* 2024).

The OCC should rescind its 2011 preemption rule and its 2020 interpretive letter, and reinterpret the National Bank Act consistent with the *Cantero* decision, thereby giving states more leeway to pass laws that hold banks accountable. It should also ensure that the CFPB is properly consulted as part of certain preemption determinations, as required by statute.[31] This would enable strong enforcement of state consumer protection laws, like prohibitions against junk fees or conditions on the activities of state-chartered banks.[32]

VI. Competition: Bringing Shadow Banking Out of the Shadows

The proliferation of "shadow banking"—the creation of money and credit by private, lightly regulated actors—has allowed for arbitrage of a critical public function that was once the exclusive realm of regulated banking (Ricks 2018). State-chartered crypto companies, fintech companies, and nonbanks like asset managers are shadow banking

[30] Pre-crisis, banking agencies' authorities to address consumer protection were related to unfair and deceptive acts and practices (UDAP). Dodd-Frank added a category of abusiveness to make consumer violations UDAAPs moving forward (Steele 2024a).
[31] *See* 12 U.S.C. § 25b.
[32] Demonstrating the need for better supervision and regulation of state-chartered banks, the three large regional banks that failed in 2023—SVB, Signature, and First Republic—were all state-chartered.

entities that create money either by renting bank charters, exploiting loopholes in banking law, or partnering with banks to engage in banking functions (Omarova and Steele 2024).[33] Banking and money creation should be limited to chartered institutions that are subject to consolidated regulation and supervision to address safety and soundness, financial stability, and consumer protection.

The banking agencies have stepped up their enforcement activities against banks that partner with fintechs (Wang and Mason 2024) and have issued supervisory guidance for banks (Federal Reserve, FDIC, and OCC 2023b). But the recent bankruptcy of the fintech company Synapse has demonstrated that more oversight of these complex arrangements is needed to ensure that these partnerships—and by extension the fintech companies involved—comply with applicable laws and regulations like consumer protections, and that customers can be made whole in a timely way in the event of a fintech's bankruptcy. The agencies should take further steps, using laws that give them authority over bank service companies and institution-affiliated parties,[34] to examine fintech partners and issue additional rules or guidance that further clarify responsible parties and legal obligations.

Nonbank financial companies like asset managers should be designated by the interagency Financial Stability Oversight Council (FSOC) for consolidated regulation and supervision by the Fed.[35] Asset managers are growing in both size and complexity and largely operate outside of the regulatory perimeter that applies to banks (Wirz 2024). These firms engage in bank-like maturity transformation that raises financial stability concerns (Steele 2020b). They also operate critical financial market infrastructure that replicates the diversified business model of modern banking conglomerates (Steele 2020b).[36] There is no justification for allowing large firms that are functionally banks to evade the critical regulatory framework that applies to banks.

In addition, while Section 165 only applies to BHCs and nonbanks that have been designated as a risk to financial stability,[37] other depository institutions—including credit unions and industrial loan companies (ILCs)—would also benefit from a regulatory framework comparable to that which applies to BHCs under Section 165. Table 2 provides a framework for using existing legal authorities to apply prudential standards and activity restrictions to entities that pose risks similar to BHCs, but which are not subject to the Bank Holding Company Act or other foundational banking laws.

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[33] Examples include the OCC's extralegal creation of a federal "fintech charter," *see* Off. of the Comptroller of the Currency, National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 44,223 (July 22, 2020), and the Department of Justice's legal opinions sanctioning the operation of money market mutual funds, a deposit substitute that was a central player in the financial crisis (Wilmarth 2017; Ricks 2018).
[34] *See* 12 U.S.C. §§ 1818, 1867.
[35] *See* 12 U.S.C. § 5323.
[36] These platforms, payments, clearing, and other services can also be designated as systemically important financial market utilities or payment, clearing, and settlement systems (12 U.S.C. § 5463).
[37] *See* 12 U.S.C. § 5365.

Table 2. Regulation of Nonbank Charters

Institution Type	Primary Regulator	Legal Authority	Regulatory Gaps
Credit Unions	National Credit Union Administration	Federal Credit Union Act	Enhanced prudential standards
Non–holding company banks	Fed/OCC/FDIC	Assorted banking statutes	Enhanced prudential standards
Industrial Loan Companies	FDIC	Federal Deposit Insurance Act	- Enhanced prudential standards - Consolidated supervision - Affiliation and activity restrictions
Special Purpose Depository Institutions	State Bank Supervisory Agencies	State laws	- Enhanced prudential standards - Consolidated supervision - Affiliation and activity restrictions
Bank-Fintech Partnerships	Fed/OCC/FDIC	Federal Deposit Insurance Act, Bank Service Company Act	Examination and supervision
Asset Managers	Securities & Exchange Commission	Investment Company Act, Investment Advisors Act, Dodd-Frank Act	- Enhanced prudential standards - Consolidated supervision - Affiliation and activity restrictions

