

The Battle is Over, But the War Goes On: Unraveling the Illusion of the Financial Modernization Act

By Thomas T. Holyoke

Abstract: *Over the last several decades, scholars have developed several models of policy making, including interest group pluralism where an equilibrium between competing organized interests becomes law, and legislative control, where the equilibrium between the preferences of legislators becomes law. While pluralism has fallen out of favor, this paper argues that it still has a place in models of policy making complementary to the legislative control theory. Using the development and passage of the Gramm-Leach-Bliley Act, the legislation rewriting the nearly century old laws structuring the banking and finance policy domain, this article shows how this enactment required agreements between organized interests as well as between concerned legislators.*

Introduction

On November 12, 1999, President Clinton signed the Gramm-Leach-Bliley Act (GLB) into law, enacting one of the most far reaching banking and finance laws in history.¹ For the first time in decades, banks, through a new holding company structure, would be able to sell and underwrite insurance, as well as underwrite securities without restriction, and even engage in limited investing in traditional commercial business firms. Securities brokerage firms and insurance companies would likewise be able to engage in banking, tearing down long standing legal firewalls that had kept these industries apart for most of the 20th Century. Market experts felt certain that the new law would sanction a wave of cross industry mergers creating massive one-stop shopping financial institutions, exemplified by the new Citigroup, where customers could handle all of their banking, investing, and insurance needs under one roof.²

Yet almost immediately, the incredibly complicated regulatory structure produced by the law showed strain as the multitude of federal and state banking, investing, and insurance regulators involved began jockeying for preeminent positions of authority from which to guide this new financial sector. Lack of clarity in GLB made their roles ambiguous, granting new powers to many agencies but also imposing checks on this power by providing one agency the authority to overrule another. The law also provided federal regulators with the power to pre-empt state actions but without clear guidance on when and how this could take place. Furthermore, the competition between the interest groups that had struggled against each other during the creation of GLB was undiminished, each launching campaigns advocating the authority of their favorite regulator over the others. Even members of Congress have begun criticizing the agencies for ambiguous rules and inability to work in concert.

Assuming that this conflict is a product of the complex regulatory structure created by GLB, the question is why was such an unwieldy system ever set up when lawmakers might have provided a more firm structure with clear delegations of authority. The search for an answer begins with a brief historical overview of banking and finance policy in the United States. The development of Gramm-Leach-Bliley and the regulatory structure it produced are then discussed. Attention is given to the conflicts that have emerged as a consequence of the act. Finally, GLB is examined through a perspective that combines different theories of policy making. The

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discussion concludes that, given the array of conflicts between the many competing actors on this issue, GLB could not have been anything but the confusing and conflict-laden product that it is.

The Financial Modernization Debate

A Brief History of Banking Policy in the United States

In 1933 Congress enacted the Glass-Steagall Act as a reaction to the financial and economic ravages of the Great Depression. With largely uncontrolled speculation in the investment market by banks blamed, rightly or wrongly, for the collapse of the financial system in 1929, lawmakers erected a "firewall," or legal barrier, barring commercial banks from future investment in the securities markets.³ This division between regular banks and the Wall Street brokerage houses created a second division in the financial landscape, building on a legal prohibition against banks selling and underwriting insurance enacted in the National Bank Act of 1864.⁴ Since the passage of Glass-Steagall, much of the history of banking politics in the United States can be characterized as attempts by the commercial banking industry to roll back these barriers and countervailing efforts by investment and insurance firms to keep banks out. Dozens of legislative and regulatory battles over these dividing lines have pitted powerful organized interests representing these sectors of the financial industry against each other in titanic clashes of raw lobbying power, grassroots campaigning, and Political Action Committee contributing.

