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Brandeisian Banking

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ABSTRACT. Banking law shapes the structure of the banking system, which in turn shapes the structure of the economy. One of the most significant ways that banking law in the United States traditionally sought to promote Brandeisian values of stability and decentralization was through a combination of carrots and sticks that enabled small banks across the country to thrive. To see this requires a richer understanding of Brandeis as someone who valued not just atomistic competition but also small business and broad flourishing. It also requires a deeper understanding of the ways different parts of banking law worked together during the heart of the twentieth century.

Following the New Deal, banking law imposed significant restrictions on the ability of banks to expand in scale or scope, resulting in a proliferation of small, community-oriented banks. At the same time, banking law also limited entry, allowing banks to often operate as local monopolies or oligopolies, insuring deposits, and limiting the ability of banks to pay interest on deposits. By supporting the profitability of banks and the value of a bank charter, these guarantees and restraints made bankers less inclined to take risks that might result in their bank failing. The net result was a banking system that was both remarkably stable and remarkably diffuse. Although the same conditions cannot be readily replicated today, understanding the way banking law simultaneously promoted stability and broad economic opportunity is critical to understanding the ways that banking law has, and could again, serve Brandeisian aims.

INTRODUCTION

Banking law is not, nor has it ever been, just about promoting the health of banks. This may seem obvious. After all, there is no way to explain the incredible complexity of today's banking system—thousands of state and national banks and bank-like financial institutions operating under various forms of federal and state oversight—except by reference to the political economy that produced this morass.[1] For most of this nation's history, debates about banking law have been

1. Bank-like institutions include thrifts, which, historically, were often focused on housing finance but today have much in common with commercial banks and credit unions. Julia Kagan, *Thrift Bank: Definition, History, How It Works, and Impact*, INVESTOPEDIA (July 31,

infused with concerns about the allocation of power and opportunity. Yet, as Saule T. Omarova and Graham S. Steele show in their new essay, *Banking and Antitrust*, over the last half-century, banking law has been recast, and sometimes rewritten, as a regime designed to do little more than promote stability and address the moral hazard that flows from stability-enhancing interventions.[2]

In peeling away this façade to expose banking law as a corpus long meant to serve aims beyond stability, Omarova and Steele remind us that banking law is not a purely technocratic exercise.[3] It cannot be reduced to an effort to identify and correct market failures in order to maximize some hypothetical pie. There are myriad, sometimes competing, values at play. This helps explain why historic debates about banking law were often broad and robust, reflecting different conceptions of how best to structure the economy and the appropriate role of government.[4] In making this plain, *Banking and Antirust* illustrates why banking law is an integral component of the broader conceptual effort underway to reconsider the aims, tools, and assumptions animating economic policymaking more generally.[5]

Omarova and Steele's specific contribution to this broader conversation is to remind policymakers that antitrust laws apply to banks and to demonstrate how antitrust values are embedded throughout banking law. They develop this account by explicitly invoking parallels and interconnections between the neo-Brandeisian movement in antitrust and the roots and possible future of banking law. The account is convincing, as far as it goes, bringing to light the numerous and sometimes nuanced ways that banking law seeks to mitigate excessive concentration and abuses of power. Yet despite frequently invoking the neo-Brandeisian movement, Omarova and Steele give short shrift to the most important way that banking law historically promoted Brandeisian aims: unit banking.

A closer look at Louis Brandeis, the forefather of today's movement, helps explain why this is a vital and missing piece. Brandeis was appalled by the

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2020), https://www.investopedia.com/terms/t/thriftbank.asp [https://perma.cc/R867-GMKR].

2. Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L.J. 1162 (2024).

3. As described in Part I, *infra*, although only implicit in their work, this framing helps to situate their work as part of the broader academic and public discourse on the nature of economic policymaking.

4. These concerns are reflected, for example, in the debates surrounding the First and Second Bank of the United States and the founding and evolution of the Federal Reserve. *See generally* ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE (2016) (detailing the history that led to the creation of America's modern central bank, the Federal Reserve); PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016) (providing an in-depth look at the history, structure, and leadership of the Federal Reserve Bank).

5. *See infra* Part I.

concentrations of power and the abuses of power that he saw in his day. These are the two values that Omarova and Steele often treat as synonymous with the aims of antitrust. And given the role of antitrust in combatting these challenges, Brandeis did indeed support robust antitrust enforcement. But Brandeis cared about far more than combatting abuses of power, and he never embraced competition at all costs. He was in fact quite open to restraints on trade when used to promote other values, and there was little he prized more than small business.[6]

A striking commonality between Brandeis and U.S. banking law, for much of its history, is the prioritization of decentralized power, small-scale enterprise, and community orientation. In stark contrast to places such as Canada, which embraced a banking system composed almost entirely of very large banks, the United States generally imposed strict limitations on the ability of banks to open branches or expand into other domains.[7] The scale and scope of restraints imposed on banks were made more palatable by the sweeteners that banking law often afforded banks. These included the capacity to issue money-like deposits and restraints on entry and competition that enhanced bank profitability. As a result, for much of the twentieth century, the United States had a banking system that was both remarkably stable and remarkably diffuse.

This regime of unit banking was not only Brandeisian in and of itself, but it also shaped the real economy in ways that furthered Brandeisian aims. Small banks have long played an outsized role in making loans to small businesses.[8] Moreover, the types of relationship-based banking disproportionately used by small banks can enhance the capacity of small businesses to access financing on favorable terms and during periods of stress, helping them to survive and thrive.[9] In short, banking law supported the viability of small banks which, in turn, enhanced the vitality of small businesses across the country. This bottom-up way that banking law promoted broad flourishing, largely overlooked in Omarova

6. As Tim Wu explains, Brandeis embraced a vision of the good life imprinted on him as a child in Louisville, where his father was one of many successful small-business owners, collectively creating a robust yet largely local economy. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 33-35 (2018).

7. Michael Bordo, *Regulation and Bank Stability: Canada and the United States, 1870-1980*, at 9 (World Bank Pol'y Rsch., Working Paper No. 1532, 1995), https://documents1.worldbank.org/curated/en/594901468769862861/pdf/multi-page.pdf [https://perma.cc/3EA4-GWZ5].

8. *See, e.g.*, Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237 (2007); Robert Cull, Lance E. Davis, Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Historical Financing of Small- and Medium-Size Enterprises*, 30 J. BANKING & FIN. 3017 (2006).

9. *See, e.g.*, Allen N. Berger & Gregory F. Udell, *Relationship Lending and Lines of Credit in Small Firm Finance*, 68 J. BUS. 351 (1995); Mitchell A. Petersen & Raghuram G. Rajan, *The Benefits of Lending Relationships: Evidence from Small Business Data*, 49 J. FIN. 3 (1994).

and Steele's account, is key to understanding the banking-antitrust-Brandeisian nexus they put front and center.

By adding this history to Omarova and Steele's framework, this Response provides a more expansive account of the ways banking law has before, and could again, promote antitrust aims. In so expanding the scope, and examining the historical context that allowed a particular legal regime to produce a particular type of banking system, this Response further suggests that policymakers who want to reinvigorate the modern banking system's capacity to promote neo-Brandeisian aims are going to have to do more than prevent banks from accumulating too much power or abusing their power. They must also consider how to enhance the viability of small banks in a very different competitive environment and how to encourage banks to prioritize small business and other community development lending.

This Response proceeds in three Parts. Part I situates Steele and Omarova's essay as part of an intellectual and political pivot in economic policymaking. Part II develops the building blocks for better understanding the interplay between stability and the structural concerns that historically animated banking law. It uses that foundation to show how banking law, for decades after the Great Depression, simultaneously promoted the Brandeisian ideal of broad and diffuse economic flourishing and financial stability. It also considers other more intractable tensions that can arise between stability and competition. Part III then explores implications for the history, present, and future of banking law.

I. ANTITRUST, ANTITRUST IN BANKING, AND ECONOMIC POLICYMAKING

Omarova and Steele argue that for most of U.S. history, banking law was seen as promoting the dual aims of enhancing stability and promoting values oft-associated with antitrust. As they show, it is only during the last half-century that stability has come to be seen as the predominant aim of that broad body of law.[10] In so framing the challenge, they draw parallels to the neo-Brandeisian movement. Yet, they opt not to take the further step of situating their work and the neo-Brandeisian movement as two facets of a much broader intellectual and political shift, the contours of which remain far from certain. Situating their work in this broader frame helps to explain why their insights are so timely and important, while also raising new questions about the policy implications that flow from their analysis.

