Banking and Competition in Exceptional Times

Brett Christophers[*]

I. Introduction

In the past three years, the world of banking has seen a resurgence of Western political, regulatory, and scholarly interest in competition policy in general and competition law in particular. Antitrust is back in the spotlight. This resurgence of interest comes after a considerable hiatus. To be sure, concerns about levels of competitiveness and potential oligopoly have surfaced regularly in recent decades: there has been a persistent flow of both antitrust banking cases and academic studies of the theory and practice of such legal interventions. However, the antitrust spotlight has not been so firmly trained on the banking sector for a long time, arguably since the 1950s. Richard Sylla, among others, has observed that the 1930s to 1950s were notable for an "anti-concentration attitude" toward banking, especially in the United States.[1] Only with the departure of "Harry Truman and his trust-busting administration" did the antitrust spotlight begin to dim.[2]

How can we account for the refocusing of this spotlight? Two connected sets of factors seem to be critical. First, there is a widespread perception among politicians, regulators, and the general public—indeed, among almost everyone except certain sections of the banking community—that today's largest banks have become "too big to fail" (TBTF). Might, then, antitrust have a role in cutting such banks down to a size where the systemic risks deemed to be associated with being TBTF can be meaningfully diminished? Second, there are concerns regarding what has happened to banking competition both during the recent global financial crisis and indeed in the period leading up to it. With allegedly TBTF banks tottering precariously, antitrust scrutiny was relaxed and

---

[*] Assistant Professor, Institute for Housing and Urban Research, Uppsala University, Sweden.

1. Richard Sylla, *United States Banks and Europe: Strategy and Attitudes*, *in* EUROPEAN BANKS AND THE AMERICAN CHALLENGE: COMPETITION AND COOPERATION IN INTERNATIONAL BANKING UNDER BRETTON WOODS 53, 54 (Stefano Battilossi & Youssef Cassis eds., 2002); *cf.* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 41 ANTITRUST BULL. 255, 262–74 (1996).

2. CHARLES R. GEISST, WALL STREET: A HISTORY 276 (2d ed. 2004).

emergency consolidation encouraged in a number of different territories at the height of the crisis. With the benefit of hindsight, how might this consolidation be conceptualized and potentially revisited? And is there a case to be made that antitrust was not doing its job properly in the years and decades preceding the crisis? How could banks have become TBTF in the first place if antitrust was working effectively?

Situated in this context, this Article has two main aims: to provide a critical consideration of this contemporary antitrust "revival" from an explicitly political–economic perspective and to point toward some theoretical resources that might facilitate such an assessment.

Part II looks backward at the evolution and application of competition law in the banking sector over the relatively *longue durée*. In this Part, I invoke the concept of "exception" to understand how antitrust policy has developed, and my chief interlocutors are the perhaps unlikely figures of Giorgio Agamben and Karl Marx. Part III looks forward and considers the central question around which the recent resurgence of interest in antitrust ultimately revolves: can (and should) antitrust law help in tackling the TBTF problem? The tentative conclusion is that unless we are prepared to fundamentally rethink the purpose of competition law—and in relation to this, the nature of capitalist competition itself—then the answer must be no. This is not because (as some commentators have argued) TBTF is not an antitrust issue. Rather, it is because antitrust theory and practice are today thoroughly economized, whereas the competition between large banks appears to be largely non-economic. In making this argument, I appeal not to Agamben and Marx, but to Paul Baran and Paul Sweezy, and most directly of all to the theorist whose name this symposium bears, Adolf Berle.

II. BANKING, ANTITRUST, AND STATES OF EXCEPTION

The years 2008 and 2009 saw several extremely high-profile emergency bank mergers in some of the world's most important banking markets. This included Lloyds TSB with HBOS in the UK and at least three major mergers in the United States: Bank of America with Merrill Lynch, J.P. Morgan with Bear Stearns, and Wells Fargo with Wachovia. These mergers would have been expected to face close antitrust scrutiny under "normal" conditions. In the event, none did, with conditions being relaxed and special clauses—for example, a "national interest" clause in the Lloyds HBOS case—being invoked.[3]

3. For discussion of this burst on consolidation, specifically in the context of competition law, see, for example, Xavier Vives, *Competition Policy in Banking*, 27 OXFORD REV. ECON. POL'Y 479 (2011); Robert P. Zora, *The Bank Failure Crisis: Challenges in Enforcing Antitrust Regulation*, 55 WAYNE L. REV. 1175 (2009).

