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THE BANK HOLDING COMPANY ACT:
HAS IT LIVED ITS LIFE?

CARL FELSENFELD*

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1. Introduction

The Bank Holding Company Act of 1956 (BHCA)¹ “regulates the acquisition of state and national banks by bank holding companies.”² The BHCA also regulates the nonbanking activities

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of bank holding companies and their nonbank subsidiaries. The BHCA was enacted and remains on the books for two fundamental reasons: 1) to prevent undue concentration in banking; and 2) to avoid the mixing of banking with other businesses unrelated to banking (generally called "commerce"). Both of these purposes have been or are being discredited, and it is time to ask whether the BHCA should be repealed.

There are different bases for discrediting the two purposes of the BHCA. As for the first purpose, to prevent undue concentration in banking, the BHCA, in combination with other United States banking laws, has successfully kept the U.S. banking system highly diffused, consisting of many small banks. Specifically, the BHCA has impeded the growth of large aggregations of individual banks through holding company systems. For example, there are probably more banks per capita in the United States than in any other country in the world. Robert Clarke, Comptroller of the Currency, has testified that "the United States currently has roughly ten times as many commercial banks per capita as the rest of the G-10 combined." As this Article will demonstrate, a basic  

3. Board of Governors v. Investment Co. Inst., 450 U.S. 46, 49 (1981). BHCA § 4(c)(6) prohibits a bank holding company and its nonbank subsidiaries from engaging in a business other than banking without a showing that the other business, subject to limited exceptions, is "so closely related to banking or of managing or controlling banks as to be a proper incident thereto." BHCA, § 4(c)(6), 70 Stat. at 137 (current version at 12 U.S.C. § 1843(c)(8)).

4. See S. Rep. No. 1095, 84th Cong., 1st Sess. 2 (1955), reprinted in 1956 U.S.C.C.A.N. 2482, 2483 (indicating that primary problems with bank holding company structure were unrestricted ability of bank holding companies to increase number of units and arrangements that allowed banks to engage in non-banking activities); see also Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 46 (1980) (same).

5. G-10 is an abbreviation for the Group of Ten, which consists of the finance ministers and central bank chief executives of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom and the United States. Switzerland attends the periodic meetings (two to three times a year) of the G-10 as an observer.

6. Bank Mergers: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 102d Cong., 1st Sess. 154 (1991) (testimony of Robert L. Clarke, Comptroller of the Currency). Testimony such as this, while undoubtedly correct in principle, requires some examination as to its specifics. Foreign institutions that take deposits in some form and offer various forms of credit frequently do not conform to the United States concept of a commercial bank, and it is difficult to know precisely if such a numerical comparison is appropriate. Germany, for example, has 3604 institutions it calls cooperative banks. Credit Institutions in European Community Are Numerous, Banking Expansion Rep., Sept. 4, 1989, at 2, 2. The United States, on the other hand, has other institutions not generally called "banks," such as credit unions and savings and loan associations, which have broad deposit and lending powers. Therefore, discrepancy in terminology alone may add to the inaccuracy of numerical comparisons.
assumption of the U.S. financial system has been the continued presence of small banks. As a result of this national policy, U.S. banks are dropping out of the running in the international market. The largest U.S. bank, in terms of assets, now ranks only twenty-sixth in international competition.7

Despite, or perhaps because of, the assumption favoring small banks, banking institutions find it increasingly difficult in today's depressed financial markets to produce a continuing stream of profits. These banking institutions perceive mergers as one method of reducing costs relative to total income.8 The result has been a wave of mergers among banking institutions throughout the country, some involving the largest institutions. The consequence of these mergers is a developing concentration of banking resources consisting of fewer and larger banks.

One finds increasing support in the United States for the concept of large banks. Concentration in banking services is increasing on a national basis as the number of banks decreases. The total number of banks has declined from 14,434 in 1980 to 12,338 in 19909 and, over the same period, the number of banking organizations decreased from 12,679 to approximately 9,688.10 In addition, the proportion of domestic banking assets accounted for by the 100 largest banking organizations decreased from 58% in 1940 to 44.4% in 1969,11 and then rose to 62% at year-end 1990.12

To accelerate this concentration in banking services, legisla-

8. For a discussion of whether mergers reduce costs, see infra notes 121-24 and accompanying text.
12. LaWare, supra note 10, at 932. Another statistic that shows the concentration of U.S. banking is that in 1920, branches represented 4% of all commercial bank offices. Klebaner, supra note 11, at 126. By 1989, branches represented 80%. See Statistical Abstract, supra note 9, at 500 tbl. 805.
tion was proposed by the Bush Administration, rejected by Congress and proposed again by the Administration. It is uncertain how the new national concentration patterns will evolve at the state and local levels, or if these patterns ultimately will be acceptable. All that is certain is that unless the law changes, the United States will be measuring new patterns by old assumptions.

As for the second purpose of the BHCA, to avoid the combination of banking and commerce, the BHCA has been less successful. On several levels, banking is combined with commerce and has been both before and after adoption of the BHCA in 1956. It is, nevertheless, regularly asserted when discussing the BHCA that the United States has a long tradition of keeping banking and commerce separate. This Article questions that assertion. Banking has never been separate from commerce. Their interrelation has only varied throughout our history, depending upon the dates and the types of institutions involved. The Bush Administration proposed a new law to make this more apparent and to make the joinder of banking and commerce more available.

With the crumbling of the two BHCA building blocks comes the question of whether the statute is useful. In the thicket of U.S. banking law, the elimination of a complex statute is, other things being equal, a good idea. The BHCA, with its unduly complex system of prohibitions, preconditions, applications and re-

13. For a discussion of the proposed legislation, see infra notes 153-64 and accompanying text.

14. For a discussion of markets, concentration levels and banking institution size, see infra notes 127-52 and accompanying text.

15. See, e.g., Independent Ins. Agents of Am., Inc. v. Board of Governors, 890 F.2d 1275, 1280 (2d Cir. 1989) (observing that major purpose of BHCA was to continue keeping commerce and banking separate), cert. denied, 498 U.S. 810 (1990); Note, The Demise of the Bank/Nonbank Distinction: An Argument for Deregulating the Activities of Bank Holding Companies, 98 Harv. L. Rev. 650, 651 (1985) (same). For a discussion of the banking and commerce issue, see infra notes 165-443 and accompanying text.

16. For a discussion of the proposed legislation, see infra notes 425-42 and accompanying text.

17. See generally Peter C. Hayward, Prospects for International Cooperation by Bank Supervisors, 24 Int'l. Rev. L. 787, 799 (1990) (stating that "[t]he only major country to supervise [bank] holding companies is the United States"). But see E. Gerald Corrigan, The Banking-Commerce Controversy Revisited, FRBNY Q. Rev. 1, 4 (Spring 1991) (statement of President of Federal Reserve Bank of New York) (reporting that Italy and Mexico "within the very recent past" enacted legislation limiting corporate ownership of banks to absolute ceiling of 15% and 10%, respectively).
porting is a particularly likely candidate for elimination. Other things are, however, not equal and the BHCA has always been considered one of the fundaments of bank regulation. To suggest its repeal is an uphill climb, but it seems time for a debate on the subject. The issues raised are serious, even if they are of less than crisis proportions. Such a debate can be engaged in without the sense of imminent disaster that regularly colors bank legislation in the United States and without the need for immediate resolution that may stimulate panic rather than reasoned thought. Questions of politics and emotion, so entwined with our banking legislation and unquestionably present when the BHCA is addressed, might be kept to a minimum. Perhaps the principal espouser of the two rationales described above, the Treasury Department, should take the lead in this investigation.

Part II of this Article deals with the first issue, concentration and size in banking. It discusses, from a historical perspective, the United State’s attitude towards this matter. It places the BHCA among the other statutes and regulations with similar relationships to bank size and concentration. Part III discusses the mixture of banking and commerce, to some extent within banks themselves, but more significantly through holding company systems. Part IV considers the regulation of the banking system without the BHCA burdens and part V suggests some conclusions.

II. The National Attitude Toward Large Banking Institutions

A. The Small Bank

In order to understand the place of the BHCA in the American legal structure, a good starting point is the consideration of the small bank within the U.S. banking system. From the time of the American Revolution, the large bank has been the bad boy of American banking. The tendency towards small banks meant the overall number of banks would be greater. As one commentator noted: “In 1794, a century after the founding of the Bank of England, the British Isles had five chartered banks. In the same year . . . there were eighteen banks in the United States.”