A core premise animating Omarova and Steele's account is that for the last half-century, financial stability came to be seen as the predominant aim of

10. Omarova & Steele, *supra* note 2, at 1169.

banking law.[11] This fifty-year period maps almost perfectly onto the reign of the "neoliberal" order.[12] In one of the more succinct distillations of this framing, historian Gary Gerstle argues that underlying economic policymaking over the last century have been two, quite different paradigms: the New Deal order and the Neoliberal order.[13] Each order grew out of the economic anxieties and aspirations that pervaded society and politics at the origins of the relevant period. As Gerstle explained in an interview, a "political order is a way of rethinking political time" and "must be undergirded by a program of political economy that can plausibly claim to promote prosperity and opportunity and connect that program to a vision of the good life that appeals to voters."[14]

This framing suggests that trying to characterize orders as normatively good or bad, a frame common to the debate over neoliberalism today, can sometimes miss the point. As circumstances change, so too do the frameworks that can plausibly claim to serve the needs of the economy and society. The paramount challenges that the United States faced in 1935 were different than the challenges confronting the nation in 1980, and they have shifted again in recent years. An order can be both exceptionally useful for a time and later counterproductive, as it outlives the conditions that propelled its rise, its inherent weaknesses become more apparent, or it is co-opted by those it empowers to perpetuate and expand that power.[15]

The collectivism embodied in the New Deal order grew out of the widespread perception that unregulated capitalism had failed.[16] The pervasive suffering, high unemployment, and prolonged recession embodied in the Great Depression created a political environment in which people wanted more government support, more regulation, and a more empowered labor force.[17] The New Deal's status as an "order" arises not from the political transformation wrought by the New Deal legislation, but from the fact that so much of that

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11. *Id.*

12. *See generally* GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022) (providing an account of how neoliberalism came to dominate American politics for nearly a half-century before clashing with both sides of the political spectrum in the twenty-first century).

13. *Id.* at 2.

14. Sunil Sharma, *A New Political Order Emerges*, INT'L MONETARY FUND (Feb. 14, 2023), https://www.imf.org/en/Publications/fandd/issues/Series/Analytical-Series/cafe-econ-a-new-political-order-emerges [https://perma.cc/BAW9-FD8P].

15. GERSTLE, *supra* note 12, at 48.

16. *Id.* at 21 (explaining that the New Deal order "gained its power" in part from "its ability to implant its core ideological principles on the political landscape," foremost among which was the principle that "unfettered capitalism had become a destructive force").

17. *Id.* at 21-27.

scheme and the reasoning behind it remained mainstream even as leadership shifted from Democratic to Republican hands.[18]

The 1980 election of Ronald Reagan roughly marks the end of the New Deal order and the beginning of the "neoliberal" order.[19] By that time, anxiety about mass unemployment stemming from market excesses had given way to anxiety about losing jobs to Japan.[20] The stagflation—high inflation coupled with unemployment—of the late 1970s made it clear that the post-war boom was over.[21] Concern about declining American competitiveness contributed to declining support for collective bargaining and government regulation. Markets were again celebrated as the key mechanism for promoting growth and advancing the well-being of all Americans. That this line of reasoning represents an "order" is evident in the way it, too, transcended partisan politics.[22] Democratic Presidents Bill Clinton and Barack Obama embraced globalism, technocracy, and, quite often, market-based solutions—all defining features of the neoliberal order—almost as much as their Republican counterparts.[23]

Understanding the rise of the neoliberal order, as imperfect as the term may be, is key to understanding both of the policy predicates from which Steele and Omarova's account grows: the decline in antitrust enforcement and the fading of the antitrust principles embodied in banking law. In both domains, technocratic reasoning became paramount, as even elected officials during this period helped to facilitate the shift underway.[24] That both antitrust and banking law

18. *Id.* at 42-44.

19. *Id.* at 107 (recognizing that notions of liberalism had long pervaded American politics and thinking and that there had been several moves to help spread neoliberalism in the West, but also pointing out that it was "Reagan [who] began to implement his neoliberal vision for American life across a broad front").

20. *See, e.g.*, Eduardo Porter, *O.K., Japan Isn't Taking Over the World. But China . . .*, N.Y. TIMES (July 3, 2005), https://www.nytimes.com/2005/07/03/weekinreview/ok-japan-isnt-taking-over-the-world-but-china.html [https://perma.cc/QU6M-2495] (explaining "Americans' fear of Japan's ascendancy in the 1980's" as a result of the "growing bilateral trade deficit" and "Japanese companies acquir[ing] leadership in industries that were once dominated by American businesses").

21. *See, e.g.*, Aaron Timms, *We're Haunted by the Economy of the 1970s*, NEW REPUBLIC (Oct. 31, 2022), https://newrepublic.com/article/168050/1970s-stagflation-haunts-politics-today [https://perma.cc/UTN3-S46P] (explaining the stagflation of the 1970s and the ongoing fear of returning to the economic conditions of that era).

22. GERSTLE, *supra* note 12, at 156 (describing Clinton as "America's neoliberal president par excellence").

23. Luke Savage, *Twilight of the Technocrats?*, JACOBIN (Feb. 23, 2017), https://jacobin.com/2017/02/hillary-clinton-brexit-trump-algorithm-experts-elites [https://perma.cc/HAV3-UK9W].

24. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1380-83 (1998).

had been focused historically on imposing checks on concentrations and abuses of power largely slipped from view.

Going back to the period that launched neoliberalism helps to explain how this happened. Critics of neoliberalism often, and understandably, focus on the ways the paradigm was opportunistically used by those with power to perpetuate and expand that power.[25] Yet, as Gerstle reminds us, an order can only take hold when "undergirded by a program of political economy that can plausibly claim to promote prosperity and opportunity."[26] The stagflation of the 1970s may not have been as destructive as the Great Depression, but it was a period of great uncertainty and struggle for many across the country. In 1980, inflation was above 13.5% and would soon hit 15%.[27] Unemployment was at 7.3% and would soon exceed 11%.[28] This context informed the restrictive monetary policy implemented under Federal Reserve Chairman Paul A. Volcker that ultimately was celebrated as illustrating the virtues of shifting power into the hands of technocrats—despite contributing to a significant rise in unemployment.[29] And it was against this backdrop that Americans welcomed Ronald Reagan's inaugural proclamation: "[G]overnment is not the solution to our problem; government is the problem."[30] Under these overarching themes, the way the rise of neoliberalism played out varied by domain.

In the field of antitrust, neoliberalism took the form of a broad consensus around consumer welfare as *the* aim of antitrust regulation.[31] The rise of a uniform, universalizable standard was animated in part by an effort to overcome what many saw as a meaningful drawback to antitrust before the Chicago

25. *See, e.g.*, Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline in Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 503-04, 517-19 (2023).

26. Sharma, *supra* note 14.

27. Diana Schoder, *Does a Tradeoff Between Inflation and Unemployment Exist?*, AM. ECON. ASS'N (Feb. 23, 2018), https://www.aeaweb.org/research/inflation-unemployment-retrospectives-milton-friedman-cruel-dilemma [https://perma.cc/9VRV-KLCT] (using data from the Federal Reserve Bank of St. Louis); Michael Bryan, *The Great Inflation, 1965–1982*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-inflation [https://perma.cc/7EUS-PNMD].

28. Schoder *supra* note 27; Bryan, *supra* note 27.

29. Bryan, *supra* note 27 (explaining that Volcker continued to increase interest rates even during a period of high unemployment because "[f]ighting inflation was . . . seen as necessary to achieve both objectives of the dual mandate [of stable prices and maximum employment], even if it temporarily caused . . . a higher rate of joblessness"); Marvin Goodfriend & Robert G. King, *The Incredible Volcker Disinflation*, 52 J. MONETARY ECON. 981, 982-83 (2005).

30. President Ronald Reagan, Inaugural Address (Jan. 20, 1981), https://www.reaganfoundation.org/media/128614/inaguration.pdf [https://perma.cc/2MEL-WMUP].

31. *See, e.g.*, WU, *supra* note 6, at 38; Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1663-66 (2020).

School[32] took over—excessive discretion exercised in arbitrary ways.[33] In this sense, the Chicago School could purport to further a particular conception of fairness by making it more likely that like cases would be treated alike.[34]

In practice, this reframing of the aims of antitrust led to far less robust antitrust enforcement and a tendency to subject mergers to much less scrutiny.[35] This enforcement stance did not flow inevitably from the focus on consumer welfare but rather reflected other assumptions implicit in the paradigm as implemented. These included beliefs that economies of scale and scope were significant, and that allowing market participants the freedom to figure out where such efficiencies may arise could help the United States and U.S. companies remain competitive. As Federal Trade Commission (FTC) Chair Lina M. Khan aptly noted, in a review of *The Curse of Bigness* by Tim Wu, during the early part of this century, the consensus around the consumer welfare standard was so broad as to suggest an end to any contention or debate.[36]

By 2020, when Khan authored her review, however, it was clear that "what may have appeared as the end of antitrust history proved instead to be a prolonged pause in an enduring clash over the purpose and values of the U.S. antitrust laws."[37] Both the Trump and Biden administrations took a far more robust approach to antitrust enforcement than their recent peers, Democrat or Republican.[38] Moreover, the paradigm animating antitrust enforcement has changed.