Early rounds went to interests representing those who preferred markets where banks were forbidden to compete. Passage of the McCarran-Ferguson Act in 1944 cemented into law state pre-eminence in the regulation of insurance, permitting states to pass tough laws against bank incursions into either the selling or underwriting of insurance.⁵ A number of court cases also reaffirmed

the firewalls of Glass-Steagall and the National Bank Act against bank competition.⁶

The tide began to turn in favor of the banking industry in 1956 with the passage of the Bank Holding Company Act. In the interest of creating greater diversification of holdings as a means of promoting the safety and soundness of the industry, banks were permitted to establish parent companies and move certain aspects of their operations out of the bank and into other subsidiaries of this umbrella company. With diversification expected to bring greater stability, bankers received limited powers to establish affiliates in this structure able to engage in venture capital, equity capital, and other limited forms of investing. More importantly, in 1987 the Federal Reserve used the Act to permit holding companies to establish what are popularly referred to as "section 20" affiliates – units permitted to engage in securities investing provided that they did not generate revenue greater than a particular percentage of total holding company assets.⁷ The Board of Governors of the Federal Reserve System, as the regulator of bank holding companies, set the initial revenue limit at 5 percent.

Passage of the Riegle-Neal Interstate Banking Act of 1994 gave the banking industry the unrestricted right to merge and acquire other banks nationwide, setting off a frenzied wave of mergers and takeovers. The result was the birth of some of the largest banks ever seen, including the new Chase Manhattan (acquired by Chemical Bank and subsequently acquiring J.P. Morgan), Wells Fargo (merging with Norwest), FleetBoston (the Fleet Bank and BancBoston merger), and Bank of America (after its acquisition by NationsBank).

Yet, in spite of its rapid growth in size and scope, the banking industry began to find itself not only behind the curve in the development of new technologies, especially utilizing the resources of the Internet, but found that its cousins in the forbidden markets were pushing

into banking. The loose laws on savings banks and savings and loans (so-called "thrifts") permitted non-banking corporations, such as insurance companies, to establish thrifts in their own corporate structures and exercise most of the powers of a regular bank.⁸ Many commercial firms such as Sears Roebuck and Ford Motor Company started offering credit card accounts to customers through thrifts of their own. Beginning in the 1970s, investment houses offered the money market fund pioneered by Merrill Lynch, an investment account from which customers could write checks. Boasting higher rates of return, these investment accounts became more attractive to consumers than long-term deposits at banks due to the strength of Wall Street in the 1990s. Brokers such as Charles Schwab were also moving swiftly into Internet business and e-commerce technology; banks were slower to adapt. By the late 1990s, the banking industry was in the humiliating position of having lost the lion's share of the nation's financial savings to Wall Street, nearly all of its profit in the early 1990s coming from fees instead of loan interest.⁹ Competitors from Europe and Japan, where banking and investing freely mix, began to see U.S. banks as appealing acquisition targets as they contemplated pushing into U.S. financial markets.

Under this pressure, bankers urged their regulators to loosen the shackles on the range of opportunities open to them. Concerned about the future vitality of the industry, regulators responded by using their authority to push the statutory limits imposed on the banks. Through its authority under the National Bank Act to define what constituted the "business of banking," the Office of the Comptroller of the Currency (OCC), the regulator of national banks in the Treasury Department, gave banks a toehold on the insurance world by permitting them to offer annuities.¹⁰ Insurance industry sponsored lawsuits aimed at stopping the OCC failed as the Supreme Court refused to defer to the Comptroller.¹¹ A more significant

victory for banks came when the OCC interpreted the National Bank Act to permit banks with branches in towns with a population of 5,000 or less to sell insurance nationwide. Since this provision rested in federal law, the OCC felt itself justified in overriding McCarran-Ferguson and pre-empting state restrictions on the right of banks to sell insurance. Protesting both the interpretation and the OCC's subsequent pre-emption of a Florida law, the insurance industry again sued, and again the Supreme Court sided with the Comptroller.¹²

Meanwhile, the Federal Reserve had been slowly raising the cap on investments bank holding companies could make through their section 20 subsidiaries to 25 percent of total holding company assets.¹³ The Federal Reserve had also loosened its policies on the level of investments a holding company could make in non-bank commercial firms, so-called merchant banking authority, long a prime market for the brokerage houses.