A. States of Exception

One way to theorize these emergency measures in political–economic terms would be to follow the lead of the urban political-economist Phillip Ashton. In a recent paper, Ashton draws on Agamben's notion of the "state of exception" to argue that emergency state interventions during financial crises have become productive moments for credit risk, securing broader norms of risk-taking by selecting out and effectively socializing problematic loans.[4] In other words, the state utilizes the emergency situation to take exceptional measures to reinforce, rather than reconfigure, the existing logics of capitalist finance. Accordingly, can we approach the recent crisis as a comparable moment of "exception" for antitrust: one during which abnormal practices were taken or enabled in order to further entrench existing political–economic structures and processes?

Since not much seems to have changed in the world of finance and its governance, maybe we can. However, I would argue that to apply Ashton's framework to banking and competition policy would be to misread both the crux of Agamben's thesis and the late-twentieth-century history of antitrust enforcement. The originality of Agamben's thesis is in his assertion that over the course of the twentieth century, the state of exception became anything but exceptional. It became normal: the relaxation or suspension of "normal" legal relations became nothing less than the paradigm of modern government.[5] This, on my reading, would actually represent a far more accurate conceptualization of competition policy in the banking sector during the two or three decades preceding the financial crisis. This period appears, in retrospect, as an extended state of exception from the putative long arm of antitrust law. Consolidation proceeded apace in all the major Western banking markets as regulators and competition authorities waved through one major merger after another.[6] The mergers of the crisis period represented a continuation of, rather than exceptional departure from, this trend.

This begs an obvious question: How can we understand such an extended state of exception in regard to competition law and banking? Three possible explanations can be identified. The first two concern the methodology of late-twentieth-century antitrust law, one in a generic and international context and one relating specifically to banking, and specifically in the United States. The generic methodological factor can best be

---

4. *See generally* Philip Ashton, *The Financial Exception and the Reconfiguration of Credit Risk in US Mortgage Markets*, 43 ENV'T & PLAN. A 1796 (2011).

5. GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005).

6. *See* Tim McCarthy, *Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 DUKE L.J. 865, 865 (1997); Shull, *supra* note 1, at 283–84; Vives, *supra* note 3, at 482.

conceived in terms of the neoclassicization of antitrust. As the principles and practices of competition law came to be dominated by neoclassical economic approaches from the late 1970s, monopoly—or oligopoly—lost some of its historical illegitimacy. Increasingly, the singular objective of antitrust law was defined as the promotion of economic welfare through a focus on allocative efficiency. Crucially, under such an approach, monopoly becomes admissible since it is only presumptively inefficient: monopoly can be more efficient than competition where the economies of centralizing production outweigh the costs of monopoly pricing. Thus, as efficiency considerations were layered over traditional market share and market concentration measures, mergers that threatened potential monopoly could be more comfortably authorized. "After Ronald Reagan took office in 1981," claims Barry Lynn, "his new head of antitrust enforcement, William F. Baxter, swiftly abandoned efforts to promote competition and promised instead a policy 'based on efficiency considerations.'"[7]

Alongside this wider neoclassical reformulation of antitrust, American antitrust authorities made decisions concerning the treatment of commercial banking that I, as a geographer, find particularly salient. All antitrust investigations require both geographic and product market definitions. To assess whether an existing or merged corporate entity might enjoy market power, the market in question—its product or service form and its geographical extent—must first be delimited. U.S. commercial banks, it was decided, competed with one another locally.[8] This was a crucially important geographical determination in terms of its implications for antitrust investigations of the bank sector. A problematic merger proposal was one that threatened high levels of concentration at the local scale—not at the national scale—because commercial banks ostensibly did not compete nationally. The result was that numerous relatively small bank mergers were blocked on the grounds that local competition might be curtailed. Meanwhile, the authorities approved much larger mergers