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32. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1978) (explaining the early rise of what remains known as the "Chicago School" approach to antitrust, identifying its growing influence to the work of University Chicago Professor Aaron Director, and showing how these ideas flow from "viewing antitrust policy through the lens of price theory," and "from the assumption that businessmen are rational profit-maximizers"); Wu, *supra* note 6, at 86 (explaining the way Aaron Director and his student, Robert Bork, helped elevate the Chicago School with its core focus on using "classic price theories" to critique the "Supreme Court case law as insensitive or counterproductive in terms of 'consumer welfare[,]'" which became the animating framework for the Chicago School).

33. WU, *supra* note 6, at 91-92 (explaining how in promoting the rise of the Chicago School approach to antitrust, Robert Bork perpetuated the notion that economic reasoning could help constrain excessive judicial discretion, reducing even complex and challenging cases to a seemingly simple yet rigorous consumer welfare analysis).

34. *Id.*

35. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 137-38 (2021).

36. Khan, *supra* note 31, at 1655.

37. *Id.* at 1656.

38. Tara L. Reinhart & David P. Wales, *Transition from Trump to Biden May Bring Less Change to Antitrust Enforcement than Expected*, SKADDEN (Jan. 26, 2021), https://www.skadden.com/insights/publications/2021/01/2021-insights/regulatory/transition-from-trump-to-biden [https://perma.cc/N9DR-T4FD].

Economic reasoning is still used, pervasively even, but it is contextualized alongside political-economy concerns about the ways democracy itself can suffer when too much power is held in the hands of too few and other dangers of concentrated power.

This shift has been facilitated by economic research showing that the consumer welfare, in practice, failed on its own terms. In his book, *The Great Reversal: How America Gave Up on Free Markets*, economist Thomas Philippon shows that lax antitrust enforcement contributed to higher concentration across an array of industries in ways that likely contributed to lower growth for the country, lower wages for workers, greater inequality, and other harms.[39] A meta-analysis of fifty studies covering more than 3,000 contested mergers in the United States in recent decades found that "most studied mergers result in competitive harm, usually in the form of higher price."[40] In short, the neoliberal antitrust consensus failed to produce the outcomes it promised, setting the stage for backlash.

The existence and form of that backlash serve as the starting point for Steele and Omarova's analysis. As they explain: "It is those original understandings of antitrust, recently revived by the proponents of a progressive neo-Brandeisian movement, that underlie our project."[41] In invoking shifts in antitrust as both the parallel and focal point for their analysis, Steele and Omarova are building off of one of the most influential elements of an emerging post-neoliberal order.

It is beyond the scope of this Response to make any conjectures about the paradigm that will supersede neoliberalism, but diving a little deeper into some of the shifts and controversies afoot illuminates why Steele and Omarova's contribution is so timely, and why the implications of their work may extend beyond its nominal scope. So far, growing appreciation of the infirmities of the neoliberal order has not been accompanied by a broad consensus about what comes next: A model that relies on better economics—more realistic assumptions and more rigorous empirical analyses? A complete rejection of economic thinking as a tool too often used to elide the power dynamics that often animate policy debates? A paradigm that rejects any methodological approach as a guise for technocrats and elites to maintain outsized power? Or maybe a transformation driven by a completely different set of considerations and aims, such as concerns about national security in an increasingly insecure global order? The possibilities are diverse and the stakes significant.

39. *See* THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 20-21, 91 (2019); Jeremy Kessler, Don't Reconstruct Critical Legal Studies (working paper) (on file with author).

40. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 158 (2014).

41. Omarova & Steele, *supra* note 2, at 1170.

The law and political economy (LPE) movement, which "place[s] themes of power, equality and democracy at the center of legal scholarship," has been among the most influential academic successors thus far.[42] Its early success speaks to the importance of the themes it puts center stage. Those themes are central to Omarova and Steele and will likely play important roles in the next era of economic policymaking. So far, however, LPE has had limited impact beyond legal academia, and its triumph there remains far from certain. Legal historian Jeremy Kessler recently set forth a powerful, leftist critique of LPE. In his view, an "historical materialist account of law, when reconstructed with care and charity," – an important qualifier – "is truer than [critical legal studies]" and its progeny, which he sees as including today's LPE movement.[43] Most relevant here, he suggests that the LPE movement falters on its presupposition that "if you want to know why the economy is a certain way, you have to figure out the legal and political decisions that made it that way."[44] As he explains: "[B]eneath the discourse of constructivism lurks a profound, and profoundly contestable, metaphysical claim: that more or less conscious human decisions to change the world . . . change the world."[45] Without trying here to resolve age-old debates about just how much of society and economy are constructed and through what means, Kessler's framing raises the specter that law may be playing less of a role than some suggest and that the array of options for a post-neoliberal order may not be as rich and varied as suggested. This possibility becomes pressing as one considers both the foundational questions explored here and the more immediate policy questions at stake.[46]

Looking abroad, for example, suggests that domestic concerns alone are unlikely to determine the paradigm that will undergird economic policymaking in the years ahead.[47] Distrust of China is a common theme running through both the Biden and Trump administrations, whose policies mark a sharp pivot away from (at least superficially) decades of trying to forge close relations and

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42. Jedediah S. Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1784 (2020).

43. Jeremy Kessler, *Law and Historical Materialism*, 74 DUKE L.J. (forthcoming 2024) (manuscript at 3) (on file with author).

44. *Id.* (manuscript at 25).

45. *Id.*

46. *See infra* Part III.

47. *See* Mario Catalán, Fabio Natalucci, Mahvash S. Qureshi & Tomohiro Tsuruga, *Geopolitics and Fragmentation Emerge as Serious Financial Stability Threats*, INT'L MONETARY FUND (Apr. 5, 2023), https://www.imf.org/en/Blogs/Articles/2023/04/05/geopolitics-and-fragmentation-emerge-as-serious-financial-stability-threats [https://perma.cc/XN63-9FDR].

promote interconnection.[48] The global decline in democracy, which bears similarities to, even if also distinct from, the global dynamics at play during the rise of the New Deal, also bespeaks that change is afoot.[49] And these two, related trends reflect and are contributing to other geopolitical shifts. The globalism that characterized the neoliberal era has been superseded, even if the "by what?" question remains unanswered.[50]

That the terrain right now is shifting, and the outcome uncertain accentuates the importance of Steele and Omarova's contribution to this broader debate. In fleshing out a new way to understand banking law, one rooted in history but dynamic enough to speak to today's challenges, they are helping to explain why a new paradigm is needed and the form it should take. They are not alone in this project. In varied ways, Mehrsa Baradaran, Raúl Carillo, Robert C. Hockett, Lev Menand, Katharina Pistor, Morgan Ricks, and many others are helping to prompt a rethinking of the nature of banking and banking law.[51] Discussions about the nature of money, banking, and the institutions supporting each at various points in the history of the United States are becoming more robust and expansive, with participants ranging from economic historians, such as Peter

48. *See, e.g.*, Jacob Gu, *US-China Tensions Are Top Geopolitical Risk, BlackRock Says*, BLOOMBERG (Oct. 23, 2023), https://www.bloomberg.com/news/articles/2023-10-23/blackrock-says-us-china-tensions-are-top-geopolitical-risk [https://perma.cc/QBM7-KXYL]; Gavin Bade, *'A Sea Change': Biden Reverses Decades of Chinese Trade Policy*, POLITICO (Dec. 26, 2022), https://www.politico.com/news/2022/12/26/china-trade-tech-00072232 [https://perma.cc/735F-F44Z].

49. *See, e.g.*, YANA GOROKHOVSKAIA, ADRIAN SHAHBAZ & AMY SLIPOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD (2023), https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf [https://perma.cc/ZB3R-ZYZF].

50. *See, e.g.*, Marcus Walker & Yuka Hayashi, *Sputtering Trade Fuels Fears of a Fractured Global Economy*, WALL ST. J. (Aug. 9, 2023), https://www.wsj.com/articles/sputtering-trade-fuels-fears-for-a-connected-world-81c99922 [https://perma.cc/M3NG-MJFE].

51. *See, e.g.*, Raúl Carrillo, *Seeing Through Money: Democracy, Data Governance, and the Digital Dollar*, 57 GA. L. REV. 1207 (2023); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV 951 (2021); Lev Menand & Morgan Ricks, *Rebuilding Banking Law: Banks as Public Utilities*, 41 YALE J. REGUL. (forthcoming 2024); MORGAN RICKS, THE MONEY PROBLEM (2012); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017) [hereinafter BARADARAN, THE COLOR OF MONEY]; MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY (2015); Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231 (2021); Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143 (2017); Katharina Pistor, *A Legal Theory of Global Finance*, 41 J. COMPAR. ECON. 315 (2013).