With the securities and insurance industries pushing into banking and claiming greater shares of the nation's wealth, and banks pushing back through their regulators by eroding Glass-Steagall, eyes began to turn to Congress for a legislative solution.

Theoretical Perspectives on Policy Making and Regulatory Structure

Political scientists have devoted decades of research and hundreds of pages in leading journals to theories of policy making and regulatory structure. The paradigm dominating this scholarship in the 1950s and 1960s was one assuming a multiplicity of competing interest groups representing different segments of society. This "pluralist" theory held that interest groups competed with each other on behalf of society until an agreement could be reached regarding the structure of public policy. After this equilibrium was reached, Congress would dutifully pass legislation cementing the agreement into law and

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regulatory agencies would carry it out.¹⁴ Pluralism began to unravel as a theory because scholars believed it assumed too much equality and failed to account for the unequal distribution of power and benefits between interest groups, and because little evidence was found to actually support it empirically.¹⁵

Contemporary perspectives on policymaking reverse pluralism by assuming that laws are enacted when the preferences of legislators, not interest groups, are congruent enough to get the minimum number of votes to pass a bill.¹⁶ Regulatory agencies, in this "legislative control" paradigm, respond to the will of legislators, and interest groups are marginalized into mere "service bureaus" that provide the information congressmen require in order to enact the policies they desire, or as contributors of money for re-election campaigns.¹⁷ Executive branch agencies only have as much wiggle room as the breadth of policy preferences held by the legislative coalition enacting the bill provides. In other words, if the legislation is vague on specifics because it had to accommodate many different legislator preferences, regulators end up with a great deal more discretion to draft rules satisfying their own policy preferences. However, if the enacting coalition has highly aligned preferences, meaning they agree on the fine print, then the law will give regulators very little discretion in what they can do.¹⁸

Neither perspective is satisfying as a general theory or as an explanation for the final legislative resolution to the financial modernization issue. Interest groups clearly played a more pivotal role than the theory of legislative control presumes. But if pluralism was accurate, the schizoid regulatory structure ultimately enacted would not have emerged and the agreement reached between competing interests would have provided greater clarity. A more satisfactory answer might lie in the combination of these perspectives.

If both legislators and interest groups have policy pref-

erences they are attempting to enact into law, then interest groups will ally themselves with like-minded legislators and the array of competition between groups will be reflected in the legislative battles within Congress. This means that a high level of conflict between interest groups will translate into conflict between legislators and produce vague laws giving regulators broad interpretive powers. If such a broad bill also requires the involvement of many agencies, such ill-defined language will almost certainly create conflict and merely embed the interest group/legislative conflict in a dysfunctional regulatory structure.

The legislative history of the Gramm-Leach-Bliley Act reflects this integrated perspective more satisfactorily than either of the two component theories alone. Without the necessary compromises between interests groups, detailed below, legislators would not have been able to reach enough of a consensus to enact a bill. Yet since these interests and lawmakers could only compromise at the most general level, the resulting product failed to provide any real resolution to the issue.

Financial Modernization Debate in Congress: Conflict and Compromise

Efforts to redefine the banking and finance sectors through statutory change were not new to Congress. Legislation had been in the offering for decades, and the Senate had passed a bill in 1982, though the House failed to act on it. Several proposals had also been floated around the House during the 103rd Congress in the early 1990s, but without action.¹⁹ The principle reason for this lack of congressional action was due to a peculiar equilibrium that had been established. With several powerful industries poised against each other, passing a bill meant lawmakers would be required to choose between them. Personified by their major trade associations, these industries had long-standing ties to members of Congress

and were heavy contributors to campaign coffers. Furthermore, most had a presence in the home districts where they employed a significant portion of the populace. The insurance agents especially had a well-organized grassroots network capable of bombarding every lawmaker with phone calls, letters, and Hill visits whenever their issues arose. Under such a balance of competing pressures, the best escape hatch for Congress was to do nothing.