ILCs are financial institutions that are allowed to take customer deposits without the same oversight that applies to most banks. Nonfinancial companies—including the industrial conglomerate General Electric, the automotive manufacturer General Motors, the retailer Walmart, the payment company Square, and the online marketplace Rakuten—have all sought or hold ILC charters. An ILC charter allows a firm to access cheap deposits in order to fund risky activities; notably, the parent companies of ILCs required billions of dollars in taxpayer bailouts during the GFC. In 2020, the FDIC issued a rule to address the risks posed by ILCs, but the rule does not adequately address the lack of consolidated supervision of the ILC's nonfinancial parent company, does not address safety and soundness concerns, and allows for conflicts of interest between the ILC bank and its parent (FDIC 2021d; Gruenberg 2020b). The FDIC should revise this rule to properly address each of these concerns presented by ILCs.[38]

Some credit unions also deserve greater scrutiny. The nation's largest credit union, Navy Federal, has more than $170 billion in total assets (National Credit Union Administration 2024).[39] It is above Section 165's $100 billion threshold, but has never been designated as a systemically important nonbank (Klimasinska and Hamilton 2013). In 2021, the National Credit Union Administration (NCUA) relaxed restrictions on credit unions' ability to use derivatives and to engage in partnerships with fintech companies (NCUA 2021; 2023). If it is this difficult for the FDIC to deal with the resolution of large regional banks, it is difficult to conceive of the NCUA resolving a credit union with more than $100 billion in assets, or with complex exposures through derivatives or third-party partnerships. That agency is not as practiced at resolutions, particularly large ones, and the options for disposing of the failed firm's assets could be more challenging than with a bank.

Two of the three large regional banks that failed in 2023—Signature and First Republic—operated without bank holding companies and were therefore not subject to the holding company regulatory regime, including Section 165's enhanced prudential standards like the Fed's supervisory stress testing framework and the associated capital buffer requirements (Steele 2023b). In 2018, Zions Bank shed its holding company. The FSOC then voted to allow Zions to exit the enhanced prudential standards regime (FSOC 2018). For large regional banks with assets primarily held in their depository institutions, there is no meaningful distinction between institutions with a holding company structure and those without one (Steele 2023b). The banking agencies can create a comparable framework to Dodd-Frank's Section 165 for large banks without holding companies for both safety and soundness and competitive equity reasons.[40]

Conclusion

As the regional bank failures in 2023 and the failures of crypto and fintech companies in 2022 and 2024 demonstrate, much of the history of Wall Street reform still remains to be written. Large banks need a more resilient base of capital to support local communities during the ups and downs of the economic cycle. Regulators need better plans to resolve large failing banks without increasing consolidation in an already concentrated banking industry. Banks' risky deposits and activities should be subject to further restrictions and regulation. And banking agencies should use the authorities at

[38] The Fed has recommended that Congress eliminate the provisions authorizing ILCs because they undermine key principles of banking law, including the effectiveness of consolidated supervision, the separation of banking and commerce, and fair competition (Federal Reserve, FDIC, and OCC 2016).
[39] It is also the only credit union authorized as a counterparty in the Federal Reserve Bank of New York's standing repo facility (Federal Reserve of New York 2022).
[40] Post-SVB, some agencies have taken initial steps to impose capital, resolution planning, and long-term debt requirements on insured banks using longstanding banking law authorities.

their disposal to oversee financial companies that seek to replicate or partner with banks without being subject to the same regulations. Implementing this agenda will help to ensure that the banking system channels its financial resources to support communities, households, and businesses rather than engaging in risky financial speculation.

Some of these rules may hit stumbling blocks in the courts, where the financial industry and conservative judges are using novel and baseless legal theories to limit agencies' authorities (Steele 2024a; Steele 2024b). But these are obstacles worth fighting. And the good news is that financial reform is politically popular: A clear majority of all voters support stronger bank regulation (Williams 2018; Bennett 2023). All that is missing is political will.

Progressives have long been skeptical of the power of Wall Street and have understood that the interests of concentrated capital were anathema to a democratic economy. Progressives know that a healthy financial sector is vital to a healthy democracy. The growth of large financial firms and the privileged economic position that banks occupy gives the financial sector outsized influence over other businesses and public authorities (Omarova and Steele 2024). President Franklin D. Roosevelt once warned of the "domination of government by financial and industrial groups, numerically small but politically dominant" (Roosevelt 1936). It is time to rediscover financial reform as an essential element of a broader agenda to create a more democratic economy.

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