Conti-Brown, to self-trained experts, such as Nathan Tankus, to policymakers, such as Steele.[52]

Just as it is not by chance that the half-century that Omarova and Steele critique maps almost perfectly onto the period associated with the rise and fall of the neoliberal order, it is not by chance that debates about money and banking are so rich at a time when the paradigm undergirding economic policy is in flux. The structure of the financial sector does—and will—shape the real economy. It influences who has access to the financial services needed to be a full participant in today's polity, the types of firms that can access credit they need to survive, and other defining features of the economy and society.

The centrality of banking law even comes through, and could be shaped by, the shifting geopolitical landscape. Through today's anti-money laundering (AML) regime and sanctions obligations, banks and other financial institutions increasingly operate as mechanisms of statecraft. Banks played a pivotal role, for example, in implementing the sanctions mandated by the U.S. government following Russia's invasion of Ukraine.[53] Should national security become paramount, banking law could become even more focused on enhancing the capacity of the United States to maximize and control flows of funds. All of this is hypothetical, and the path forward, as a matter of ideology and policy, remains highly speculative, but speculations suffice for purposes of this analysis.

Periods when a dominant paradigm is fading yet influential and when multiple, sometimes competitive, and sometimes complementary alternatives are starting to arise, are moments of opportunity. In proposing a new way of understanding banking law, one based in history but dynamic enough to speak to today's distinct challenges, Omarova and Steele are showing why conversations about the nature of banking and money are an integral part of the broader intellectual and political shift underway.

II. THE EVOLUTION OF BANKING LAW, THEORY, AND PRACTICE

Omarova and Steele contribute to this broad debate about economic policy by making a very specific claim about banking law. They show that just as

52. PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2017); Graham Steele, *Banking on the Edge*, 2 U. CHI. BUS. L. REV. 171 (2023); NOTES ON THE CRISES, https://www.crisesnotes.com [https://perma.cc/LRV2-FXVP].

53. *See, e.g.*, GRANTTHORNTON, RUSSIA-RELATED RISKS TAKE HOLD (2023), https://www.grantthornton.com/services/advisory-services/risk-advisory/anti-money-laundering-advisory-services/sanctions-survey-report-2023 [https://perma.cc/HJR9-ZGUQ] (describing how increased regulation focused on sanctions compliance requires financial institutions to implement risk assessment and management).

antitrust was flattened and the array of values embodied in antitrust laws were recast in consumer-welfarist terms, banking law was flattened and recast as meant to do little beyond promoting stability. In their telling, this recasting elided the ways that banking law traditionally also sought to promote a set of values they ground in antitrust: combatting abuses of power and excessive concentration. They support this claim by showing that antitrust laws do indeed apply to banks and that a range of features within banking law, properly understood, can function as tools to further entrench and promote these aims. Their essay thus provides a critical first step in efforts to recover a richer account of the aims of banking law and to focus particular attention on the interplay among banking law, antitrust aims, and stability.

Honing in more closely on these dynamics, however, reveals a more complex picture than the one they paint. Banking law has indeed played a central role in promoting aims beyond stability, many of which may be broadly associated with antitrust, Brandeis, and the neo-Brandeisian movement from which so much of their analysis flows. Yet one of the primary mechanisms through which banking law promoted these aims—a mix of restraints and sweeteners that simultaneously required and supported small financial institutions—is largely missing from their account. Adding this history to their framework provides support for their core claim while raising new questions about the types of policies needed today to restore the capacity of banking law to serve the range of aims it sought to further historically, and might again.

To understand how these pieces fit together requires a little groundwork. This Part begins by examining the insights from economists that both helped explain why stability must be a core aim of banking law and was used, at times, to facilitate a flattening and weakening of banking law. It then shows how these economic insights can be used to explain and help justify very different approaches to banking law, including the legal regime used during the middle of the twentieth century which produced a banking system that was both more stable and diffuse than today's banking system. Interspersed between these two points is a deeper dive into Brandeis, which helps to explain why this period during which small financial institutions across the country flourished may be the most complete, realized embodiment of a banking system that promotes Brandeisian aims.

A. The Rise of Stability as the Aim of Banking Law

As happened in many domains over the last half-century, work by economists was used to explain, shape, and revise banking law. As Omarova and Steele show, the shift was not to eliminate regulation but to construe its aims—and therefore, often, its substance—narrowly, with an overarching focus on promoting "stability."

The dynamics animating this concern were formalized by Douglas W. Diamond and Philip H. Dybvig, in a paper that helped them win a Nobel Prize.[54] They showed that when too many depositors want their money back, a bank runs out of liquid assets it can readily convert to cash. When this happens, the bank must sell illiquid loans at discounted, fire-sale prices. This process can cause even a solvent bank to be rendered insolvent.[55] Because the depositors at the front of the line get paid in full while those at the back of the line may have to eat some of the losses incurred as a result of the fire sales, it can be rational for depositors to "run."

Accentuating the policy challenge, a run on one bank can trigger runs on others.[56] It was a run on another bank in town that led to what might be the most famous bank run in history: the run on Bailey Brothers Building & Loan, headed by Jimmy Stewart as George Bailey, in *It's a Wonderful Life*.[57] This concern has not disappeared, in theory or practice. Treasury Secretary Janet Yellen cited concerns about contagion as a key reason for invoking extraordinary authority to protect all depositors of Silicon Valley Bank and Signature Bank when those banks failed in the spring of 2023.[58]

Just as importantly, there are significant positive externalities from a well-running and trusted banking system and significant negative externalities when that system breaks down. Ben S. Bernanke, former Chair of the Federal Reserve and co-recipient of the Nobel Prize alongside Diamond and Dybvig, for example, has shown that banks play a critical role extending credit and that bank

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54. Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 402 (1983).

55. As other economists have shown, however, few bank runs arise out of the blue. They are typically triggered because a bank is already precarious. Charles W. Calomiris & Gary Gorton, *The Origins of Banking Panics: Models, Facts, and Bank Regulation*, *in* FINANCIAL MARKETS AND FINANCIAL CRISES 109, 163-65 (Glenn R. Hubbard ed., 1991).

56. There are multiple possible mechanisms of contagion, including interconnections, common exposures, and incomplete information. *See generally* Franklin Allen & Douglas Gale, *Financial Contagion*, 108 J. POL. ECON. 1 (2000) (modeling and evaluating the risks of financial contagion).

57. IT'S A WONDERFUL LIFE (Liberty Films 1946). That Bailey Brothers Building & Loan was fictional and not actually a bank even within the fiction of the movie does not preclude it from being exemplary of the inherent fragility of banks and bank-like entities.

58. Chris Stein, *Janet Yellen Says 'Serious Risk of Contagion' Prompted Intervention in Banking Crisis—As It Happened*, GUARDIAN (Mar. 16, 2023), https://www.theguardian.com/us-news/live/2023/mar/16/svb-yellen-iraq-war-abortion-rights-politics-live-updates [https://perma.cc/9F79-HJ29].

failures can restrict capital flows in ways that undermine the health of the real economy.[59]

This body of work helped enable a recasting of much of banking law as primarily aimed at promoting stability. Diamond and Dybvig's model of bank fragility, for example, provided a stability-based rationale for deposit insurance, a scheme adopted in the United States in the wake of the Depression.[60] While enhancing stability is certainly among the aims justifying its adoption originally, this frame can overshadow other considerations—such as an effort to protect consumers and to help small, rural banks—that also played a role in the adoption of deposit insurance.[61]

The work by Bernanke and others also helped to explain why the government may well—and should—intervene to prevent widespread or otherwise destructive bank failures. Yet interventions in the banking system intended to promote stability can paradoxically encourage excessive risk-taking in ways that lead to more instability. Whether government support comes in the form of insurance or an expectation of ex post support, it can produce a "moral hazard," that is, a tendency by banks to take on excessive risks once creditors are shielded (in whole or in part) from losses.[62] This concern also animates Omarova and Steele's analysis, although they frame the cause in slightly different terms, focusing on moral hazard as a byproduct of the government's decision to authorize banks to exercise the sovereign prerogative of money issuance.[63] Either way, the implication is the same: the government must intervene to address the incentive problems that flow from its stability-promoting or money-creation policies. Thus, when Omarova and Steele characterize banking law as excessively focused on stability over the last half-century, they are also capturing the ways banking law sought to address the distortions that could arise from explicit and implicit government support.

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59. Ben S. Bernanke, *Non-Monetary Effects of the Financial Crisis in the Propagation of the Great Depression*, 73 AM. ECON. REV. 257, 257-58 (1983); Ben S. Bernanke, Mark Gertler & Simon Gilchrist, *The Financial Accelerator and the Flight to Quality*, 78 REV. ECON. & STAT. 1, 1-2 (1996).