Yet by the mid-1990s the pressure was becoming unbearable. The securities industry and insurance companies, long content to let the statutory status quo remain, were growing concerned with what they saw as regulators, captured by the banking industry, running amok. Arguments that these agencies had usurped the rightful power of Congress by enacting regulations that were essentially tearing down Glass-Steagall and the other firewalls received a sympathetic ear from lawmakers. Incoming chairman of the Senate Banking Committee, Senator Alfonse D'Amato (R-NY), held hearings on the behavior of the OCC and asserted his committee's right to oversee banking regulators and chart future policy. But it was in the House where a ground swell finally occurred and enabled the passage of some form of financial modernization legislation.

The bill that would ultimately become law was crafted and introduced by the new House Banking Committee Chairman, Rep. James A. Leach (R-IA), after a series of hearings in 1995. Once passed by Leach's Committee, the bill experienced a tumultuous existence from 1995 through 1998 where it was re-worked by the House Commerce Committee, barely scraped through the House floor, and passed by the Senate Banking Committee only to meet with a filibuster on the Senate floor. In 1999, the legislation was reintroduced, approved by the same committees, passed both houses, and was heavily rewritten by a conference committee. In the last days of the 1999

legislative session, the Gramm-Leach-Bliley Act was approved and signed into law.

Regulatory Structure Produced by the Gramm-Leach-Bliley Act

Named for the chairmen of the three respective committees through which it passed, the Gramm-Leach-Bliley Act is the embodiment of numerous deals struck between both the competing industry interest groups and regulators. Realizing that the historical congressional equilibrium perpetuating gridlock could only be broken if the threat of retaliation from one sector was quelled, the various interest groups worked amongst themselves to produce a series of compromises that would give each side, and their allied legislators, enough of what they wanted to allow them to support the legislation. For some parties the effort was easier than for others. The securities and investing industry largely made peace with the bankers in 1997 by agreeing to an open two-way street where banks could enter the investing business and securities firms could acquire or establish banks through a new corporate entity called a financial holding company (FHC). Banks would also be allowed expanded merchant banking powers through these FHCs, though their goal of unlimited authority to invest in commercial firms was denied them.²⁰ While these new FHC entities would be regulated by the Federal Reserve System, in the spirit of "functional regulation," the Securities and Exchange Commission would retain primary regulatory authority over all investment and securities operations, subject to only nominal oversight by the Federal Reserve.

Insurance company interests also reached an agreement in 1997 by receiving the right to continue expanding into banking, largely as FHCs, though those companies that already had established a thrift would be permitted to conduct banking without any structural change. Banks, in return, would be permitted to underwrite in-

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insurance in an affiliate of their FHC, not in the bank itself.

More difficult to bring to the bargaining table were the insurance agents and their representative associations. Not as willing to give up the venerable barrier between banks and insurance sales, they held out in opposition through 1997 and much of 1998, nearly scuttling the bill in the House. Finally, Senator D'Amato met with representatives of the agents and the bankers in New York City and pressured them into an agreement.²¹ This agreement essentially was the realization that banks were going to sell insurance, either in subsidiaries of FHCs or those of the banks themselves, but that this did not necessarily mean a substantial change in the careers of agents, merely that many would become employees of banks or their holding companies. In return the bankers agreed to support functional regulation concepts where all agent licensing would continue to be handled by the states rather than any new federal agency. Furthermore, the deference shown by the Supreme Court to the interpretations of the OCC would be statutorily altered so that the Court would recognize the primacy of the states on insurance matters per the McCarran-Ferguson Act.²² However, if the OCC determined that a state is clearly using its authority to discriminate against the rights of a national bank to sell insurance, that state law could be pre-empted.

The insurance companies, and even a few of the banks and an insurance agent group, pressed hard for the creation of a federal insurance charter so those companies operating in multiple states could be subject to one set of laws and regulations instead of those of every state in which they chose to do business. While heavily opposed by the states, state insurance commissioners, and most of the insurance agent associations, lawmakers struck a compromise. The states were directed, through the coordinating efforts of the National Association of Insurance Commissioners, to amend their various laws to in-

crease uniformity. Should they fail to achieve this satisfactorily by November 2002, the law ordered the establishment of the National Association of Registered Agents and Brokers (NARAB), a trade association empowered to set national standards for performance and licensing of insurance agents, effectively usurping the power of the states.