---

7. Barry C. Lynn, *Killing the Competition: How the New Monopolies Are Destroying Open Markets*, HARPER'S MAG., Feb. 2012, *available at* http://harpers.org/archive/2012/02/0083788. In a similar vein, Mark N. Cooper, the Director of Research at the Consumer Federation of America, recently argued in testimony to the United States Congress concerning competition policy specifically in banking that U.S. antitrust in recent times "has given far too much deference to efficiency at the expense of competition." *See 'Too Big to Fail?': The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. of the Judiciary*, 111th Cong. 111–33 (2009) [hereinafter *'Too big to fail?' Hearing*] (statement of Mark N. Cooper).

8. The key decision to this effect was the 1963 case *United States v. Philadelphia National Bank*. 374 U.S. 321 (1963).

that materially increased national levels of market concentration, but which were perceived as harmless at the all-important local level.[9]

But the extended state of exception, which I suggest characterized banking under competition law in the decades leading up to the financial crisis, was perhaps not only a matter of methodological reformulation and refinement. It must also be placed within a much longer history of widely varying approaches to competition policy in the finance sector.[10] Competition has, at certain junctures, been minimally enforced; at other times, it has been actively discouraged.[11] The reason for this is that regulation of the financial sector within capitalism has always been regarded as a delicate balancing act—ideally fostering competition, but never at the expense of that other shibboleth of banking propriety: financial stability.[12] When stability has been seen as paramount (and not only during times of perceived crisis), competition has been actively dampened. And while some historians might argue that the period from the 1970s through 2007 was one in which the balance of regulatory priorities was in favor of competition, stability concerns have never been entirely absent. Indeed, the influential British economic commentator John Kay recently claimed in the *Financial Times* that "throughout the 20th century, we maintained stability in British banking through oligopoly, with minimal competition, no new entry and no banking failure of any significance."[13] Thus, by broadening our historical perspective, we may be justified in seeing the strongly competition-oriented 1940s and 1950s as the exception to a wider rule of stability prioritization. From this vantage point, the disapplication of antitrust during the recent crisis looks entirely unexceptional; thus, our theorization should not be of an exceptional period, but of an exceptional (because it is stability-requiring) banking sector.

9. On the nature and effects of this particular modality of geographic market delimitation, see *'Too Big to Fail?' Hearing*, *supra* note 7, at 7, 12 (statement of Albert A. Foer, President, American Antitrust Institute); Carl Felsenfeld, *The Antitrust Aspects of Bank Mergers - Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 512–15 (2008); Shull, *supra* note 1, at 285; Katerina Simons & Joanna Stavins, *Has Antitrust Policy in Banking Become Obsolete?*, 1998 NEW ENG. ECON. REV. 13, 14 (2003).

10. For an excellent overview of this history, albeit with a strict U.S. focus, see Shull, *supra* note 1.

11. Adolf A. Berle, *Banking Under the Anti-Trust Laws*, 49 COLUM. L. REV. 589, 595–98 (1949) (providing several concrete historical examples).

12. On this balancing act, see, for example, Vives, *supra* note 3.

13. John Kay, *It is Time to End the Oligopoly in Banking*, FIN. TIMES (May 8, 2012), http://www.ft.com/cms/s/0/da96880a-98f8-11e1-948a-00144feabdc0.html#axzz26awYSdR8.

B. The Investment Banking Exception

In recent decades, of all areas of the banking industry, an enduring state of exception from antitrust has been most notable in investment banking, and additional explanations for banking's exceptionality are required here. In other words, efficiency and stability considerations are not in themselves adequate. This section briefly highlights two explanations specific to investment banking. The first is a matter of historical failure. In *United States v. Henry S. Morgan*, the U.S. government famously challenged the major Wall Street investment banks from 1947 through 1953 in a long, costly, high-stakes antitrust case alleging endemic cartel-like behavior—and lost.[14] Chastened by this failure, it is perhaps no wonder that competition authorities in the United States and elsewhere subsequently backed off from the investment banking sector and left it largely to its own devices, focusing their interventionist energies elsewhere.