18. See Note, supra note 15, at 651 (criticizing burden of “additional layer of regulation” imposed by BHCA).

19. Klebaner, supra note 11, at 3. As the Supreme Court has explained, “control of commercial banking [in the United States] is diffused throughout a very large number of independent, local banks—13,460 of them in 1960—rather
United States was to have commercial banks at all, the American tradition insisted on keeping them small from the beginning.  

Thomas Jefferson and the Republicans believed that the United States should not have commercial banks at all. Jefferson opposed the first Bank of the United States, asserting that it was unconstitutional. This attitude continued among the Jacksonians concentrated in a handful of nationwide banks, as, for example, in England and Germany.” United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 325 (1963).

This Article does not attempt to trace this tradition to its source other than to observe that the small, locally owned bank was compatible with the adventurous spirit of the new world. See Lynne P. Dotti & Larry Schweikart, Banking in the American West 4 (1991) (“Western values demanded openness and fairness in competition, which translated into unit-bank [no branching] laws from Texas to North Dakota.”); W. Ralph Lamb, Group Banking 28 (1961) (“The spirit of independence and enterprise that characterized a young and rising democracy was reflected in part by the individualistic tradition of American free banking.”).

England began nationwide branching in the nineteenth century to meet the growing needs of business. As one commentator explained: When Lloyds Bank, hitherto confined to the Midlands, absorbed two well-known London houses in 1884, when the Birmingham and Midland Bank took over the Central Bank of London in 1891, and when Barclays united fifteen private firms into one large company in 1896, it was plain that the day of the small local bank . . . was very near its end.

W.F. Crick & J.E. Wadsworth, A Hundred Years of Joint Stock Banking 37 (2d ed. 1938).

20. As one commentator noted: “Most of the farmers and shopkeepers of the new world, and scarcely less the large land owners and conservative merchants, were not disposed to have large scale, corporate, monied organizations at their thresholds.” Bray Hammond, Banks and Politics in America 25 (1957). The basis of the American predilection may have been a national distrust of banking power or, as has also been suggested, simply a desire on behalf of small, local bankers to protect their own competitive positions. See George J. Bento, Federal Regulation of Banking: Historical Overview, in Deregulating Financial Services 1, 8 (George G. Kaufman & Roger C. Kormendi eds., 1986).

21. Jefferson was concerned with the concept of commercial banks as being the creators of money by issuing notes or establishing demand deposit accounts. See Letter from Thomas Jefferson to John W. Eppes (June 14, 1813), in 6 The Writings of Thomas Jefferson 141 (H.A. Washington ed., 1854) (“But it will be asked, are we to have not banks? . . . I answer, let us have banks; but let them be such as are alone to be found in any country on earth, except Great Britain.”). Jefferson later recanted and acknowledged that commercial banks were necessary because the role of manufacturing was at least as important to the national economy as that of farming. See Arthur M. Schlesinger, The Age of Jackson 18 (1946). For a discussion of the method by which banks lend money and thereby create money, see Charles L. Prather, Money and Banking 136-40 (7th ed. 1961).

22. Hammond, supra note 20, at 210. In a letter to Albert Gallatin dated December 13, 1805, Jefferson wrote concerning a national bank: “This institution . . . is one of the most deadly hostility existing, against the principles & form of our Constitution.” 4 Albert J. Beveridge, The Life of John Marshall 172 (1919). Despite such objections, the Supreme Court held that the United States...
sonians. Despite Jefferson's ideals, the earliest period of United States banking, starting immediately after the Revolution, was more monopolistic than any seen since. The first U.S. bank, the Bank of North America, was chartered in 1781, by the United States Congress under the Articles of Confederation. Massachusetts and New York had doubts as to the validity of a charter granted under the Articles and soon granted charters to the bank in their own states. Similar legislation was enacted in Connecticut, Rhode Island and Pennsylvania. The Bank of North America had, for the three years after its chartering, a virtual monopoly in the United States.

A new bank was chartered in Massachusetts in 1784, and, as a result of state legislative acts, four banks were in existence by 1790. For some sixty-five years after the Revolution, the only way a bank could be created in corporate form was by an act of a state or federal legislature. Charters were difficult to obtain and every bank, upon its creation, had a high degree of immunity from threats of new entrants—threats that today are considered important to the concept of competition in banking. Although technically not monopolies, banks within this banking system were of grave concern to Jefferson, who in 1802, expressed his distaste for the "monopoly of a single bank." The Jacksonian

had the implied power to create a bank and to protect it against state interference. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 331 (1819).

23. Andrew Jackson has been reported as saying to Nicholas Biddle, President of the first Bank of the United States: "I do not dislike your Bank any more than all banks. But ever since I read the history of the South Sea Bubble I have been afraid of banks." 1 FRITZ REDLICH, THE MOLDING OF AMERICAN BANKING 164 (photo reprint 1968) (1951).

24. See JOHN J. KNOX, A HISTORY OF BANKING IN THE UNITED STATES 91 (Bradford Rhodes & Elmer H. Youngman eds., 1900) ("The idea that the privilege of banking should be a monopoly to be exercised only by capitalists who were granted exclusive rights by the Government was the one that at first prevailed.").

25. HERMAN E. KROOSS & MARTIN R. BLYN, A HISTORY OF FINANCIAL INTERMEDIARIES 19 (1971) (observing that historians are fairly certain that Bank of North America, located in Philadelphia, was first U.S. money bank); see also 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 216-20 (Herman E. Krooss ed., 1969) [hereinafter DOCUMENTARY HISTORY] (reprinting copy of Continental Congress' resolution to establish first bank).

26. HAMMOND, supra note 20, at 50-51.

27. Id. at 65-66.

28. Id. at 66.

29. 1 REDLICH, supra note 23, at 96-100.

30. Id. at 21. For a discussion of a type of charter provision that spread stock ownership in order to reduce the threat of monopoly, see infra notes 264-89 and accompanying text.
Democrats also condemned the legislatively chartered banks as “wicked monopolies.”

As far back as the 1760s, commentators voiced the economic philosophy that banks should be subject to the same concepts of competition and free enterprise as businesses generally. This philosophy found early expression in the writings of Adam Smith and later in the views of the Jacksonians. Through the early years of the nineteenth century, branch banking also developed and, in combination with the legislatively organized banks, sustained the tendency of the U.S. banking system toward concentration if not monopoly. Movements to liberate banks from the legislative charter were supported by libertarian interests and forcefully opposed by conservatives committed to the charter.

The legislative charter saw its demise in statutory enactments, first in Michigan in 1837 and then in New York in 1838. These banking statutes allowed the formation of banks without legislative action to the extent that the economy could support them. The term given to the system introduced by these statutes was “free banking” under which “all are permitted to embark in [banking] who comply with the rules prescribed.” Other states rapidly enacted free banking acts and the monopoly of the legislatively chartered banks came to an end.

After passage of the free banking acts, the philosophy of the Jeffersonians and the Jacksonians dominated the banking scene. Branching was tightly limited by law and unit banks (banks without branches) became the rule. “Only then did unit banking become one of the characteristic features of our national economy. Whatever the merits or demerits of this kind of banking, one must concede that it fitted well into typical American thinking . . . .” Subject to the restrictions on branching, banks became subject to the play of the market and proliferated. From roughly 1900 into the 1920s, the investment bankers led by J.P. Morgan were hard at work developing concentrations of power. They were more

31. Hammond, supra note 20, at 562.
32. 1 Redlich, supra note 23, at 188.
33. Schlesinger, supra note 21, at 336-37.
34. See 2 Redlich, supra note 23, at 193-94.
39. 2 Redlich, supra note 23, at 194.
40. Id. at 187-90.
than offset, however, by state and federal laws that ensured a banking system composed principally of many small banks, in a number well above that required by an uncontrolled free market.\textsuperscript{41} The laws supported the philosophy of small banks, and, as affairs later developed, ensured that the United States would also have a system of small banking aggregations—bank holding companies as well as banks themselves. The next section reviews those laws.

B. Statutes and Regulations Stimulating Small Banks and Small Banking Institutions

1. The McFadden Act

In discussing statutes and regulations that stimulate small banks and small banking institutions, foremost are the laws that make interstate branching virtually impossible in the United States. It is illegal in almost all states for state banks to branch from one state into another. Exceptions do exist\textsuperscript{42} but they are insufficient to conceal a national pattern prohibiting interstate branching.\textsuperscript{43} National banks are governed in their branching opportunities by the McFadden Act, which prohibits interstate branching.\textsuperscript{44}

In the early years of the national bank system, branching was not a crucial issue. It was not even mentioned in the original National Bank Act.\textsuperscript{45} When the issue arose, however, it incited fury

\textsuperscript{41} See Donald R. Fraser & James W. Kolari, The Future of Small Banks in a Deregulated Environment 10 (1985) ("The fragmented nature of the U.S. banking structure reflects the types of regulations that have been applied to commercial banks throughout the development of the U.S. financial system.").