The most difficult battle between interest groups was actually fought between two regulatory agencies. While the concept of "functional regulation" had largely been agreed to, a final battle was waged by all sides in the conference committee for nothing less than which federal agency would have overarching regulatory oversight of the new financial holding companies. The OCC, backed by banking interests, strongly advocated itself and the inclusion of most of the new powers for banks to be held directly in subsidiaries of banks. Other interests supported the Federal Reserve Board as supreme regulator and claimed that most of these new powers should be held by bank affiliates in a holding company structure, not by the banks themselves lest the OCC continue to be too great an advocate for banks at the expense of other industries. Since the Federal Reserve was the regulator of bank holding companies, it was the logical candidate to regulate FHCs. In order to persuade the OCC and the bankers at the eleventh hour to accept the Board's dominance it was agreed that the OCC would not only have a say in the development of all regulations by the Federal Reserve impacting banks, but would essentially have a veto power over such rules.

The Rise of Agency Competition

While such compromises were essential to garner enough support from organized interests to enact the legislation, the result is a patchwork regulatory structure dependent for its success on the capacity of historically competitive federal and state agencies to cooperate. It

also depends on the concerned interests and legislators to continue trying to work together to make the system function smoothly. Unfortunately, there is little sign of this occurring.

With tensions still raw, Federal Reserve Board Chairman Alan Greenspan, in a speech to the members of the American Council on Life Insurance, expounded on the Board's role as supreme regulator, clearly demarcating the Federal Reserve as the apex of the new regulatory hierarchy instead of the "partnership" role others had envisioned for it.²³ Furthermore, Board Governor Laurence Meyer stated that the Federal Reserve would not simply accept the reports of other government agencies on the conditions of the various subsidiaries under the control of a financial holding company when reviewing merger and acquisition applications. Rather, they would actively seek their own information and even perform examinations themselves, a veritable spit in the eye at functional regulation.²⁴ In June, Comptroller of the Currency John D. Hawke shot back at the Federal Reserve claiming that it was not given all-encompassing power to regulate by GLB, that the OCC retained the power as the sole regulator of national banks and all of the activities conducted through subsidiaries of those banks.²⁵

The Federal Reserve's adherence to Governor Meyer's words has become apparent in the treatment of the first application by a non-bank to convert to a financial holding company. When the discount broker Charles Schwab filed its application to acquire U.S. Trust Company, a wholesale bank, instead of relying on reports and examinations from the Securities and Exchange Commission, Schwab's primary regulator, Federal Reserve officials required Schwab to supply it with a large amount of information regarding its safety and soundness and risk management structures. Even though such information had already been submitted to the SEC, Federal Reserve staff

decided to examine Schwab for themselves.

Difficulties between the Federal Reserve and the OCC, as joint developers of rules governing the new powers of national banks in financial holding companies, was underscored by the long delay in the issuing of the rule on the privacy of customer financial data, the merchant banking rules, and rules implementing the sunshine provisions of the Community Reinvestment Act. Furthermore, once issued, these rules have encountered nothing but criticism from interest groups and lawmakers alike for failing to adhere to the legislation, even though the complaints raised are contradictory. The OCC has also shown a willingness to consider pre-empting state insurance laws on the grounds that these statutes discriminate against the ability of national banks to sell insurance. Petitions from a banking association in West Virginia has been filed asking for pre-emption, which industry experts expect to see approved, another is pending in Massachusetts. Insurance industry advocates have already protested the move as a violation of functional regulation and are promising suits.²⁶

Finally, the attempt to begin developing uniformity in the state insurance laws in order to ward off the creation of NARAB has nearly stalled. While optimistically declaring that it would be able to facilitate such parity, the National Association of Insurance Commissioners has instead been plagued by fighting between its members in attempts to develop a coherent set of standards that could be approved by their respective state legislatures.²⁷