The second and more pertinent explanation (which chimes with an issue we will consider more closely below) concerns the nature and location of capitalist competition dynamics and how we can conceptualize these. Generally, the main focus of post-war antitrust law has always been consumer-facing business activities on the grounds that consumer economic welfare is and should be such a law's primary consideration. Where businesses serve other businesses, especially large businesses, competition law has been much less vigorously applied. The experience of the banking sector is typical: substantial antitrust scrutiny into retail and small-business commercial banking, but relatively little into investment banking. While the "man on the street" requires protection from unscrupulous monopolistic or oligopolistic commercial banks, the big companies that represent investment banks' main customer base do not.

The problem with this dualistic approach is the questionable, linked assumptions it contains. The first of these is that, in the words of the British antitrust lawyer Becket McGrath, investment banking customers are generally "big enough to look after themselves."[15] They can either resist monopoly pricing or absorb its costs. But the presumption of cost absorption is itself predicated on an atomistic and not remotely credible conception of the economy: it assumes that if investment banks charge their clients monopoly prices, those customers absorb this monopolistic rent in full; they do not pass any of it on to their own customers. To disa-

14. Vincent P. Carosso, *The Wall Street Money Trust from Pujo Through Medina*, 47 BUS. HIST. REV. 421, 431 (1973).

15. Press Release, Becket McGrath, Partner, Edwards Wildman Palmer LLP, Client Advisory – Banking in the Antitrust Crosshairs – the EU Situation (Apr. 2010), *available at* http://www.edwardswildman.com/newsstand/detail.aspx?news=1905.

buse ourselves of this particular misconception, we can usefully turn to Marx. In one of the concluding chapters of the final volume of *Capital*, felicitously titled "The Illusion Created by Competition," Marx scorns the notion that monopolies somehow transform the law of value. Accumulation and pricing dynamics, he notes, do not play out independently within what we like to think of as discrete industry "sectors"; rather,

> A monopoly price for certain commodities simply transfers a portion of the profit made by the other commodity producers to the commodities with the monopoly price [here, the investment banking service]. Indirectly, there is a local disturbance in the distribution of surplus-value among the various spheres of production, but this leaves unaffected the limit of the surplus-value itself.[16]

In other words, the notion that only investment banks' immediate clients would be affected by monopoly pricing is based on a fallacy of separate industry sector economics. In reality, Marx concludes, the monopoly price is paid from two sources: "from the profit of other capitalists," and "by deduction from real wages."[17] Where investment banking is concerned, antitrust has implicitly internalized such transfers.

III. ANTITRUST, TOO BIG TO FAIL, AND THE NATURE OF CAPITALIST COMPETITION

With this context in mind, how then should we theorize and assess the recent resurgence of interest in antitrust in the banking context? As I indicated at the outset, this resurgence is closely bound up with the problem of TBTF: the sense not only that antitrust might help alleviate this problem, but also that a more rigorous application of antitrust in recent decades could perhaps have prevented the problem from arising. The rekindling of antitrust energies is currently apparent in multiple markets, including the United States and Europe. Indeed, within two months in mid-2012, two major antitrust-related banking investigations—albeit investigations not directly concerned with the TBTF phenomenon—yielded high-profile results. First, in May 2012, in *United States v. Carollo, Goldberg & Grimm*, three ex-bankers were found guilty by a U.S. federal jury of manipulating auctions for municipal-bond investment contracts.[18] Five major Wall Street banks, furthermore, have paid over $700 million to settle claims associated with the same U.S. probe

16. 3 KARL MARX, CAPITAL 1001 (Ernest Untermann trans., Frederick Engels ed., Charles H. Kerr & Co. 1909 ed. 1894).