\textsuperscript{42} Exceptions that have been found, or manufactured, do not alter the nature of the basic rule. See, e.g., In re State Savings Bank, Merger Decision 91-7, 1991 OCC Ltr. LEXIS 73 (Comptroller of the Currency, Apr. 8, 1991) (allowing national bank to branch interstate based upon strained interpretation of Rhode Island law governing savings banks); Sam Zuckerman, Utah Has Opened Door to Interstate Branch Banking, Am. Banker, July 12, 1990, at 1 (discussing Utah's consent to Arizona-chartered bank's entry into Utah banking market).

\textsuperscript{43} See Is Interstate Branching Measure in Massachusetts Beginning of a Trend?, Banking Pol'y Rep., Jan. 18, 1993, at 8, 8 (describing proposed interstate branching legislation and discussing how majority of states continue to prohibit interstate branching but allow interstate banking expansion through acquisitions).


\textsuperscript{45} The National Bank Act was actually two acts. See Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99. The failure to mention branching supposedly represented a lack of interest in the subject
that stemmed from opposition to large banks. In 1898, a bill that mentioned branching was introduced in Congress and approved by the House Banking Committee. A minority report stated: "But our choice must be made between one great 'United States Bank' with ten thousand branches, and on the other hand, ten thousand independent local banks."\textsuperscript{46} The bill was not enacted.

The McFadden Act was a crucial juncture insofar as the size of American banks was concerned.\textsuperscript{47} When the Supreme Court held in 1924 that national banks did not have the power to branch at all,\textsuperscript{48} Congress immediately appreciated that branching rights should be given to the national bank system so that it could compete effectively against state banks. The state banks, in response to the expanding economy of the early twentieth century were branching intrastate as necessary to meet the needs of their customers. Congress, a federal institution not limited in its legislative powers by state boundaries, could have given the national banks any branching power it deemed appropriate.\textsuperscript{49} It could have legislated national branching, and did indeed consider this possibility.\textsuperscript{50}

What Congress did was to give national banks,\textsuperscript{51} and state banks that were members of the Federal Reserve System,\textsuperscript{52} the smallest possible branching power necessary to address the problem. The McFadden Act prescribed limits on branching to au-

\textsuperscript{49} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 334-36 (1819) (stating that power to create bank included power to authorize branches).
\textsuperscript{50} During a debate in 1926, Representative McFadden stated: "[I]t is well to bear in mind that Congress has the power to permit the establishment of nation-wide branch banking systems in this country." 67 Cong. Rec. 2831 (1926).
\textsuperscript{51} See McFadden Act of 1927, § 7, 44 Stat. at 1228 (indicating that existing branches could be continued if maintained for preceding 25 years, if branches were state banks converted to national banks, or if, in limited circumstances, such branching was permitted by state law).
\textsuperscript{52} Id. § 9, 44 Stat. at 1229 (requiring state bank desiring to acquire stock in Federal Reserve bank to relinquish branches outside its municipal limits).
authorized national and state member banks: "[The banks may branch only] within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." The reference in federal law to state law—that is, a national bank can branch within a state only where the state banks can branch—has had a further limiting effect upon size when one considers the nature of state branching laws. In 1926, twenty-two states were "unit banking states" that did not permit branching at all for their state banks and, by derivation, prohibited branching for national banks as well.

In 1933, as state banks continued to broaden their branching activities, the federal authorization was expanded to permit national banks to branch within a state. Again, the authority was measured by the extent to which state banks were permitted to branch.

In more recent years, state bank branching authority has expanded thereby permitting the establishment of larger banks. Today there are only three unit banking states. Despite these changes, however, the inability of state banks to enter into interstate branching, a movement entirely in the hands of the state legislatures insofar as state banks are concerned, has remained essentially unaffected and subject to the McFadden Act's general philosophy on interstate branching.

The concern of Congress throughout its consideration of the McFadden Act was that branching might enable national banks to

53. Id. § 7(c), 44 Stat. at 1228.
59. For insight into whether Congress recently undermined this concept when it created state bank powers that go beyond the powers of national banks still subject to prior approval of the Federal Deposit Insurance Corporation (FDIC), see Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 303(a), 105 Stat. 2236, 2349 (codified at 12 U.S.C. § 1831a (Supp. III 1991)). Such a discussion, however, is beyond the scope of this Article.
grow too large. The concept of monopoly or undue concentration of bank resources pervaded the committee hearings and the congressional debates. As a country, the United States was more than comfortable with the small unit bank; we were committed to it. Whatever benefits might be derived from bigness faded into insignificance when compared to the vision of small, rural, friendly bankers and the local businesses that they understood and serviced. Studies have indicated that banks with branching powers are generally stronger than unit banks and that larger banks, when permitted to enter a previously restricted community, bring in money for local businesses that had been unavailable from the protected rural bank. This concept had little public appeal, instead the public believed, however erroneously, that the local banker was part of, understood, and was dedicated to, the local community.

If Congress had given national banks the power to branch from coast to coast one may reasonably surmise that the face of the banking landscape would be very different today. Under

60. The arch-villain was Amadeo Peter Giannini, Chief Executive Officer of the California Bank of America. See 68 CONG. REC. 5817 (1927). Giannini was said to have been vocal in support of branching rights from the time he heard Woodrow Wilson, President of Princeton University, commend the device in 1908. MARQUIS JAMES & BESSIE R. JAMES, BIOGRAPHY OF A BANK: THE STORY OF BANK OF AMERICA 41-43 (1954).

61. See, e.g., 68 CONG. REC. 2167 (1927) (statement of Rep. Hull) (declaring that "the public interest does not rest in the encouragement of banking monopoly").

62. See Bruce L. Rockwood, Interstate Banking and Nonbanking in America: A New Recipe for an Old Prescription or Why Does the Elephant Banker Wear Tennis Shoes and Waterwings, and Carry an Economist Pocket Diary?, 12 SETON HALL LEGIS. J. 137, 195-96 (1989) (indicating that specific bank failures may not have occurred if banks had been able to branch).

63. See Thomas E. Snyder, The Effect of Merger on the Lending Behavior of Rural Banks in Virginia, J. BANK RES., Spring 1973, at 52 (describing research study that showed that mergers between urban and rural banks did not "materially affect[,] the amount or type of bank credit available in rural areas"). Against arguments that large banks will go into needy neighborhoods and remove their deposits, it has been observed that local banks may be unduly complacent with their protected positions and lend less locally than is appropriate. Id. at 53. If there is a need for funds, it is a natural function for branch banks to supply them. Another study revealed that larger banks with branch offices "had higher loan ratios than unit banks in the same area" and were better able to transfer funds to the areas of greatest need. See Jack M. Guttentag, Branch Banking: A Summary of the Issues and the Evidence, in BRANCHING BY FINANCIAL INSTITUTIONS, supra note 45, at 99, 104.

64. See LAMB, supra note 19, at 39 (indicating that, at its 1916 annual convention, in response to pressure from local bankers, American Banking Association passed resolution opposing all branch banking).

65. See Douglas H. Ginsburg, Interstate Banking, 9 HOFSTRA L. REV. 1183,
this assumption, as national banks branched nationwide, state legislatures would have given equivalent competitive powers to the state banks just as national banks had been given powers in 1927 and 1933 to counter state bank branching. Large banks would thereby have become more dominant and quite possibly could have become the predominant American banking institution. However, as the House Banking Committee stated in 1955:

Repeatedly Congress has been urged to break down the restrictions in the national banking law regarding branches of national banks. Congress has been urged to permit branches, regardless of State bank laws, on a trade area basis, on an interstate or Federal Reserve district basis, and in fact on a nationwide basis. Each time, however, Congress has declared its approval of the American system of local independent and competitive banks, and has left the matter of branches to the States to determine, each State for itself.66

2. The Douglas Amendment

As stated, one dominant goal of the BHCA was to retain the pattern of small, diffused banking organizations that dominated the American banking scene. The BHCA drafters focused on the possibility that many small banks could be grouped together into one corporate framework, thereby providing the levels of size and concentration denied to a single bank under the McFadden Act's branching limitations. During one of the final House Banking Committee hearings preceding BHCA passage, Federal Reserve Board Chairman Martin described the then current, pre-BHCA condition: “Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation.”67

The linchpin of the original BHCA in this respect is section

1286 (1981) (concluding that interstate branching "would be a net improvement over state-by-state banking").