Reflecting on Financial Modernization

Financial modernization occurred because interest groups successfully convinced lawmakers that it was in their interests to act. Regulators, they claimed, were usurping the rights of Congress through overly broad interpretations of statutes with the blessing of the Supreme Court. If legislators still hoped to be relevant to

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the debate over how to structure future financial markets, they could not withhold any longer. Non-bank interests claimed that customers would be ill-served by a regulatory structure that favored commercial banks over other components of the finance industry. It was out-of-control banks, after all, that had allegedly caused the financial collapse of 1929, and had brought about the savings and loan crisis and costly bailout that followed. Furthermore, legislative action would present many opportunities for claiming credit for it would be one of the most diverse and contentious bills in history. Finally, there was the unspoken promise of financial support. A promise apparently fulfilled for the Center for Responsive Politics estimates that between 1993 and the end of 1999 interests made approximately \$190 million in contributions to lawmakers.²⁸

After years of lobbying what had emerged in Congress was an array of legislator preferences reflecting the conflicts and alliances between interests. Many members on the House Banking Committee bolstered the interests of banks. Members of the House Commerce Committee supported the securities and insurance industries, while the Chairman of the House Rules Committee, Rep. Gerald Solomon (R-NY), as a former insurance agent, was sympathetic to agent issues. A similar distribution of preferences could be found in the Senate. With members taking such a diverse array of preferences it is hard to imagine that any enacting coalition necessary for passing legislation could have been formed at all. Such diversity had stalled financial reform in the past, but this time the circumstances were different for interest groups had come under intolerable pressure to act. While the banking industry remained content to allow gridlock in Congress, for the OCC was acting as an extremely effective advocate for their issues, several of the largest, money-center banks had ambitions that could not be satisfied even through agency interpretation of statute.

Citicorp especially placed pressure on policy makers to enact a new law by merging with Travelers Group to create an institution not strictly legal under the existing framework. More importantly, securities and insurance interests were growing increasingly uneasy with the OCC and insisted on a legislative redesign of financial markets, not one driven by regulators.

Succeeding in getting the process started, but aware that the diversity of preferences in Congress would have to change to enact legislation, these interests knew that they had to reach some form of agreement and began to negotiate among themselves. Yet these were not deals resolving the thorny issues dividing these interests except on the most general points. Having only limited flexibility, constrained as they were by the needs of their own members, just enough in the way of agreement was reached to move legislative preferences to a point where something could be passed. Everyone appeared to gain something and surrender something else but the murky details were left to regulators to figure out if the coalition was to hold. What the bill would do was formally grant broad new powers and give each interest a voice in the inevitable fight that was to come over exactly how these new powers would be exercised. Legislators, unable to give clear guidance, could individually gain points with interests by engaging in *ex-post* oversight of regulators to bolster the industries in their new fight.

Which federal agency would have primary regulatory jurisdiction? What exactly was the new relationship between federal and state regulators over insurance? How would new powers such as merchant banking be structured? The law intentionally left these critical questions vague, for the consequences of having provided a clearer answer would have been to elevate one regulator into a position of pre-eminence over the others. Instead, a regulatory structure was created not for efficiency, or even practicality. It was created to provide each interest with

some type of strategic advantage through regulatory checks and balances inside of which they could continue to compete at the regulatory level to help shape the new, consolidated finance arena. In return, each interest group could report a victory to its members and establish a relatively level playing field as the new struggle began to take shape. Political needs were satisfied, but at the cost of clear and coherent public policy.

Conclusion

In sum, the new financial modernization law resolved fairly little. It merely allowed members of Congress to satisfy their own preferences, and those of interests just enough to pass a law, creating a regulatory structure geared towards competition between interests instead of providing clear directions that would have created clear winners and losers. The legislative control theory demands that the regulatory environment reflect the breadth of diversity in preferences in Congress, and so it does. Legislative proponents created a system with something for everyone, a new arena for interests to compete for dominance of domestic and international financial markets in the 21st Century.