17. *Id*.

18. Drew Fitzgerald, *Three Ex-GE Workers Convicted in Bid Rigging*, WALL ST. J. (May 13, 2012), http://online.wsj.com/article/SB10001424052702304203604577398720070122232.html.

into the collusive rigging of bids for investing the proceeds of the sales of such bonds.[19]

Second, in June 2012, in a settlement with three separate authorities (the United Kingdom's Financial Services Authority and, in the United States, the Department of Justice and the Commodity Futures Trading Commission), the U.K.-headquartered bank Barclays was fined more than $450 million for attempting to manipulate the pivotal London Interbank Offered Rate (LIBOR) for interest.[20] Once again, this individual settlement occurred within the context of a much wider, ongoing investigation into alleged antitrust violations and immediately prompted calls for conclusive answers. Philip Augur wrote in the *Financial Times*:

> We need to know whether several banks were in this together in a formal or informal ring. If so, such an organised rigging of the market would revive suspicions about the existence of a banking cartel. If one market was rigged, might there not be others? Regulators must look again at places where there has been a lack of price competition, for example on new issues and other capital markets business where price protection appears to have been occurring.[21]

More broadly, influential economic commentators had already issued a series of high-profile antitrust rallying cries. For example, in early 2010, a professor at the Massachusetts Institute of Technology, Simon Johnson, identified antitrust scrutiny, explicitly of TBTF financial institutions, as "a sensible idea that is long overdue."[22]

A. Differing Views on Antitrust and TBTF Banks

Not surprisingly, some legal scholars and political and regulatory authorities have been quick to offer opinions on what we can generally expect of antitrust, specifically vis-à-vis TBTF banks in the post-crisis

---

19. Bob Van Voris & Martin Braun, *Ex-UBS Executives Go to Trial in Bond Bid-Rigging Case*, BLOOMBERG (Jul. 30, 2012), http://www.bloomberg.com/news/2012-07-30/ex-ubs-executives-go-to-trial-in-bond-bid-rigging-case.html.

20. Brooke Masters, Caroline Binham & Kara Scannell, *Barclays Fined a Record £290m*, FIN. TIMES (June 27, 2012), http://www.ft.com/intl/cms/s/0/2a4479f8-c030-11e1-9867-00144feabdc0.html#axzz26gnXAbDN.

21. Philip Augar, *Too Big to Manage or Regulate Are What Matter Now*, FIN. TIMES (June 28, 2012), http://www.ft.com/intl/cms/s/0/c2a9609a-c04a-11e1-982d-00144feabdc0.html#axzz26gnXAbDN; *see also* Simon Goodley, *EU Inquiry Into Claims of Banks' Collusion in Credit Derivatives Market*, GUARDIAN (Apr. 29, 2011), http://www.guardian.co.uk/business/2011/apr/29/banking-credit-default-swaps-eu-investigation (showing that the European Commission is probing the credit default swaps market for collusion).

22. Simon Johnson, *An Antitrust Investigation of the Banks?*, N.Y. TIMES (Jan. 21, 2010), http://economix.blogs.nytimes.com/2010/01/21/an-antitrust-investigation-of-the-banks; *see also* Krishna Guha, *Opening Salvo on Banks Has Yet to Come*, FIN. TIMES (Jan. 18, 2010), http://www.ft.com/intl/cms/s/0/8302b178-047a-11df-8603-00144feabdc0.html#axzz26gnXAbDN.

era. Some, mostly from the strict neoclassical tradition, say we cannot and indeed *should* not expect much because to make TBTF an antitrust issue is to misunderstand both. Antitrust, they say, is about competition, while TBTF is about size, and size per se is not a competition issue. "TBTF," avers Lawrence White, "does not represent an instance in which size involves the exercise of market power."[23]

Others are slightly more optimistic. They say that antitrust should have a role in the fostering of a financial system in which banks are not TBTF. However, their argument comes with a significant caveat. Antitrust as it is currently configured—specifically, antitrust with the methodological dispositions described in the first part of this Article (in other words, with strong efficiency considerations, and with a privileging of the local geographical scale)—is simply not properly equipped to inhibit big national or even international bank mergers. Important voices have recently made this case, including Albert Foer, the President of the American Antitrust Institute.[24] For such commentators, antitrust needs methodological revision to be effective.