3(d). Often called the "Douglas Amendment" after its sponsor, Senator Paul Douglas of Illinois, section 3(d) provides that no bank holding company can acquire a bank outside the state where its principal banking activities are conducted unless that state specifically authorizes, by statute, such an acquisition.69

The Douglas Amendment is a double-edged sword designed not only to keep bank holding companies small but to protect the unit bank system that might suffer in the face of competition from large, widespread bank holding companies.70 Senator Douglas, somewhat inaccurately, stated his intent that the amendment would:

carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-state holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act.71

The inaccuracy of Senator Douglas' statement has been highlighted by recent events. The McFadden Act, as previously noted,72 does not permit interstate branching for national and other member banks regardless of what the states do. A state statute cannot vary this, but it can enable interstate banking through a holding company system.

Senator Douglas' conception of his amendment was perfectly accurate for almost twenty years during which time no state enacted the kind of interstate authorization contemplated by section 3(d). In 1975, however, Maine introduced authorizing legislation and by statute permitted out-of-state bank holding companies to acquire Maine banks but only so long as Maine banks could enter the other jurisdiction.73 Obviously there was no reciprocal state at that time, and the statute went unused for some years. In 1976,

68. BHCA, § 3(d), 70 Stat. 133, 135 (codified as amended at 12 U.S.C. § 1842(d) (1988)).
69. Id.
72. For a discussion of the McFadden Act, see supra notes 47-64 and accompanying text.
Alaska followed Maine’s lead with a statute of its own. Through the mid-1980s, in response to increasing pressure from expansion-minded banks, various states enacted legislation that, in one way or another, allowed out-of-state holding companies to enter their jurisdiction.

A key issue in the development of interstate banking was settled in *Northeast Bancorp, Inc. v. Board of Governors*. Regional and local banks had been concerned with the specter of toe-to-toe competition from large money-center bank holding companies that might ultimately be authorized to enter their states. In response, some states devised a method of introducing interstate banking gradually. Through a variation on the Douglas Amendment state authorization device, some state statutes allowed entry only to bank holding companies from similarly situated states in one state’s immediate region of the country. The approach, generally called “regional interstate banking,” allowed banking regions to develop in New England, the southeast, the southwest and elsewhere. Thus, states could exclude the gargantuan and frightening international money-center holding companies from such cities as New York, San Francisco, Chicago and Houston. In addition, local banks, through their own holding company structures, could grow in size and strength in order to meet the competition now seen as inevitable.

A few large bank holding companies, together with some of their trade associations, challenged the New England regional interstate banking scheme as involving an unconstitutional asser-

74. 1976 Alaska Sess. Laws ch. 218, § 18 (current version at Alaska Stat. § 06.05.253(e) (1992)).

75. The interstate banking movement was spurred substantially by a movement begun by South Dakota in 1980. The Supreme Court had held that a national bank could export the interest rate of its home state nationwide. Marquette Nat’l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 308 (1978). In response, South Dakota was the first state to invite out-of-state holding companies to establish national banks in South Dakota and to liberalize its usury laws. 1980 S.D. Laws ch. 331 (current version at S.D. Codified Laws Ann. § 51A-2-40 (1990)). Other states, led by Delaware, followed suit in order to attract banking business. See, e.g., 63 Del. Laws ch. 2, § 2 (current version at Del. Code Ann. tit. 5, § 803 (1985)) (allowing out-of-state bank holding company to acquire and hold no more than two in-state banks, subject to specific conditions).

76. 472 U.S. 159 (1985). In *Northeast Bancorp*, the Supreme Court approved the acquisition of an in-state bank by an out-of-state holding company under a state statute found to be within the contemplated scope of the BHCA’s Douglas Amendment. *Id.* at 169-73.

77. *Id.* at 163-64.

78. *Id.* at 164-65 (describing New England’s regional interstate banking statute and referring to similar statutory enactments in other regions).
tion of state power under the Commerce, Compact and Equal Protection Clauses of the Constitution. 79 Rejecting the challenges, the Supreme Court in Northeast Bancorp unanimously upheld the validity of the regional banking concept. 80

Northeast Bancorp broke the dam. States rushed to attract out-of-state holding companies, usually limited in whatever manner the inviting state deemed appropriate, to invigorate the local economy. Small banks, that still had not found security in their ability to compete, could now welcome a purchaser with lined pockets. By April, 1991 forty-seven states and the District of Columbia had some form of Douglas Amendment enabling legislation. 81

There has been no change in the Douglas Amendment since 1956, when it could reasonably be viewed as the equivalent of the McFadden Act's prohibition on interstate branching. Despite this, the national attitude toward large bank holding companies has undergone significant change. As can be seen from the state invitations to out-of-state bank holding companies, the rejection of the large banking institution was replaced nationally with a much more accepting posture.

3. Convenience and Advantage Requirements

The McFadden Act limiting bank branching and the Douglas Amendment limiting the spread of holding companies are the two most significant statutes sustaining the small banking institution. Another noteworthy type of statutory approach is called the "convenience and advantage" requirement or "C&A." This type of provision peels bank statutes and regulations at both federal and state levels. Before a bank can obtain a charter, C&A requires, even under "free banking" statutes, that the bank demonstrate to the charter issuer that the bank serves the convenience and advantage (sometimes referred to as the convenience and needs) of its community. 82 The same requirement exists when

79. Id. at 166.
80. Id. at 178. The attack on the New England compact began in a proceeding before the Federal Reserve Board (Fed), was reconsidered on appeal to the United States Court of Appeals for the Second Circuit, and finally was appealed to the Supreme Court. In these three forums, the objectors failed to win a single vote.
82. The Comptroller of the Currency has promulgated a C&A requirement in chartering national banks. See 12 C.F.R. § 5.20(c)(4) (1992). On a national level, the C&A requirement is a bank regulation, not a statutory requirement.
obtaining permission to open a branch. Indeed, when Congress enacted the Community Reinvestment Act in 1977, it wrote that it "finds that ... regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business." The import of C&A requirements is that a bank cannot obtain a charter in the first instance or, if expansionist by nature, branch under an existing charter if it cannot demonstrate that there is an actual need for a new bank in that location, even when it can satisfy the restrictions of the McFadden Act. C&A requirements protect local banks from competition and, as a result, prohibit greater size.

4. Antitrust Standards In Banking Statutes

Banks and bank holding companies are both subject to the federal antitrust laws. This principle standing alone does not favor small institution banking beyond whatever smallness standards antitrust laws generally impose upon business. The principle is, however, subject to an important qualification: the antitrust standards are applied as prior restraints by both the BHCA and by the Bank Merger Act to bank and bank holding company activities.

This is probably due to the fact that the National Bank Act was modeled after the original New York State free banking act. The C&A requirement, however, is a statutory precondition to obtaining insurance under the Federal Deposit Insurance Corporation Act (FDIC Act), without which national banks, and most state banks, cannot get their charters. 12 U.S.C. § 1816 (Supp. III 1991). Most states also have similar requirements. See, e.g., N.Y. BANKING LAW § 24 (McKinney 1990). New York did not incorporate the C&A requirement into its banking laws until 1932. 1932 N.Y. Laws ch. 118, § 2 (current version at N.Y. Banking Law § 24(1)).


86 In the consumer finance field, and applicable largely to nonbank finance companies, it was noted: "Although the intent of C&A licensing is purportedly to encourage the growth of the size of loan offices to attain economies of scale, misdirected application of the rule can lead to substantial lack of competition." NAT'L COMM'N ON CONSUMER FINANCE, REPORT ON CONSUMER CREDIT IN THE UNITED STATES 114 (1972).


89 Pub. L. No. 86-463, 74 Stat. 129, 129 (1960) (codified as amended at 12...
acquisitions. Although the normal posture of the antitrust laws allows them to be generally imposed after the event to eliminate a discovered illegal situation or occurrence, the banking statutes essentially require that antitrust standards be satisfied before permitting such events as acquisitions, mergers, entry into new businesses and even branch openings. The Supreme Court has held that the standards enunciated in these banking statutes are no different than the antitrust laws from which they were derived; any difference lies in the element of precondition.

a. The BHCA Antitrust Standards

In addition to the specific restrictions discussed, the larger structure of the BHCA also imposes limitations favoring bank smallness. One primary example is the BHCA's antitrust provisions. Section 3 regulates the creation of bank holding companies and the acquisition within existing bank holding companies of additional banks. When enacted in 1956, the BHCA imposed several preconditions on such additional acquisitions. One precondition required the Federal Reserve Board (Fed) to consider whether such acquisition, merger or consolidation would "expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking."