60. Diamond & Dybvig, *supra* note 54, at 413-16.

61. Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/glass-steagall-act [https://perma.cc/B264-A6H9]; Charles W. Calomiris & Eugene N. White, *The Origins of Federal Deposit Insurance*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 145, 146 (Claudia Goldin & Gary D. Libecap eds., 1994).

62. This is one of the few economic concepts used by Omarova and Steele. Yet they do not frame it as arising from the dynamics examined here but instead as the byproduct of a related issue, which is the authority given to banks to issue money. Omarova & Steele, *supra* note 2, at 1171.

63. *Id.*

To be clear, in banking, as in antitrust and so many other domains, there is a meaningful separation between economists engaged in academic debates and the elected officials and regulators who use and sometimes exploit those ideas to bring about meaningful changes in policy. With respect to antitrust, Filippo Lancieri, Eric A. Posner, and Luigi Zingales have shown that the policies actually implemented in antitrust law during the neoliberal eras are probably not the set of policies that would have been implemented had policymakers been doing their best to harness academic insights of the time.[64] The policies actually adopted are, instead, more consistent with the policy mix one would expect if big business and other powerful political constituencies were opportunistically using economic ideas to further policy choices that served their interests at the expense of those of the general public. While this is not something that anyone can prove, they use a variety of different forms of secondary evidence to make a strong case that this is the better explanation of the policies implemented during this era.[65] It is beyond the scope of this Response to undertake a similar analysis for banking, but recognizing that there was often a large gap between the actual ideas coming from economists and the policies subsequently implemented cautions against dismissing all of the insights derived from economics. As the following discussion will reveal, economics helps to explain a core piece of the story missing in Omarova and Steele's account—the way that banking law, for a time, promoted both stability and neo-Brandeisian aims.

Banking law has sought to promote bank safety and soundness and guard against moral hazard in two different ways. First, banking law historically limited the activities and assets of banks. These restrictions were continually relaxed throughout the neoliberal era. Such deregulation was defended, at the time, as enhancing bank stability by allowing banks to harness the benefits of diversification.[66] This view was made more plausible as savings and loan institutions, which had faced some of the most stringent restrictions on the assets they could hold, faced staggering and often destructive losses on the mortgages they owned when Fed Chair Volcker hiked interest rates to rein in inflation.[67]

Second, banking law seeks to address moral hazard by changing the incentives of bank shareholders and management. Economists and regulators have

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64. *See* Lancieri, Posner & Zingales, *supra* note 25, at 443, 446.

65. *Id.*

66. *See, e.g.*, Lawrence J. White, *A Cautionary Tale of Deregulation Gone Awry: The S&L Debacle*, 59 S. ECON. J. 496, 505-07 (1993).

67. Kenneth J. Robinson, *Savings and Loan Crisis, 1980–1989*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/savings-and-loan-crisis [https://perma.cc/G6RC-4BZW] ("The relatively greater concentration of S&L lending in mortgages, coupled with a reliance on deposits with short maturities for their funding, made savings institutions especially vulnerable to increases in interest rates.").

realized that forcing shareholders to have more skin in the game increases their downside risk and thus reduces their incentive to engage in excessive risk-taking.[68] One way to do this is through capital regulation, which forces banks to rely on more equity funding than they otherwise might.[69] Another way to make a bank's failure costly for shareholders is to increase the value of the bank charter that gets lost in resolution—that is, to promote positive charter value. This is where the relationship between competition and bank regulation gets interesting. Since the 1980s, some economists have recognized that shielding banks from competition and providing other modest subsidies, such as underpriced deposit insurance, can promote stability by making bank shareholders and management more risk averse.[70] Operating an oligopoly is more profitable than operating a firm that faces perfect competition, so shareholders have more to lose should a bank fail.

Sometimes notions of charter value and the way it can enhance stability are used to justify having a small handful of very large banks. Canada, for example, has long had six to ten big banks that have traditionally been perceived as able to earn outsized profits.[71] Many credit this concentrated banking system structure with allowing Canada to coast far more smoothly through global financial disruptions, including the 2008 financial crisis.[72]

But bigness is by no means necessary to create charter value, and it certainly was never embraced in the United States. To see how it was possible to both shield banks from competition and promote Brandeisian values, as was

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68. *See, e.g.*, Alan J. Marcus, *Deregulation and Bank Financial Policy*, 8 J. BANKING & FIN. 557 (1984).

69. *See generally* ANAT ADMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT—NEW AND EXPANDED EDITION (2024) (discussing why the authors believe the banking system is broken and the steps that must be taken to fix it).

70. Gary Gorton, *The History and Economics of Safe Assets*, 9 ANN. REV. ECON. 547, 570 (2017); GARY B. GORTON, MISUNDERSTANDING FINANCIAL CRISES: WHY WE DON'T SEE THEM COMING 126, 134 (2012); *see generally* Damien Capelle, *Competition vs. Stability: Oligopolistic Banking System with Run Risk*, (IMF, Working Paper 21/102, 2021) (developing a model of the relation between bank competition and stability); *cf.* Gary Gorton, *The Development of Opacity in U.S. Banking*, 31 YALE J. REGUL. 825, 827 (2014) (arguing that, in contrast to traditional arguments in favor of market transparency, banks reduce risk by maintaining an optimal level of opacity).

71. Deirdre Maclean, *DBRS Morningstar's Takeaways from Credit Outlook Canada 2024: Solid Fundamentals Position Large Canadian Banks for Growth Opportunities*, MORNINGSTAR DBRS (Oct. 13, 2023), https://www.dbrsmorningstar.com/research/421868/dbrs-morningstars-takeaways-from-credit-outlook-canada-2024-solid-fundamentals-position-large-canadian-banks-for-growth-opportunities [https://perma.cc/5NZB-84BT].

72. Jean Roy, *The Potential Benefits and Costs of Stability in the Canadian Banking Sector*, GOV'T CAN. 1-3, https://www.canada.ca/content/dam/fin/migration/consultresp/pdf-ssge-sefc/ssge-sefc-27.pdf [https://perma.cc/5FHF-D7MZ].

successfully achieved in the United States, it is necessary to better understand the range of values embraced by Louis Brandeis and some of his admirers today.

B. *Brandeis, Competition, and the Neo-Brandeisian Movement*

In claiming that banking law promotes antitrust values, Omarova and Steele recognize the multiplicity of values embedded in different notions of antitrust. They opt, explicitly and I would argue rightfully, to ground their analysis more specifically in the view of antitrust embodied in the neo-Brandeisian movement that has swept the field in recent years.[73] As they explain, "Neo-Brandeisians seek to incorporate issues of political economy and corporate power into antitrust theory and practice" and view "antitrust as a tool for restructuring markets, and economic relationships more broadly."[74] Yet to see how banking law traditionally promoted these considerations, it is helpful to know a little more about Brandeis, the many different values he held dear, and how he and at least some of his acolytes understand the relationship between antitrust, competition, and an economy structured to promote broad flourishing.

An article in the *Yale Law Journal* aptly titled *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined*, published in 1956 – fifteen years after Brandeis had passed – provides a useful starting point for understanding some of these dynamics and possible tensions.[75] An overarching concern for Brandeis was that excessively large companies could distort both the economy and politics. But by the 1950s, it appeared that robust enforcement of antitrust laws might do little to prevent such concentrations of power, as economies of scale and scope might allow firms to become incredibly large without running afoul of antitrust laws.[76] In such an environment, the authors explained, "to preserve that market structure considered most socially desirable, government regulation of the economy must paradoxically take the form of *restricting*, rather than *increasing*, the economic competition generally deemed the crux of a free enterprise system."[77] For Brandeis, in the view of the authors, "the social and political advantages which may accompany the preservation of the small businessman and the diffusion of concentrated economic power" could justify government

73. Omarova & Steele, *supra* note 2, at 1170.

74. *Id.* at 1178.

75. *Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined*, 66 YALE L.J. 69 (1956).

76. *Id.* at 69-71.

77. *Id.* at 71 (emphasis added).

interventions even when they may not seem justified by a consumer welfare standard alone.[78]

As another commentator later described it, rather than supporting competition above all, Brandeis embraced an approach sometimes called "regulated competition."[79] (Taken too far or out of context, this suggestion can be used to justify regulatory schemes that entrench and empower incumbents and otherwise interfere with healthy competition, but as already explained, in banking, efforts to shield firms from competition have at times been used to very good effect.[80]) In short, the goal, for Brandeis, was not competition per se but an economic system that promoted the health of small businesses and a diffusion of economic power.