Finally, there are those who think not only that TBTF is an antitrust issue, but also that if scrupulously applied, contemporary antitrust will be able to do the policing work that it has seemingly failed to do in the past. Legal scholar Sharon Foster, for instance, points to the powerful possibilities of systemic risk analysis. Foster maintains that such analysis "will work under current law without the need for legislative amendment nor a reconsideration of the law by courts." Thus, "the antidote to too big to fail is antitrust."[25]

With the possible exception of White's (whose argument I perceive to be tendentious), all such positions are to one extent or another defensible. Yet critically, they share a certain conservativeness in the scope of their conceptualization of the issues at hand. Specifically, none venture beyond relatively narrow framings either of antitrust—what it is, what it could and should be—or, perhaps more importantly, of the nature of corporate competition in the banking sector. In the remainder of this

23. "TBTF is not an antitrust issue. It should not become part of an antitrust agenda." Lawrence J. White, Commentary, *Financial Regulation and the Current Crisis: A Guide for the Antitrust Community* 39, 43 (June 10, 2009), *available at* http://www.antitrustinstitute.org/files/AAI%20White%20COmmentary%20fin%20reg%20and%20antitrust_061120092144.pdf (recommending that the existing antitrust approach in banking should be broadly maintained); *see also 'Too Big to Fail?' Hearing*, *supra* note 7, at 32 (statement of William Askew, Senior Policy Advisor, Fin. Serv. Roundtable).

24. *'Too Big to Fail?' Hearing*, *supra* note 7, at 12 (statement of Albert A. Foer, President, Am. Antitrust Inst.).

25. Sharon E. Foster, *Too Big to Fail – Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law But Such a Solution Will Only Work If It Is Applied on an International Basis*, 22 FLA. J. INT'L L. 31, 35 (2010).

Article, I propose a more radical theorization of the pertinent issues, explicitly from a political–economy perspective.

B. Baran, Sweezy, and Berle's Political Economy

To discuss a more radical theorization of the role of antitrust, we return to two important political–economic interventions from the mid-century. One is Baran and Sweezy's influential *Monopoly Capital*, published in 1966. A central tenet of this book is that contrary both to popular beliefs and to the conventions of neoclassical economics, capitalist firms do not necessarily engage in "real," price-based competition. Instead, big corporations can be seen to behave toward each other in what Joseph Schumpeter had called a "corespective" manner, maintaining the impression of serious competition but in reality refraining from eroding each other's profits.[26] Explicit price-fixing would be the most egregious example of such behavior. Baran and Sweezy suggested that this type of behavior had in fact become the norm within modern capitalism—and competition, "perfect" or otherwise, a state of exception.[27] An "attitude of live-and-let-live toward other members of the corporate world," according to Baran and Sweezy, now dominated capitalist microeconomic affairs.[28]

Yet for all its impact, this argument was not wholly novel. Twelve years earlier, Adolf Berle published *The 20th Century Capitalist Revolution*, a book vastly less influential than his work, *The Modern Corporation*, and criticized from all sides for its policy recommendations, but nonetheless brimming with insights regarding the core dynamics of the corporate world.[29] Berle's starting point was with the high levels of concentration visible in key sectors of the American economy, including banking. In such a situation, he observed, competition looks very different from "when thousands of tradesmen, craftsmen, or farmers are offering their wares to thousands of customers." In place of intense price competition one finds "either consolidation, or elimination of one of the units, or"—and here again the echoes of Schumpeter are unmistakeable—"acceptance of a situation in which the place of each is approximately respected." In short, competition is "rarely if ever permitted to carry through to its logical result. Nobody, it seems, wants that."[30]

26. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 90 n.5 (1942).
27. This exception might be considered a complement to the historical regulatory "exception" of meaningful, competition-oriented antitrust in banking.
28. PAUL BARAN & PAUL SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER 48 (1966).
29. *See generally* ADOLF A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).
30. *Id*. at 45–46, 48.