Conditions precedent are not, of course, unknown in commerce generally. See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390-91 (codified at 15 U.S.C. § 18a (1988)) (requiring premerger notification to Federal Trade Commission (FTC) and compliance with mandated waiting period in specified mergers and acquisitions). Hart-Scott-Rodino, however, only requires advance notice to the FTC of larger acquisitions. 15 U.S.C. § 18a(a). The FTC has the power to stop acquisitions it deems to be in restraint of trade, but its prior approval is not required. Id. § 18a(f).


93. Id. § 3(c), 70 Stat. at 135.
As amended in 1966, the foregoing test was replaced by a new test that essentially adopted the standards of section 7 of the Clayton Act and section 2 of the Sherman Act. Thus, a bank holding company, before acquiring a bank, must now prove in advance of the acquisition that the tests prescribed by the antitrust acts are satisfied.

Section 4 of the BHCA addresses the relationship of a bank holding company to any activity of a company other than a bank within the holding company. The current version requires that for approval by the Fed, the other activity must be both closely related to banking and "a proper incident thereto." In defining the latter test, the BHCA states:

In determining whether a particular activity is a proper incident to banking or managing or controlling banks, the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as . . . increased competition . . . that outweigh possible adverse effects, such as undue concentration of resources, [or] decreased or unfair competition . . . .

As with the antitrust standards injected into BHCA section 3(c), the section 4 tests also serve as preconditions. Unlike section 3, however, in applying the more generally written section 4 tests, the Clayton and Sherman Acts standards are not directly used. Instead, the Fed applies tests such as the Herfindahl-

94. Act of July 1, 1966, Pub. L. No. 89-485, § 6(c), 80 Stat. 236, 237 (current version at 12 U.S.C. § 1842(c) (Supp. III 1991)) (amending § 3(c) of BHCA to allow Fed to preclude any merger, acquisition or consolidation that would result in monopoly or lessen competition). The amended § 3(c) does permit acquisitions that violate the adopted standards if the acquirer can show that the probable effect of the transaction in meeting the "convenience and needs of the community" to be served "clearly outweigh[s]" the anticompetitive effects. 12 U.S.C. § 1842(c)(1)(B) (Supp. III 1991). The same language is used in the Bank Merger Act. See 12 U.S.C. § 1828(c)(5)(B) (1988).

95. See United States v. First City Nat'l Bank, 386 U.S. 361, 364 (1966) (describing premerger consideration of antitrust implications); Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255, 1260-61 (5th Cir. 1981) (establishing principle that Clayton Act tests are to be applied under amended BHCA).


98. Id. § 1843(c)(8)(F).
Hirschman Index and the Department of Justice Merger Guidelines.\textsuperscript{99}

b. The Bank Merger Act Antitrust Standards

The BHCA is not the only banking regulation that establishes antitrust standards. The Bank Merger Act imposes additional antitrust considerations on the banking industry. The Bank Merger Act was enacted in 1960, as a result of a perceived concentration of banking resources.\textsuperscript{100} Addressing a different mix of institutions from those covered by the BHCA, the Bank Merger Act is part of the Federal Deposit Insurance Corporation Act (FDIC Act) and is consequently directed to mergers of insured institutions.\textsuperscript{101} In 1966, an amendment to the Bank Merger Act adopted as a precondition to a merger (which includes consolidations, acquisitions of assets and assumption of liabilities) essentially the same antitrust tests that were incorporated into section 3(c) of the BHCA.\textsuperscript{102} Under the current version of the Bank Merger Act, an institution must demonstrate to its governing federal agency\textsuperscript{103} that the merger does not violate the Clayton Act and the Sherman Act.\textsuperscript{104} The Bank Merger Act and the BHCA amendments thus confirm the continuing dedication of the nation to the small bank.


\textsuperscript{101} For a discussion of the body of banking regulation, including the Bank Merger Act, that is distinct from the BHCA, see infra notes 462-78 and accompanying text.


5. **Deposit Insurance**

Another type of banking regulation that tends to promote the small bank structure is the deposit insurance system. Branch banking, with the benefits derived from diversification of product and of geography, was, until 1933, generally perceived as a source of bank safety.\(^{105}\) Earlier deposit insurance systems, as enacted by the states, had been designed principally to protect unit banking structures;\(^{106}\) such insurance was largely unknown in branching states. The legislation that established federal deposit insurance in 1933 continued this pattern. It was intended to protect unit banking and the small bank and to prevent branching with its risks of bigness.\(^{107}\)

6. **Variegated Regulation**

Finally, although certainly not designed for the protection of the small bank, the nation's unfortunate regulatory structure does tend to reinforce the lines among the different institutions and promote smallness.\(^{108}\) The number of regulatory agencies and the way the regulations keep the various banking entities separate and distinct makes establishment of a nationwide banking system difficult.\(^{109}\) For example, to the extent that interinstitutional mergers might tend to reduce the dominance of the small bank, and

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105. See generally Klebaner, *infra* note 11, at 126-27 (discussing growth of bank branches in 1920s).
106. For a discussion of the relationship between deposit insurance and branching, see Benston, *infra* note 20, at 20 (indicating that fractionalized U.S. banking system was major factor in bank failures that prompted need for federal deposit insurance); Charles W. Calomiris, *Regulation, Industrial Structure, and Instability in U.S. Banking: An Historical Perspective, in Structural Chance in Banking* 19, 91 (Michael Klausner & Lawrence J. White eds., 1993) (noting that benefits of branching, such as diversification and coordination, provided alternative stability to banking and thereby minimized need for liability insurance).
109. The federal regulatory structure includes the Comptroller of the Currency for national and district banks, the Federal Reserve for state member banks, the FDIC for state nonmember banks, the Office of Thrift Supervision for federal savings and loans (S&Ls) and the National Credit Union Administration
they are correspondingly inhibited.\textsuperscript{110}

C. The Evolving Picture

The heyday of the U.S. small banking institution may have been 1921, when the number of banks had grown to more than 30,000.\textsuperscript{111} Perhaps it arrived in 1977, when Senator William Proxmire, Chairman of the Senate Banking Committee and champion of the small bank, introduced a bill (subsequently defeated) which would have flatly prohibited any bank acquisition when a bank holding company controlled more than twenty percent of the banking assets of its state.\textsuperscript{112} This mechanistic standard was designed to replace the reasonable man tests of the antitrust laws and the flexible examinations the Fed regularly applied to each bank acquisition application. Senator Proxmire stated that the legislation was necessary because “[t]he largest institutions acquired an increasing share of the Nation’s banking resources over the past several years and State markets are highly concentrated.”\textsuperscript{113}

Since that statement was made, there has been an increase in the presence of the large bank holding company and an apparent shift in the country’s attitude towards the diminishing number of banks.\textsuperscript{114} There is a natural pressure upon banks to grow in size as their customers grow in number. As banks get larger, bank holding companies are able to meet their customers’ needs for larger credit lines and for increasingly diverse and sophisticated products. Banks can better deal with customers who have themselves developed geographic dispersion.

It has long been recognized that the traditional American

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\textsuperscript{111} Lent, supra note 57, at 9 (indicating that number of commercial banks reached all time high of 30,456 in 1921).

\textsuperscript{112} S. 72, 95th Cong., 1st Sess. (1977) (subsequently defeated).


\textsuperscript{114} See Franklin R. Edwards, Concentration in Banking: Problem or Solution?, in Deregulating Financial Services, supra note 20, at 145, 150-51 (discussing changes in banking industry arising from larger bank size and movement toward holding company organizational structure).
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dedication to the unit bank structure has not only weakened banks but has had an adverse effect upon consumers.\(^{115}\) A widespread unit bank structure diminishes bank competition for the consumer because the banks, restricted to their local communities, do not meet each other in face-to-face competition.\(^{116}\) Increased branching within individual states and, more recently, the development of interstate banking through holding company expansion under the Douglas Amendment, have tended to diminish these problems.

Two recent developments, one in foreign commerce and the other in domestic bank mergers, are now accelerating the shift to fewer and larger banking institutions.

1. Developments in Foreign Commerce

In 1956, the United States had five of the top ten banks in the world. By 1978, the number had reduced to three. By 1988, there were none.\(^{117}\) Today no United States bank appears in the world's top twenty; only three rank even in the top fifty.\(^{118}\) Comptroller of the Currency Robert Clarke put it this way: "A nation with a second-rate banking system is a second-rate nation."\(^{119}\) When viewing proposals for change in the bank regulatory system, one of the considerations that is increasingly taken into account is whether a proposal might impede a bank from getting larger and thereby diminish its international capabilities.\(^{120}\)

\(^{115}\) See Lent, \textit{supra} note 57, at 9 (noting that "overbanked" condition leads to too many banks for available business).