For those who study how executive branch agencies implement public policy, explanations as to why one agency may stick closely to the intent of Congress while another appears to sharply diverge, or why one agency can promulgate an acceptable policy while another creates a firestorm, may be found in the politics behind the policy's creation. Those who decide to search for the origins of a controversial policy are likely to find that conflict over implementation is not so much a product of aggressive regulators acting independently as it is the product of deeply embedded structural problems created by the politics surrounding its enactment. Given the breadth of conflict and the alignment of preferences by interest groups and legislators, it is not surprising that

Gramm-Leach-Bliley failed to bring closure to long-standing fights over the structure of the financial industry, and in fact appears to be sparking even more conflict. It could not have come out otherwise. The task of regulators and policy analysts in the future will be to try to walk a fine line between these interests if they hope to successfully bring coherence to financial regulation.

Notes:

¹ The Gramm-Leach-Bliley Act started life as H.R. 10 in the 105th Congress. Reintroduced as the same number in the 106th Congress, it was ultimately superseded by the Senate bill, S. 900. Upon final enactment, the legislation became Public Law 106-102.

² The Citigroup prototype was created through the merger of Citicorp (the Citibank holding company) and Travelers Group (holding Travelers Life Insurance) and was completed prior to the enactment of Gramm-Leach-Bliley. While technically legal under certain temporary provisions in the Bank Holding Company Act, Citigroup would have been forced to divest much of its insurance and investing businesses if GLB not been passed.

³ A concise history of the movement of banks into the securities markets prior to 1929, the collapse itself, and the subsequent enactment of the Glass-Steagall Act are details in Edward J. Perkins, "The Divorce of Commercial and Investment Banking: A History," *The Banking Law Journal*, 88 (1971):483-528.

⁴ This is the legislation that created the original national bank charter, taking the first steps towards a firmly regulated banking system in the United States. Prior to this time banks had operated largely independently, even able to print their own currency.

⁵ Specifically, McCarran-Ferguson holds that federal law does not pre-empt state law regulating the business of insurance unless Congress specifically intends a federal law to do so. Some of the interplay between McCarran-Ferguson and banks is detailed in Murray A. Indick and David Domenici, "Barnett Bank: The National Banks Win Another Battle But the War Rages On," *The Banking Law Journal*, 113 (1996): 688-707.

⁶ For example, see *Arnold Tours, Inc. v. Camp* 472 F.2d. 427, 1972; *M & M Leasing Company v. Seattle First National Bank* 563 F.2d. 1377, 1977; *National Retailers Corporation of Arizona v. Valley National Bank* 411 F. Supp. 308, 1976.

⁷ "Section 20" refers to a section number in the Glass-Steagall Act permitting banks a very limited form of investing. The Bank Holding Company Act permits holding companies to establish subsidiaries involved in business "closely related to" banking, with the Federal Reserve acting as interpreter of what this standard might mean. In 1987 the Federal Reserve interpreted it to mean that bank holding companies could establish section 20 subsidiaries with more freedom to act than any bank subsidiary.

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⁸ More specifically, these companies were allowed to set up single thrift subsidiaries, popularly known as "unitary thrifts." "Thrifts," the common name for savings banks and savings and loan associations, have also been encroaching into the market of commercial banks through the offering of larger commercial loans.

⁹ See Brett Chase and Liz Moyer, "Fees Offset Sluggish Lending As Big Banks Post 4Q Results," *American Banker*, January 16, 1998; Jeremy Quittner, "Banks Again Stuck at 14% Share of Exploding Mutual Fund Market," *American Banker*, February 12, 1998.

¹⁰ The Comptroller's Office has a history of attempting to "modernize the national bank charter" dating back to Comptroller James J. Saxon in the early 1960s. See the remarks of Carter H. Golembeg, "The National Bank System in a Changing Environment," in *The Future of National Banking* published by the Financial Services Roundtable, November 1998.