This, of course, was very similar to Baran and Sweezy's later argument. What distinguishes Berle's thesis, however, is his further development of this observation regarding the lack of price competition. "[C]ompetition in mid-twentieth century," he concluded, "leads more often to a political than to an economic resolution of events."[31] At a certain point, in concentrated industries, economics is set aside and politics takes over. Berle was so sure of this dynamic that he called it "indefensibly disingenuous to assert that these operations are primarily following economic laws more or less accurately outlined by the classic economists a century ago when the fact appears to be that they are following a slowly emerging pattern of sociological and political laws."[32]

Interestingly, Berle was something of an expert on antitrust and competition in banking, and in 1949, he penned a paper in the *Columbia Law Review* that anticipated the arguments of *The 20th Century Capitalist Revolution*, specifically in relation to banking.[33] If large corporations generically did not obey economic laws, then this was especially true, he believed, in finance. If banking was unique, then for Berle its uniqueness lay in the fact that a political rather than economic response to competition was, to a degree, necessary: "While competition may be desirable up to a point in deposit banking, there is a clear bottom limit to its desirability." He continued: "a high degree of cooperation among banks is essential."[34]

As I will suggest shortly, Berle's theory of the sociopolitical laws of corporate behavior is tremendously insightful and consequential in the antitrust context. But was—and is—he right? Do large corporations, and banks in particular, circumvent the "laws" of price competition? In one sense the question is rhetorical, because a central purpose of antitrust practice is precisely to try to answer it. But there are certainly those who have little doubt (and the recent revelations from the *United States v. Carollo* and Barclays LIBOR cases will hardly have shaken their convictions). John Kay, whom I referenced earlier, remarks that in relation to U.K. commercial banking "we have lost the assurance of stability," as the financial crisis demonstrated, yet still "experience fully the disadvantages of oligopoly."[35] U.S. Congresswoman Sheila Jackson Lee, speaking at a congressional hearing on banking and antitrust in 2009, insisted similarly that "the named big banks or the entity big banks are a

31. *Id*. at 48.
32. *Id*. at 12.
33. *See* Berle, *supra* note 11.
34. *Id*. at 592.
35. Kay, *supra* note 13.

monopoly."[36] Meanwhile, where investment banking more specifically is concerned, the ex-banker William D. Cohan is an articulate and forceful proponent of a similar argument. He believes that Wall Street was clearly a cartel in the mid-twentieth century, notwithstanding Judge Harold Medina's finding to the contrary in the *Morgan* case; and he says the business "is an even more powerful and threatening cartel" today than it was then:

> Although banks will argue that all fees are negotiable, every corporate issuer knows the rules: Initial public offerings are priced at a 7 percent fee; high-yield-debt underwriting is priced at 3 percent; loan syndications are priced at about 1 percent. M&A deals are still priced off the "Lehman formula," even though there is no more Lehman Brothers.[37]

C. Antitrust, Too Big to Fail, and the Political Economy of Competition

In the context of our consideration of antitrust and TBTF banks, the significance of Berle's thesis—and, alongside it, that of Baran and Sweezy—is simply as follows: Except where direct evidence of collusion or other manipulative practices is allegedly available as in the *Carollo* and Barclays cases (of course, these two cases, in any event, were not formally geared toward the TBTF issue), contemporary antitrust is in large measure rendered toothless if large corporations are not following economic laws because in the past half-century, antitrust theory and practice has been thoroughly economized. Put bluntly, an economic framework cannot help address a non-economic problem.