\(^{116}\) \textit{Id.} at 15 ("The existence of many independent banks does not assure competition."). For a further exploration of this issue, see Arnold A. Heggies-tad, \textit{Market Structure, Competition, and Performance in Financial Industries: A Survey of Banking Studies, in ISSUES IN FINANCIAL REGULATION} 449 (Franklin R. Edwards ed., 1979) (analyzing various studies of relationship between structure and performance of banks).

\(^{117}\) Jim McTague & Mindy Fetterman, \textit{Banks on the Brink; Rough Times Ahead for USA’s Banks; Bad Loans, Competition Take Their Toll}, USA TODAY, May 29, 1990, at B1.


\(^{120}\) The Department of the Treasury noted in 1981:
The domestic commercial bank share of both national and world markets for banking and financial services has been on the decline in recent years . . . . [W]hile the potential for unrestricted branching leading to a possibly undesirable increase in national concentration in banking can-
2. Cost-Saving Mergers

The United States has experienced a spate of large bank mergers over the last few years. The purpose of these mergers is to reduce costs in a difficult economic period.\textsuperscript{121} Pressed for profits in the face of soft business conditions, banks and their holding companies are seeking to join forces, principally in order to reduce overall costs relative to income. Whether such economies will in fact be accomplished is beyond the scope of this Article.\textsuperscript{122}

An important consideration in any discussion of bank mergers is the situation of a bank facing liquidation. An impending bank failure can be reversed if, through merger or acquisition, a

\begin{quote}
not be ignored, it is not a compelling reason to maintain the current inefficient and inequitable restrictions.
\end{quote}

\textsc{Dep't of the Treasury, Geographic Restrictions on Commercial Banking in the United States: The Report of the President 13 (1981) [hereinafter Geographic Restrictions].}

Meanwhile, one commentator anticipates that Japan, the leader in world banking, will further concentrate its banking structure, leading to fewer and larger institutions. \textit{Herve de Carmoy, Global Banking Strategy: Financial Markets and Industrial Decay 83 (1990).} While Mr. de Carmoy's predictive ability may be open to question, he clearly indicates the direction in which the United States is headed: "Moreover, it appears inevitable that the American banking sector's spectacular world decline will be the prelude to a phase of national concentration, followed ten to twenty years later by the emergence of an American oligopoly." \textit{Id.} at 179.

\textsuperscript{121} The three largest banking mergers in the United States were Chemical Banking Corporation with Manufacturers Hanover Corporation (Chemical to survive with $135 billion in assets); NCNB Corporation and C&S/Sovran Corporation (survivor to be called Nationsbank with $116 billion in assets); and BankAmerica Corporation and Security Pacific Corporation (combined assets of $192 billion). \textit{See} Barbara Rose, \textit{First Chicago's Last Stand,} CRAVIN'S CHI. BUS., Nov. 30, 1992, at 13. For a further discussion of the Chemical Banking Corporation and Manufacturers Hanover Corporation merger, see \textit{infra} note 147.

\textsuperscript{122} A recent study on economies of scale in banking concluded, based upon "limited" analysis leading to a "tentative" conclusion, that "profitability . . . typically decreased as the size of the bank becomes larger." \textsc{Analysis of Banking Consolidation, supra} note 10, at 16. It seems clear that size does result in an economy of scale when modern electronic transfers are at issue. \textit{See} Jeffrey Kutler, \textit{Superregionals Make Their Mark on ACH,} AM. BANKER, Apr. 13, 1992, at 1 (reporting that consolidation of automated clearing house activities can yield economies of scale and other competitive advantages).

Using a more empirical approach, another commentator has noted that large banks are not necessarily more efficient than small banks and, therefore, mergers are not likely to produce efficiency and cost savings. John P. Danforth, \textit{Merger Economies and Recent Trends in Bank Consolidation,} BANKING POL'Y REP., Oct. 7, 1991, at 1, 8; \textit{see also} Richard Layne, \textit{Does Merging Pay? Fed Studies Say No,} AM. BANKER, Feb. 12, 1992, at 1 (indicating that 1992 Fed study provided additional proof that increased profitability is generally not achieved by large bank mergers). But Danforth commented: "The suggestion that merger-related cost savings are unattainable, even in the context of in-market mergers where significant branch consolidation is possible, is simply ludicrous." Danforth, \textit{supra}, at 8.
healthy institution infuses new capital into the failing bank. What can emerge is one stronger bank.\textsuperscript{123} This form of assistance by the stronger to the weaker banks is encouraged by the FDIC as one method of avoiding resort to the insurance fund. A statutory pattern sustains this procedure.\textsuperscript{124} Such statutes reinforce the growing acceptance of the larger bank, particularly when such banks perform public policy functions.

The BHCA had been presented to Congress as a specialized statute designed to protect the small banking institution. As Senator Morse explained: "[T]he Bank Holding Company Act is an antimonopoly measure."\textsuperscript{125} One doubts that a banking statute presented in this manner would receive as warm a welcome today as the BHCA did in 1956. It appears that the public no longer views large banks as generally offensive. Instead the public seems to regard the quality of service as being more important than size.\textsuperscript{126}

D. Markets, Concentration and Banking Institution Size

The relationship between bank or holding company size and the relevant competitive market is in some confusion.\textsuperscript{127} The in-

\textsuperscript{123} For a detailed discussion of this private sector role in resolving the thrift crisis, see Lissa L. Broome, Private Market Solutions to the Savings and Loan Crisis: Bank Holding Company Acquisitions of Savings Associations, 59 FORDHAM L. REVIEW 111 (1991).


\textsuperscript{125} 111 CONG. REC. 20,541 (1965) (statement of Sen. Morse).

\textsuperscript{126} Given our vast banking structure of approximately 13,000 banks, it is inconceivable that the development of more large banks will mean the end of the small bank. If this eventuality should occur, it will necessarily be over decades with ample public opportunity to observe and fine tune. We have seen confirmation of this most clearly when state unit bank structures, i.e., no branching, have given way to statewide branching. Although banks have grown larger, there has been room for the small bank to "continue to fill an important niche in the marketplace." S. REP. No. 167, 102d Cong., 1st Sess. 67 (1991); see also id. (statement of Robert Carswell, former Deputy Treasury Secretary) (describing New York experience in which growth of large banks did not affect health of small independent banks); Gorinson, supra note 47, at 246 (discussing number of reasons why "the potential for the demise of the small bank is greatly exaggerated").

creasing size and decreasing number of banking institutions must inevitably have an effect on market concentration. How this effect will manifest itself on national, state, local or other market levels is uncertain.128

The BHCA plays a significant role in the development of this issue. Under the BHCA, the Fed must evaluate market concentration when reviewing any bank or nonbank acquisition by a bank holding company.129 Although the BHCA uses other statutes for its sources, the necessary considerations of the relevant market and the appropriate level of concentration are based upon the mandates of the BHCA.130 Other laws govern as well, particularly for situations, such as bank mergers or simple internal expansion, that are beyond the ambit of the BHCA. The BHCA, however, sets the tests that must be satisfied for certain crucial events: the creation of a bank holding company; the acquisition by a bank holding company of a bank; and the entry by a bank holding company and its nonbank subsidiaries into new businesses.131

The Senate Report to the original BHCA cites as one of its purposes the prevention of "the concentration of commercial bank facilities in a particular area."132 The current tests of market concentration were inserted into the BHCA with its 1966133 and 1970134 amendments. There are two sets of tests. The first set derives from the 1966 BHCA amendments and is used when evaluating the acquisition of banks. The test applies, with some modifications, the standards established by the antimonopoly provisions of section 2 of the Sherman Act135 and the provisions of the Clayton Antitrust Act protecting competition.136

number of large bank mergers and observing that "current measures of market share are outdated and inadequate").