Brandeis's appreciation of the ways that limits on competition could promote the type of diffuse economy most likely to promote human flourishing (the aim, in his view, of economic regulation) comes through in one of his many famous decisions, *Board of Trade of Chicago v. United States*.[81] In 1913, the Department of Justice sought an injunction against the Chicago Board of Trade and its officers and directors on the basis that a recently instituted provision, known as the "call" rule, violated Section 1 of the Sherman Act, the nation's first and most sweeping antitrust law.[82] As Brandeis recounted, that rule prohibited members from purchasing "during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye 'to arrive' at a price other than the closing bid at the call."[83] Justice Brandeis, authoring the opinion of a unanimous Supreme Court, upheld the rule, despite it being a literal fixing of prices for a limited period of time.[84] Examining the impact of the rule in context, pursuant to the rule of reason, he concluded that "within the narrow limits of its operation the rule helped to improve market conditions."[85]

As Tim Wu, a key figure in the neo-Brandeisian movement, explained in *The Curse of Bigness*, Brandeis was a business lawyer who had long represented small businesses and appreciated the valuable role they could play in society. His stance was never antibusiness. Brandeis was instead "commit[ed] to the protection of

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78. *Id.* at 94.

79. GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 35 (2009).

80. *See infra* Section II.C.

81. 246 U.S. 231 (1918).

82. *Id.* at 237; *see* 15 U.S.C. § 1. (2018).

83. *Bd. of Trade of Chi.*, 246 U.S. at 237.

84. *Id.* at 238 (rejecting "the bald proposition[] that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Anti-Trust Law").

85. *Id.* at 240.

workers, and an open economy composed of smaller firms."[86] FTC Chair Lina Khan, another leading figure in the movement, has explained that a core component of efforts to promote "fair competition," the FTC's mandate, entails "ensuring that small businesses and entrepreneurs have a fair shot in the marketplace" and "addressing business practices that prevent small businesses from thriving."[87]

This detour into Brandeis and the neo-Brandeisian movement reveals that in addition to trying to prevent excessive concentration and prevent abuses of power—the aims Omarova and Steele put center stage—the neo-Brandeisian movement also aspires to promote the viability and vitality of small firms and the diffusion of economic power and opportunity that can accompany a more diffuse economy.

C. *Banking Law, Bank Size, and the Structure of the Real Economy*

Coupling this rudimentary gloss on Brandeis and the neo-Brandeisian movement with the notion promulgated by economists that creating charter value via reduced competition can enhance stability sheds new light on the virtues of the U.S. banking system and the regulatory regime supporting it during the heart of the twentieth century, a time when banking law succeeded in promoting both the viability and stability of small banks.

To understand how this regime came to be, it's important to appreciate that Brandeis is far from alone in his distrust of bigness. In contrast to Canada, the United States has a long history of being skeptical of allowing banks, public or private, to become too powerful. This is why both the First Bank of the United States and the Second Bank of the United States were shuttered, despite the value of the services they provided, when their twenty-year charters expired.[88] These closures were facilitated, as has often also been the case in the United States, by the effective lobbying of small banks. Both federal and state banking laws in the United States also long imposed significant restrictions on the ability of banks to open branches, resulting in a very diffuse banking sector, with thousands of small banks across the country.[89] This regime of limited bank branching

86. WU, *supra* note 6, at 42.

87. Lina M. Khan, Remarks as Prepared for Delivery at Small Business Majority Event on Non-Compete Agreements (Apr. 13, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-small-business-majority-event-noncompete.pdf [https://perma.cc/J8L4-ZN3Z].

88. MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 36-41 (3d ed. 2021).

89. *Id.* at 746-47.

is often known as "unit banking," as the majority of banks had only one location.[90]

In practice, the period in which unit banking worked best is, in Gerstle's framing, the period of the New Deal order.[91] That period began after the adoption of the New Deal reforms and ran through, roughly, the 1970s. During this period of time, the United States consistently had roughly 13,500-14,500 banks, and only a modest number of branches and modest-sized bank holding companies.[92] Alongside these commercial banks, there was a robust regime of small thrifts focused on providing mortgages to households in their communities.[93] This meant that the United States had many small financial institutions that were closely intertwined with the communities they served.[94]

As the National Monetary Commission noted in 1910 in one of the series of reports that ultimately contributed to the creation of the Federal Reserve, the limitations on bank branching reflected a "very general wish of each American community, no matter how small, to have its banks managed by its own citizens."[95] This aligns well with the views of Brandeis, who was an influential voice at the time. Brandeis was keenly aware that "for most people, a sense of autonomy is more influenced by private forces and economic structure than by government."[96] Small, community-oriented banks were the type of private forces that could promote a sense of autonomy in people and communities throughout the nation.

Strikingly, this was also a period of remarkable stability in the banking sector. Despite the large number of banks, just 5.3 banks, on average, failed each

90. *Id.* at 747.

91. Prior to the United States having federal deposit insurance and a robust lender of last resort, the diffuse nature of the banking system often accentuated fragility. *Id.*

92. *BankFind Suite: Find Annual Historical Bank Data*, FED. DEPOSIT INSUR. CORP. [hereinafter *BankFind Suite*], https://banks.data.fdic.gov/bankfind-suite/historical?displayFields=TOTAL%2CBRANCHES%2COFFICES%2CNew_Char&endDate=1980&pageNumber=1&resultLimit=100&searchPanelExpand=true&selectedReport=CBS&selectedStates=0&sortField=YEAR&sortOrder=DESC&startDate=1940 [https://perma.cc/3QVH-UNM3] (showing annual reports on the U.S. commercial banking structure from 1935-1980).

93. For a description of the distinct role played by thrifts and the mechanisms that allowed them to thrive during this period, see Kathryn Judge, *The Unraveling of the Federal Home Loan Bank System*, 41 YALE J. REGUL. (forthcoming 2024).

94. *See* Scott E. Hein, Timothy W. Koch & S. Scott MacDonald, *On the Uniqueness of Community Banks*, 90 FED. RSRV. BANK ATLANTA ECON. REV. 15 (2005).

95. EUGENE NELSON WHITE, THE REGULATION AND REFORM OF THE AMERICAN BANKING SYSTEM 1900-29 (2014).

96. WU, *supra* note 6, at 40.

year during the period between 1941 and 1979.[97] Charter value likely helps to explain why.

During this era, much of banking law operated to enable U.S. banks to maintain supracompetitive profits, albeit in a localized way. As Steele and Omarova note, for example, it is far more difficult to open a bank than it is to open a nonfinancial firm.[98] Regulators have significant discretion in whether to grant a new bank charter, and among the key considerations that they must take into account is how the proposed bank would serve the "convenience and needs of the community."[99] Although this factor often weighed in favor of allowing bank charters (and mergers) in an era that assumed market participants knew best and the benefits of competition would flow through to consumers, it historically allowed bank regulators significant discretion to *disallow* the creation of a bank when they perceived that existing banks already served the needs of a community—even if more competition might have resulted in more favorable terms for consumers.

Rate regulation, as it played out in banking, also often served to shield banks from competition. The intent and impact of rate regulation depends on the context. Sometimes, as in the case of usury laws, which limit the interest rate that a bank can charge on a loan, the regulation seeks to protect consumers. Regulation Q, which limited the interest rate that banks could pay on deposits, served the opposite function: it prevented banks from passing along gains to consumers.[100] By design, it suppressed how and how much banks could compete for deposits, thereby enhancing bank profitability.

In these ways, the United States built a regulatory regime that helped promote positive charter value while avoiding large, national banks. The mix of tools deployed suppressed competition, making it profitable and attractive to run a bank, while simultaneously creating a financial infrastructure that promoted a diffusion of economic opportunity via credit availability throughout the country to enhance the viability of small, local banks.

Taking a step back, integrating insights from economics into the structural framework set forth by Omarova and Steele reveals a vital way, overlooked in their account, that banking law shaped the structure of the economy and society. By suppressing competition to enable the viability of small banks—a practice that continued in many forms until the 1980s—banking law helped empower local communities. It promoted a more diffuse allocation of power and a sense

97. Drew DeSilver, *Most U.S. Bank Failures Have Come in a Few Big Waves*, PEW RSCH. CTR. (Apr. 11, 2023), https://www.pewresearch.org/short-reads/2023/04/11/most-u-s-bank-failures-have-come-in-a-few-big-waves [https://perma.cc/R675-MEXB].

98. Omarova & Steele, *supra* note 2, at 1188-89.

99. 12 U.S.C. § 1816 (2018).

100. *See, e.g.*, 12 C.F.R. § 217.3 (1966).

of local control. And it helped to enable broad economic participation from the bottom up. Strikingly, it did so while also promoting stability. The combination of positive charter value, enabled by banks that were partially shielded from competition, alongside deposit insurance, robust regulation that kept banks relatively simple and enabled more effective supervision, and a central bank ready to serve as a lender of last resort, contributed to a consistently very low level of bank failures throughout this period.[101]

To be sure, there were also drawbacks to banking law during this period. Most notably, the banking system did far more to perpetuate than disrupt the deep inequities that existed along dimensions other than geography.[102] The point here is not to overly glorify, but instead to highlight a critical way that banking law promoted neo-Brandeisian aims and stability via a mechanism overlooked by Omarova and Steele. For a time, banking law simultaneously promoted a healthy balance of power in the real economy, providing bottom-up support for communities and small businesses, while also being remarkably stable.