I have already referred to one dimension of this economization of antitrust—the increasing focus in recent decades on efficiency principles—but it runs far deeper than that development alone. In 1984, Frederick Rowe wrote powerfully of antitrust lapsing "into bondage to economic models" from as early as the 1940s.[38] The most important such model, before neoclassical efficiency concerns arrived on the scene, was the so-called Oligopoly Model, which posited that "few producers dominating a concentrated market instinctively behaved like one monopolist,"

---

36. *'Too Big to Fail?' Hearing*, *supra* note 7, at 81–82 (statement of Sheila Jackson Lee, Member, Subcomm. on Courts and Competition Policy). She continued: "And you can point out to me what little guy has risen to be a big guy in the last 50 years, short of the big guys buying them up, and you might say, well, the big guys have now added and so that little guy finally got in. But no, that little guy was eaten up."

37. William D. Cohan, *Wall Street Turned Crisis Into a Cartel: William Cohan*, BLOOMBERG (Jan. 8, 2012), http://www.bloomberg.com/news/2012-01-09/cohan-how-wall-street-turned-a-crisis-into-a-cartel.html.

38. Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1559 (1984).

and which, in relying on a concept of market power measurable by numerical market shares, crucially "obviated proof of anti-competitive purpose or effect."[39] Even Albert Foer now concedes that "[t]he course of antitrust has been determined by the Chicago School, where we focus on microeconomics, and in particular on short-term price effects . . . ."[40] But perhaps the most striking acknowledgement of antitrust's reduction to neoclassical economics can be found in the preface to the second, 2001 edition of the textbook written by this tradition's arguably most prominent advocate and theorist, Richard Posner. "The first edition of this book [*Antitrust Law*], published a quarter of a century ago, bore the subtitle 'An Economic Perspective,' implying there were other perspectives. . . . In the intervening years, the other perspectives have largely fallen away"[41]—as, therefore, did the subtitle.

We began with the question: Can antitrust law ordinarily help us in tackling the TBTF banking problem? I find myself in the unexpected position of agreeing with Lawrence White: No, it probably cannot. For me, however, this is not because TBTF is not an antitrust issue, but because I am personally persuaded by the arguments of Baran and Sweezy and Berle—that many large corporations, including (though not only) in banking, tend to avoid price competition at all costs; their rivalry, such as it is, is largely non-economic. To seriously confront the TBTF problem and the powers and risks it involves, therefore, antitrust would have to struggle free of the economistic straitjacket that currently confines and defines it. It would have to reintroduce some of the non-economic principles—protection of small businesses, for example—that Posner ridicules as political and ideological; as if neoclassical economics is itself ideology-free and politically neutral.[42]

IV. CONCLUSION

In *Competition, Confusion, and Commercial Banking*, Almarin Philips observed, "The recent interest in competition in the commercial banking industry is a strange turn of events."[43] But this paper was published not, as one might expect given the allusion to the "recent interest in competition," in 2011 or 2012; rather, it was published in 1964.

---

39. *Id*. at 1520, 1524.

40. Albert A. Foer, *The Antitrust Aspects of Bank Mergers - Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 542, 542–43 (2008).

41. RICHARD A. POSNER, ANTITRUST LAW vii (2d ed. 2001).

42. *Id*. at viii.

43. Almarin Phillips, *Competition, Confusion, and Commercial Banking*, 19 J. FIN. 32, 32 (1964).

As we have seen, the 1940s and 1950s were an exceptional period in the history of banking and competition policy insofar as competition, rather than stability, was prioritized. Philips regarded this turn to antitrust enforcement as strange precisely because it occurred against the backdrop of a long history of pursuing stability. More pointedly, Phillips conjectured that antitrust investigations into banking were and would likely remain a case of "tilting at windmills" because "non-price forms of rivalry" were so embedded—sometimes covertly, but often overtly and legitimately.[44] Given my own comparable diagnosis of the current conjuncture, at a moment of similar heightening of interest in antitrust, I will leave the last word to Phillips in the form of this wonderfully wry and piercingly apt observation: "Fears of monopoly and of a substantial lessening of competition have arisen with regard to an industry which hitherto few had regarded as competitive in the first place."[45]

44. *Id*. at 33, 40.
45. *Id*. at 32.