128. A Fed study examined the effects of the increased intrastate branching powers given to banks. Stephen A. Rhoades, Geographic Expansion of Banks and Changes in Banking Structure, 65 Fed. Res. Bull. 221, 221 (1979). This study concluded that there was increased state concentration and questionable local market change as a result of such geographic expansion. Id.
130. Id.
131. Id.
Under this test, the market defined and the calculation of concentration within the market depend upon the nature of the underlying legal test used, the bank services offered and the customers for those services. Whether an antitrust law is violated turns on a calculus built on factors of bank size, concentration and competition,\(^{137}\) combined with an evaluation of more subjective market qualities such as ease of entry, the reality of potential competitors and whether the firm to be acquired is a market leader.\(^{138}\) None of these factors necessarily has a positive correlation with the others. In a continuing attempt to establish the correct mix, reevaluation is necessary.\(^{139}\) There is no fixed concept of a relevant bank market.\(^{140}\) For example, for Sherman Act monopolies, the Supreme Court has said that any relevant market will serve.\(^{141}\) On the other hand, for Clayton Act purposes, the Court has specifically identified discrete market parameters.\(^{142}\)

The second set of tests is applied to the acquisition of compa-

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137. See Edwards, supra note 114, at 145 (examining whether concentration is necessary result of current financial revolution).


142. See, e.g., United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 361 (1963) (selecting four-county Philadelphia market as “meaningful banking community”). The Court approved a statement of the Comptroller of the Currency that read in part: “With respect to the effect upon competition, there are three separate levels and effective areas of competition involved. These are the national level for national accounts, the regional or sectional area, and the local area of the City of Philadelphia and the immediately surrounding area.” Id. at 361-62.
nies that are not banks. These tests were enacted in the 1970 BHCA amendments. In establishing these tests, Congress was much less specific and supplemented the section 4(c)(8) tests with general language that spoke in terms of "undue concentration of economic resources." The tests offer little specific guidance to the Fed. "Undue" concentration could have several meanings having to do with effects upon markets, combinations of banking and commerce or the aggregation of immense economic power. The targeted market might mean the national, the state or the local banking market.

Federal Reserve Board decisions have so far concentrated upon state and local markets. The law defining an appropriate banking market is, however, in need of refinement. Both the Fed and the Justice Department engage in the quest, sometimes together, sometimes separately. State regulators concerned with

143. For a discussion of the BHCA § 4 tests, see infra notes 96-99 and accompanying text.
146. Id. at 220-28.
149. The Fed's 1982 proposed policy statement indicated that the Fed would withhold the issuance of its own merger guidelines until the corresponding guidelines of the Department of Justice became available. 47 Fed. Reg. 9017 (1982) (proposed March 3, 1982, but never adopted). Furthermore, the Fed "incorporated the current Department of Justice Merger Guidelines into competitive analysis involving the elimination of existing competition." Id. For a discussion of cases in which the Justice Department pursued antitrust actions despite approval of the acquisitions by other bank regulatory agencies, see infra notes 489-91 and accompanying text.
antitrust issues add to the complexities.\textsuperscript{149} Whether the banking industry needs this tandem review and whether the BHCA adds qualitatively to the considerations at issue are two questions to be addressed in this Article. Meanwhile, it must be noted that the Justice Department and the Fed disagree on the definition of a relevant bank market.\textsuperscript{150} The Fed also disagrees with the courts.\textsuperscript{151}

In observing the changes that have taken place and continue to take place in the U.S. attitude towards bank size and banking concentration, this Article does not attempt either to identify a relevant market or to recommend the percentage tests of concentration that should be applied. Instead, the Article observes the development of what can only be perceived as a new set of standards. The comfort that the United States has traditionally experienced with its many small banks is reducing. Ideas of appropriate concentration on the national level are evolving as banks grow larger and fewer.\textsuperscript{152} The effect that these factors will have upon market concentrations is impossible to predict. Whatever uncertainties the regulators already have in applying congressional BHCA tests will be exacerbated as new ideas about bank size and power take hold.

The goal of this Article is to encourage a fundamental reexamination of the BHCA and its usefulness as basic banking law. Should that reexamination occur, the ideas of appropriate market concentration must be tested in the light of conditions vastly different from those that existed in 1956, 1966 and 1970, the three key years for the BHCA.

\textsuperscript{149} See, e.g., \textit{Maine Antitrust Official Criticizes Fed on Antitrust Enforcement in Bank Mergers}, 58 Banking Rep. (BNA) 587, 587 (Apr. 6, 1992) (noting that “state attorneys general will continue to be a strong force in evaluating merger guidelines”).


\textsuperscript{151} See, e.g., \textit{United States v. Central State Bank}, 817 F.2d 22 (6th Cir. 1987) (upholding district court finding that “cluster of banking services traditionally offered by commercial banks” was relevant product market).

\textsuperscript{152} For a discussion of the concentration statistics, see \textit{supra} notes 9-12 and accompanying text.
E. Today—The Treasury Proposal

A wider acceptance, even encouragement, of the large bank and the large bank holding company is becoming part of the national policy. The new view was exemplified in a 1987 interview with George D. Gould, Under Secretary of the Treasury, who called for the creation of large banks that could better compete with Japan.153

As already observed, the dominance of the small banking institution is sustained in this country principally through the McFadden Act and the Douglas Amendment to the BHCA. Other laws join and play their supporting roles. All prevent true national banking and, therefore, inhibit the development of large banks. Although many have advocated the repeal of these laws for years, the Department of Treasury has only recently agreed.154 A 1991 Treasury Department proposal that is supportive of Under Secretary Gould's views, represents the unashamed position of a credible federal department in support

153. See Nathaniel C. Nash, Treasury Now Favors Creation of Huge Banks, N.Y. TIMES, June 7, 1987, at A1 (quoting Mr. Gould, who “acknowledged that any policy promoting the creation of very large financial institutions encounters deep-seated sentiments that date from the founding of the Republic”). Alan Greenspan, who was at the time President Reagan’s nominee for Chairman of the Federal Reserve Board, also endorsed the Treasury plan. Id. He stated that “the plan would provide multibillion-dollar pools of investment capital for a banking industry that was ‘severely undercapitalized.’” Id. The Fed is the agency that enforces the provisions of the Bank Holding Company Act, which tends to sustain the small bank. See id. (“Formation of . . . large banks has been hampered by . . . the Bank Holding Company Act of 1956, which prohibits nonbanking companies from owning banks.”).

Gould was encouraged “that the nomination of Mr. Greenspan could provide an important stimulus for change [because] Greenspan contends that many of the laws restricting commercial banks severely limit their ability to adapt to a changing marketplace.” Id.

Officials at smaller banking institutions feared that these proposed “superbanks” would threaten the existence of the smaller banks, which would be unable to compete with the large banks. Eric N. Berg, Many Bankers Upset By Talk of “Superbanks,” N.Y. TIMES, June 10, 1987, at D1. In response to this reaction, the Treasury Department denied that the government had plans to create superbanks and stated that Gould’s views “were solely his observations.” Id.

154. See Department of the Treasury, Modernizing the Financial System: Recommendations for Safer, More Competitive Banks, Fed. Banking L. Rep. (CCH) No. 1377 (1991) [hereinafter Modernizing the Financial System]. The Treasury Department recommendations carried forward an earlier Reagan Administration position to a similar effect that stated: “Today, the nation’s major corporations and wealthy individuals frequently effect transactions with banks across state lines; it is only the small business and household customers who continue to be deprived of the benefits of a competitive interstate banking system.” GEOGRAPHIC RESTRICTIONS, supra note 120, at 2.
of the large bank. As the Treasury Department proposal explains:

Nationwide banking would lead to safer, more efficient, and more competitive banks, directly decreasing taxpayer exposure to losses. Yet the United States is the only major industrialized country in the world that does not have a truly national banking system.

\[
\text{... . .} \\
\text{The continuing usefulness of branching restrictions is particularly questionable . . . Interstate branching would promote safety and soundness; provide immediate cost savings; and increase consumer benefits.}^{155}
\]

How different this rings from a House Banking Committee Report some twenty-five years earlier:

Controls over the acquisition of banks by holding companies are needed to preserve the traditional American system of locally owned and operated independent banks competing to serve the needs of their communities, and to avoid the dangers of concentrating control of bank credit in a few large institutions.\(^156\)

With respect to the first barrier, the McFadden Act, the Treasury Department has stated: "Congress should authorize a national bank to branch into any state in which the bank's holding company could acquire a bank, which would effectively end the branching restrictions of the McFadden Act."\(^157\) As to the Douglas Amendment, the Treasury proposal simply states: "The Douglas Amendment to the Bank Holding Company Act should be repealed."\(^158\)

The Treasury Department submitted the proposal to Congress in a bill that would eliminate the restrictions of the McFadden Act and Douglas Amendment while encouraging branching and interstate banking.\(^159\) The Banking Committees of both the

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155. Modernizing the Financial System, supra note 154, at 52.
158. Id.
159. S. 713, 102d Cong., 1st Sess. §§ 261-262 (1991) (subsequently defeated); H.R. 1505, 102d Cong., 1st Sess. (1991) (same proposal). This bill, titled The Financial Institutions Safety and Consumer Choice Act of 1991, proposed an amendment to the BHCA Douglas Amendment. The Douglas Amendment prevents "any bank holding company or any subsidiary thereof to acquire ... interest in ... any additional bank located outside the State in which the operations
Senate\textsuperscript{160} and the House\textsuperscript{161} reacted favorably to the proposal. The Senate Banking Committee Report noted: "In light of the technological and other changes that have blurred the distinctions between distinct geographic banking markets, [the proposed Treasury bill] removes outdated restrictions on interstate banking and branching."\textsuperscript{162}

The Treasury bill, however, was subsequently defeated in the House and not even considered by the Senate.\textsuperscript{163} Its reintroduction was recently proposed.\textsuperscript{164}

of such bank holding company's banking subsidiaries were principally conducted." 12 U.S.C. § 1842(d) (1988). The proposed bill would have expressly permitted a bank holding company to control a financial services holding company "in any State." S. 713, § 261. The proposed bill also provided for interstate branching. \textit{Id.} § 262. This provision would have lifted the McFadden Act restriction on nationwide branching. \textit{See id.; see also} 12 U.S.C. § 36 (1988) (current McFadden provisions).