¹¹ See *Variable Annuity Life Insurance Company v. American Council on Life Insurance*, 115 S. Ct. 810, 1995.

¹² See *Barnett Bank of Marion County v. Bill Nelson, Florida Insurance Commissioner*, 116 S. Ct. 1103, 1996.

¹³ Mahua Dutta, "With Rules Eased, Banks Flock to Securities Underwriting," *American Banker*, August 18, 1997.

¹⁴ Pluralism was first articulated as a political theory by Arthur F. Bentley in *The Process of Government*, Chicago, IL: University of Chicago Press, 1908. It formed the basis of a great portion of political thought, culminating the work of David Truman in *The Governmental Process*, New York: Knopf, 1951. Also see Earl Latham, "The Group Basis of Politics: Notes for a Theory," *American Political Science Review*, 46 (1952): 376-397.

¹⁵ See Theodore J. Lowi, *The End of Liberalism*, 2nd ed., New York: Norton, 1979. Also see Mancur Olson, *The Logic of Collective Action*, Cambridge: Harvard University Press, 1965.

¹⁶ Originally articulated as a theory by Duncan Black, *The Theory of Committees and Elections*, New York: Cambridge University Press, 1958. Also see William Riker, *The Theory of Political Coalitions*, New Haven: Yale University Press, 1963. Later developments of these theories are discussed in Kenneth A. Shepsle and Barry R. Weingast, "Positive Theories of Congressional Institutions," *Legislative Studies Quarterly*, XIX (1994): 149-179.

¹⁷ This is what Matthew McCubbins, a leading proponent of the legislative control theory, terms as "structural constraints" where statutes specifically narrow the amount of discretion an agency has to craft policy. See Matthew D. McCubbins, "The Legislative Design of Regulatory Structure," *American Journal of Political Science*, 29 (1985): 721-748.

¹⁸ See the work of Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virginia Law Review*, 75 (1989): 431-482.

¹⁹ A quick overview is provided by F. Jean Wells, "Financial Modernization Legislation: Precursors to Proposal in the 105th Congress," CRS Report for Congress 97-45E, December 31, 1996.

²⁰ Dean Anason, "Supporters of Reform Bill Rally for Rematch," *American Banker*, October 23, 1998.

²¹ "Merchant banking" refers to equity investments made by banks in non-financial corporations. Before GLB, banks could own up to 5% of voting equity, and 25% of non-voting equity, in such a company. GLB allows FHCs to invest without limits, taking a controlling interest, but the investment can only be temporary and the FHC cannot actively direct the company. The specifics were left to the Federal Reserve to figure out. For a closer look at this and the debate surrounding it, Randall S. Kroszner, "The Legacy of the Separation of Banking and Commerce Continues in Gramm-Leach-Bliley," *The Region*, Federal Reserve Bank of Minneapolis, June (2000): 18-21.

²² Dean Anason, "Bank Trade Groups Hedge Support for Reform Bill," *American Banker*, September 11, 1998.

²³ The Supreme Court rested the legal basis for its deference to the OCC on precedent set down in *Chevron, USA Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 1984.

²⁴ See the Chairman's speech at the Board's website at <<http://www.federalreserve.gov/boarddocs/speeches/2000/20000525.htm>>.

²⁵ See <<http://www.federalreserve.gov/boarddocs/speeches/2000/20000525.htm>>.

²⁶ "Comptroller Pokes Holes in Fed's Umbrella," *American Banker*, July 28, 2000.

²⁷ Lee Ann Gjertsen, "Insurers See Fight Looming in OCC Preemption of States," *American Banker*, July 13, 2000.

²⁸ Much of this debate can be found on the web page of the American Insurance Association at <<http://www.aiadc.org>>. Entering "NAIC" into the search field will produce numerous documents on this conflict.

²⁹ See the web page of the Center for Responsive Politics on Gramm-Leach-Bliley at <http://www.opensecrets.org/alerts/v5/alertv5_22.htm>.

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