D. A Qualifier

Before diving further into implications, it is important to recognize that even though some modes of regulation, under the right conditions, can simultaneously promote stability and neo-Brandeisian aims, these aims can come into sharp conflict. Perhaps the most significant way that antitrust principles and stability concerns collide is in efforts to prevent or contain the fallout from the failure of a financial institution.

Merging weak institutions into strong ones was a key mechanism by which policymakers handled the fallout of the 2008 financial crisis. Bear Stearns was merged into J.P. Morgan, Merrill Lynch was absorbed by Bank of America, and Wachovia was merged into Wells Fargo.[103] These and other crisis-era mergers produced financial institutions that were even larger and more complex at the very moment that Americans were outraged to learn that financial institutions could be "too big to fail." In each instance, short-run efforts to promote stability produced decisions that ran directly contrary to antitrust aims, no matter how that term is defined.

101. DeSilver, *supra* note 97.

102. *See, e.g.*, BARADARAN, THE COLOR OF MONEY, *supra* note 51, at 260.

103. *See generally* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009) (discussing the lead up to and lessons from these mergers).

A core aim of the reforms that followed was to preclude any financial institution from again being "too big to fail." Yet, as became evident in the spring of 2023, despite the extensive reforms following the 2007-2009 financial crisis, policy makers often still feel compelled to intervene (suggesting the too-big-to-fail problem is far from solved) and merging large banks into larger banks remains a common mode of resolving institutions during periods of stress.

The trouble in 2023 started when two large U.S. regional banks, Silicon Valley Bank and Signature Bank, faced debilitating runs.[104] But the Federal Deposit Insurance Corporation (FDIC) did not then resolve the banks according to the default rules that typically come into play when a bank fails. Instead, citing concerns about the risk of contagion, the FDIC, the Federal Reserve Board of Governors, and the Treasury Secretary collectively agreed to invoke exceptional authority, known as the "systemic risk exception," in order to guarantee that all deposits of the Silicon Valley Bank and Signature would be repaid in full.[105] But the problems did not stop there.

Soon thereafter, depositors ran on Credit Suisse. In response, Swiss authorities merged it into UBS, creating a far larger and more complex financial institution.[106] According to one assessment, following the merger, the assets of the enlarged UBS would be roughly double Switzerland's GDP.[107] Similarly, in the United States, when the next large regional bank, First Republic, came tumbling down, policymakers allowed it to be acquired by J.P. Morgan, already the country's biggest bank.[108] In short, although there are ways that suppressing competition can promote broad flourishing and Brandeisian aims, as embodied in the vibrant and stable banking system that existed for decades after the Depression, at other times the two very much come into conflict.

Accentuating the challenge, even adding Brandeisian concerns back into the mix, the optimal government response remains far from evident. There are significant drawbacks to allowing giant banks to grow even bigger, and there is

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104. *See, e.g.*, *What Really Went Wrong at Silicon Valley Bank*, ECONOMIST (Mar. 13, 2023), https://www.economist.com/leaders/2023/03/13/what-really-went-wrong-at-silicon-valley-bank [https://perma.cc/9C4D-CQKG].

105. 12 U.S.C. § 1823(c)(4)(G) (2018).

106. Yvan Lengwiler & Beatrice Weder di Mauro, *Global Lessons from the Demise of Credit Suisse*, VOXEU (Sept. 4, 2023), https://cepr.org/voxeu/columns/global-lessons-demise-credit-suisse [https://perma.cc/NFJ4-LUHK].

107. Julian Zimmermann, *Switzerland*: *UBS-Credit Suisse Takeover Highlights Long-Standing Financial Sector Contingency Risk*, SCOPE RATINGS (Mar. 20, 2023), https://scoperatings.com/ratings-and-research/research/EN/173684 [https://perma.cc/BYQ5-TWNA].

108. Brooke Masters, Stephen Gandel, James Fontanella-Khan, James Politi & Colby Smith, *JPMorgan to Acquire First Republic's Deposits as US Regulators Step in*, FIN. TIMES (May 1, 2023), https://www.ft.com/content/0c61a540-e6be-4bca-8054-841d9983756b [https://perma.cc/Q7F8-WBAW].

meaningful room for improvement just by ensuring that concerns about industry structure are not completely disregarded during periods of stress. But there are also significant drawbacks to allowing messy bank failures. As was all too evident when policymakers sought to force banks to stew in their own juices during the Great Depression, when too many banks fail, the real economy suffers.[109] The information and relationships that exist within a bank are valuable not only to that bank but to the borrowers on the other side.

Recent research affirms that more recent periods of banking distress have continued to harm the businesses and people that make up the real economy. For example, one analysis of sixteen advanced economies during the 1960–2014 period, found that "non-systemic financial distress in the banking system has sizable and persistent contractionary effects on real GDP per capita" and leads to a meaningful increase in unemployment."[110] When systemic banking crises are added to the data set, the adverse effects on output and on unemployment are even more pronounced.[111]

That policymakers in the post-Depression era have consistently opted for intervention, even as legislatures have increasingly sought to tie their hands, is striking. The Biden Administration is both blamed and credited—depending on who you ask—for bringing back a much more robust, and many would say neo-Brandeisian, approach to antitrust policy generally.[112] Nonetheless, it was the Biden Administration that blessed J.P. Morgan's acquisition of First Republic. What would have happened had policymakers responded differently to the banking turmoil of spring 2023 will forever remain unknown. But the robustness of the economy in the year that followed—including the highest rate of growth among any advanced economy and a remarkably low unemployment rate—helps explain why even policy makers inclined to embrace the dual aims of banking law may still have a hard time not prioritizing stability when push comes to shove.[113]

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109. *See, e.g.*, Bernanke, *supra* note 59, at 261.

110. Falk Bräuning & Viacheslav Sheremirov, *The Historical Effects of Banking Distress on Economic Activity*, FED. RSRV. BANK BOS. CURRENT POL. PERSP. (May 25, 2023), https://www.bostonfed.org/publications/current-policy-perspectives/2023/the-historical-effects-of-banking-distress-on-economic-activity.aspx [https://perma.cc/YR2A-N5FU].

111. *Id.*

112. *Capitalisn't: The Evolution of Antitrust—From Brandeis to Biden*, CHI. BOOTH REV. (Aug. 17, 2023), https://www.chicagobooth.edu/review/capitalisnt-evolution-antitrust-brandeis-biden [https://perma.cc/2W5S-WPEZ] (considering the Biden Administration's more aggressive antitrust policy).

113. Jeanna Smialek, Ana Swanson, Alan Rappeport & Jim Tankersley, *The Soft Landing Is Global, but It's Cushiest in America*, N.Y. TIMES (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/business/economy/soft-landing-economy-inflation.html [https://perma.cc/W2WN-NAJE].

There are ways to reform banking law to give regulators inclined toward Brandeisian aims greater freedom to pursue those aims during periods of stress. As a starting point, the rules governing bank resolutions could be modified to allow the FDIC more flexibility to consider aims beyond minimizing the cost a resolution will inflict on the Deposit Insurance Fund without having to invoke the systemic risk exception.[114] More importantly, these types of tensions show why efforts to promote antitrust aims cannot be separated from efforts to promote stability, as it is often during periods of perceived instability that policymakers are most inclined to disregard concerns about concentration in their efforts to restore stability.

Nonetheless, absent a very different regulatory regime than the one that now exists, the fundamental economic quagmire is likely to persist. Once a legal regime seeks to promote multiple aims, those aims will sometimes come into conflict. Restoring antitrust concerns to their rightful place alongside promoting stability is a valuable corrective, but implementation may involve difficult tradeoffs. Acknowledging them in advance—rather than trying to ignore or deny that such challenges may arise—makes it far more likely that policymakers will have the tools and understandings needed to maintain some degree of fidelity to multiple aims, even during periods of distress.

Grappling with such tensions and the patterns that emerge in their midst may also, in a small way, provide another avenue for exploring some of the bigger picture debates underway. As touched on above, LPE has been at the forefront of a recent revival in efforts to reimagine the role of law in shaping the economy and society. It has raised critical questions too long ignored, yet whether it provides the path forward remains uncertain. One of the more interesting recent critiques of LPE comes from Jeremy Kessler. Among the key issues of contention between Kessler, on the one hand, and those embracing LPE or other veins of critical legal studies alive today, on the other hand, are the degree of determinacy relative to interdeterminacy and the nature of the mechanisms through which choices can have impact.[115] Although by no means resolving that debate, nor easily mapped onto its terms, the striking tendency of governments, democratic and otherwise, to intervene to promote stability in an array of ways is the type of phenomenon that may merit further study in efforts to understand how broad the options right now really are and what might constrain them.

114. 12 U.S.C. § 1823(c)(4)(G) (2018).

115. Kessler, *supra* note 43 (manuscript at 20-30).

III. SOME IMPLICATIONS

This Response supports Steele and Omarova's core claim that banking law is at a pivot point. The aberration of the last half-century, during which stability concerns so dominated banking law as to overshadow the other values that banking law could and has furthered, is on the wane. Yet, in providing historical and contemporaneous support for that claim, this Response also suggests a host of additional and sometimes different implications with respect to the history, present, and future of banking law and its role in the broader landscape.

In drawing out the parallels between the neo-Brandeisian movement and banking law, Steele and Omarova focus on the ways banking law and antitrust laws that apply to banks manifest a concern with limiting excessive concentration and preventing abuses of power. These are very much aims embraced by Brandeis and the neo-Brandeisian movement. But a closer examination of Brandeis's work, the neo-Brandeisian movement, and the history of banking law suggests that the most important way that banking law promoted the broad flourishing and sense of autonomy that Brandeis embraced may well have been through the distinct mix of restraints and protections provided to banks during much of the twentieth century.

During this period, the United States was covered in small banks that served the communities where they were based. Banking law both required most banks to remain small and then enhanced their viability by shielding them from various forms of competition and backstopping depositors. The net result was a banking system that was rooted in local communities and responsive to the needs of those communities, while also being remarkably stable. The way the banking system helped to promote Brandeisian aims through bottom-up empowerment is a critical addition to any discussion of the relationships among the neo-Brandeisian movement, stability, and banking law.

What this means with respect to current policies is more complicated. Recognizing that the pivot in banking law is not a pivot specific to banking law but instead is part of a broader shift in economic policymaking suggests that we must look at but also beyond banking law to understand what can and should come next. The financial system has always played a formative role in shaping the real economy and allocations of power. This is among the reasons that Brandeis himself was so interested in banks and banking.[116] It also makes Omarova and Steele's contribution particularly timely and important, and helps to explain why this is such a rich period for scholarship about money and banking more generally. But the array of dynamics at play is too myriad for a path forward to be readily charted within banking scholarship alone.

116. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW THE BANKERS USE IT 17-18 (1914).

Looking at the neo-Brandeisian movement not just as a reference point but as an indicia of the nature of the broader shift underway adds to the picture. The success of that movement in both academic and policy circles is a testament to the fact that it is moving us in the right direction. Viewing the movement in Gerstle's frame may also help to explain some of its success. Recall Gerstle's view that a new order will only succeed if "undergirded by a program of political economy that can plausibly claim to promote prosperity and opportunity and connect that program to a vision of the good life that appeals to voters."[117] Concerns voiced by Connecticut Senator Chris Murphy, who has garnered press for his criticisms of neoliberalism, are representative of what many see as a way the current order falls short. According to Murphy, "the disease," ailing the country is "rooted in the fact that people feel like they have no control over their lives any longer."[118] Murphy is a Democrat, but this is not a partisan issue. If anything, concerns that power has migrated from small communities to large cities is more of a cause of the right than the left, and many see such concerns as helping to explain why so many rural areas vote Republican.[119]

The banking system of the 1950s helped to promote meaningful localized control and agency. The number of banks today is less than half of the number that existed in 1950, despite the United States's now much bigger population and economy.[120] More importantly, the assets held by the biggest banks have grown far more rapidly than the banking system as a whole, contributing to a significant increase in concentration.[121] This is part of what is motivating Omarova and Steele, and it is consistent with trends in other domains.[122]

117. *See* Sharma, *supra* note 14.

118. Luke Goldstein, *Sen. Chris Murphy: 'This Party Has Not Made a Firm Break from Neoliberalism*, PROSPECT (Dec. 4, 2023), https://prospect.org/politics/2023-12-04-sen-chris-murphy-democrats-neoliberalism [https://perma.cc/T7QJ-R68Z].

119. *See, e.g.*, ROSS BENES, RURAL REBELLION: HOW NEBRASKA BECAME A REPUBLICAN STRONGHOLD 4-5 (2021).

120. *BankFind Suite*, *supra* note 92 (showing that there were 13,446 banks in 1950 and just 4,136 in 2022); *Fast Facts 1950*, U.S. CENSUS BUREAU HIST., https://www.census.gov/history/www/through_the_decades/fast_facts/1950_fast_facts.html [https://perma.cc/L3LM-MP4B] (showing a population of just over 151 million in 1950); *Fast Facts 2020*, U.S. CENSUS BUREAU HIST., https://www.census.gov/history/www/through_the_decades/fast_facts/2020_fast_facts.html [https://perma.cc/69GB-AG3A] (showing a population of well over 331 million people in 2020).

121. *5-Bank Asset Concentration for United States 2000–2020*, FRED ECON. DATA, https://fred.stlouisfed.org/series/DDOI06USA156NWDB [https://perma.cc/LR6R-CQFR] (showing that just over the last twenty years, the assets held by the five biggest banks have ballooned from twenty-eight to forty-six percent).

122. *See* PHILIPPON, *supra* note 39, at 45-61.

Yet, more robust restraints on excessive concentration and abuses of power are not, themselves, sufficient to promote the broad flourishing that once characterized the U.S. banking system. The structure of the financial system and broader economy has changed. During the New Deal era, banks were the dominant type of financial intermediary. As late as 1974, depository institutions held more than forty percent of the assets in the financial system.[123] Over the past fifteen years, by contrast, that figure has floated between eighteen and twenty percent.[124] Global competition, the capacity of money to flow across borders, and the rise of nonbank financing mean that even if lawmakers reinstated all of the policies of 1950, they still would not recreate the banking system that then existed. The significance of these constraints may have been overstated and framed in flawed and opportunistic ways over the last fifty years, but they are not mere fictions conjured up to promote deregulation. Today's world is different.

Just because there is no winding back of the clock, does not mean there are not important lessons that can be learned from the way the U.S. banking system managed to be both stable and diffuse for so long. On this front too, the neo-Brandeisian movement holds insight. As Lina Khan has explained with respect to antitrust, "antimonopoly principles for a twenty-first-century paradigm . . . build[] on—rather than replicate[]—the Brandeisian era."[125] In antitrust, neo-Brandeisians are trying to use those principles to craft interventions suited to today's distinct challenges. Similar possibilities exist in banking.

For example, the analysis here shows that banking law succeeded in serving multiple aims through a combination of carrots and sticks. The carrots were key at times to the viability of the entire regime. Going forward, carrots may be key to promoting the viability of small banks and encouraging them to reinvigorate their traditional support for small businesses. And even if the shields from competition that worked reasonably well during the twentieth century cannot work today, there are other carrots used during that time that could still be useful, particularly if well designed to further specified aims. For example, in other work, I explain how the Federal Home Loan Bank system could be redesigned to support primarily smaller banks and to encourage them to engage in more small business lending and other community development support by providing collateralized loans on terms designed to encourage such activity.[126]

123. *Annual Report 2023*, OFF. FIN. RSCH. 77 (Dec. 6, 2023), https://www.financialresearch.gov/annual-reports/files/OFR-AR-2023_web.pdf [https://perma.cc/88BN-MHWF].

124. *Id.*

125. Khan, *supra* note 31, at 1664.

126. *See, e.g.*, Judge, *supra* note 93.

Imposing restraints on how power is concentrated and the ways it can be used and abused are key to developing a healthier economy in the years ahead. But the history of banking here shows the value of coupling top-down restraints with bottom-up modes of support. Finding ways to enhance the viability of small banks and encourage them to provide the types of loans and services needed to promote broad-based flourishing in the real economy could prove to be a critical additional element to the antitrust revival now underway.

CONCLUSION

Banking law traditionally has often been about far more than stability. Neo-Brandeisian aims are among the goals banking law has furthered, and are likely among those it can and should seek to promote again. Whether that will be the only or even primary aim of banking law—beyond stability—in the years to come remains far from clear. Geopolitical tensions, housing affordability concerns, and a host of other current challenges that have a close nexus to banking could also prove influential in shaping the precise direction of the pivot underway. Concerns about the structure of the economy may thus have to share space with other pressing priorities. Regardless of the ultimate direction forward, the fiction of unitary aims, be it consumer welfare or stability, is clearly fading in the rearview mirror. This may be uncomfortable for those who are accustomed to the fiction that economic policymaking is a technocratic exercise for which there are "right" answers. Yet the reality that economic policies often serve a multiplicity of aims, which sometimes complement each other and other times come in conflict, is not a flaw in the paradigm now emerging but an inherent part of policymaking in a pluralistic democracy.

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