161. H.R. Rep. No. 157, 102d Cong., 1st Sess. 116 (1991). The House Report unambiguously asserted: "The need for this legislation is clear." \textit{Id.} The report explained that "[t]he United States needs a safe, stable and viable banking system." \textit{Id.} To achieve this goal, the report stated that banks must invest prudently. \textit{Id.} Further, "[t]o encourage safe investment, banks should be well-capitalized and closely supervised." \textit{Id.}


163. The defeat of the bill resulted not so much from a conceptual conflict in Congress, but from the failure of the various banking interests to unite behind the Treasury Department's position. The American Bankers' Association's senior lobbyist described it as "lobbying gridlock." David E. Rosenbaum, \textit{An Effort to Salvage Bank Bill, N.Y. Times}, Nov. 11, 1991, at D1, D5.

III. Banking and Commerce

A. Introduction

It was correctly written in 1989, that "[t]he extent to which banks should be permitted to engage in nonbanking activities is a major controversy in this country, attracting the increasing attention of Congress, administrative agencies, and courts."\textsuperscript{165} Whether "commerce" such as automobile manufacturing and hamburger cooking, which are not traditionally considered banking, belong in the same corporate unit as banking is currently a hotly debated issue. Philosophies about banking and its place in our social fabric, enlightened self-interest and unenlightened emotion all play a part when establishing an opinion concerning this issue.

This Article does not take sides in the debate.\textsuperscript{166} Rather, this Article asserts two positions. First, banking and commerce have not been definitively separated in our banking history. Second, there is currently substantial opinion arguing that banking and commerce should be less separate than they are. The leader in this view is, once again, the Treasury Department which has floated a proposal that businesses in "commerce" be permitted to acquire banks.\textsuperscript{167}

B. The Concepts of Banking and Commerce

As a preliminary matter, it is essential to understand what is meant when using the term "commerce" in contrast to "banking." There are two possible approaches. First, the entry of banking into commerce may mean the exercise of an essentially unrestricted ability by banks and their holding companies to engage in any activity. That is, banks could, for example, manufacture automobiles. The following discussion will concentrate on this approach.

\textsuperscript{165} Independent Ins. Agents of Am., Inc. v. Board of Governors, 890 F.2d 1275, 1277 (2d Cir. 1989), cert. denied, 498 U.S. 810 (1990).

\textsuperscript{166} Evidence is accumulating on both sides of the issue. For a summary of some of the economic studies on this topic, see John T. Rose, The Effect of the Bank Holding Company Movement On Bank Safety and Soundness, in The Bank Holding Company Movement, supra note 145, at 151 ("This suggests that direct risk exposure of BHC banks is unaffected by the extent of expansion into nonbanking activities (of whatever type)."").

\textsuperscript{167} For a discussion of this aspect of the Treasury Department's proposal, see infra notes 425-42 and accompanying text. For a discussion of the nationwide banking and branching aspects of the Treasury Department's proposal, see supra notes 153-64 and accompanying text.
Second, an alternative approach assumes that banking is all that a bank can do, but then questions how far the concept of banking may extend. The current controversies under this approach focus on questions such as whether banks can enter the fields of insurance, securities activities, real estate development and data processing. Although the line drawn between (permissible) banking and (impermissible) commerce is a question this Article will occasionally address, it is not a central question in this investigation. 

C. Contrary Views of History

An appropriate starting point appears to be the related questions of whether banking and commerce have been historically separate in the United States and whether, in fact, they are separate today. As to history, one’s view generally seems to derive from one’s opinion on the current Treasury proposal. For example, in a statement made to Congress, a prior Chairman of the Federal Reserve System, the regulatory body that today has the primary authority to keep banking and commerce apart, noted:


170. See, e.g., 12 C.F.R. § 225.25 (1992) (suggesting in proposed amendment to Fed regulations that “activities . . . so closely related to banking [that they] may be engaged in by a bank holding company” include leasing real property and community development investing).


172. The cases and commentaries discussing how far a bank may go in its business of banking are legion. As early as 1857, a New York court advocated implied powers for a bank to give effect to a bank’s express powers. Curtis v. Leavitt, 15 N.Y. 9, 210 (1857). This view of the implied powers of banks was reaffirmed more than a century later. See Ralph F. Huck, What Is the Banking Business?, 21 Bus. Law. 537, 542 (1966) (stating that “the function of a bank and of the banking system is to mobilize money resources . . . and to in turn put the money to work wherever it is needed”); see also Henry Harfield, Sermon on Genesis 17:20; Exodus 1:10 (A Proposal for Testing the Propriety of Expanding Bank Services), 85 Banking L.J. 565, 567 (1968) (approving of Huck’s approach and advocating broad powers for banking institutions). But see To Prohibit Banks From Performing Certain Nonbanking Services: Hearings Before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency, 89th Cong., 2d Sess. 10 (1966) (statement by Library of Congress legal counsel) (asserting that Huck’s liberal construction of banking statutes goes beyond power granted).
"The United States has had a long tradition of legislative separation of banking and commerce."\textsuperscript{173} However, in testimony given before a House Subcommittee, a previous General Counsel to the Treasury Department stated: "There never has been a national policy of separating banking and commerce."\textsuperscript{174} Other commentators on the banking scene have gone down one path or the other, largely depending upon their opinion of what should be done today.\textsuperscript{175} If might makes right, those who assert the traditional separation of banking and commerce clearly have the upper hand.\textsuperscript{176}

In reviewing the history related to the issue of banking and commerce, the next section examines the degree to which banks themselves have been engaged in commerce. The following section then discusses the extent to which banking and commerce have been joined—and also have been separated—through a bank holding company system.

D. Banks Themselves in Commerce

When comparing banks as contrasted to bank holding companies, the limitation of the former to banking activities, and their exclusion from commerce, is more pronounced. History is considerably more supportive of a tradition that banks shall not be in commerce.\textsuperscript{177} Banks, as they have been principally perceived in

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\textsuperscript{175} 1991 Hearings, supra note 174, at 620 (statement of Ralph Nader) (testifying that "one of the longest standing rules of United States banking law [is] the separation between banking and commerce"); Cynthia C. Lichtenstein, Thinking the Unthinkable: What Should Commercial Banks or Their Holding Companies Be Allowed to Own? 67 IND. L.J. 251, 251 (1992) (indicating that when Congress separated banking and commerce in BHCA, it "enshrined [a] shibboleth").

\textsuperscript{176} This upper hand is most evident in the testimony given by witnesses, who were principally representatives of the Fed and other federal regulatory agencies, spokesmen for trade associations and bankers, to Congress between 1943 and 1970 in connection with the federal BHCA, in which almost all took the generally accepted view on separation. For a discussion of this testimony, see infra notes 354-73 and accompanying text.

\textsuperscript{177} The reach of permissible banking activities and the grey area of banking's division from commerce remain, of course, an issue, but, as previously noted, this issue is beyond the scope of this Article. For a discussion of activities falling within this grey area, see supra notes 168-72 and accompanying text.
\end{flushleft}
this country, perform the function of creating money. Originally, they did this largely through the issue of bank notes whose acceptance in the marketplace depended upon the creditworthiness of the banks that stood behind them.\textsuperscript{178} Today, they do it mainly through the creation of demand deposit accounts. Money created in this manner is based upon the ability of banks to honor their obligations to their customers under the deposit accounts in existence between them. Because the solvency of the banks is based principally upon their ability to collect the business and commercial loans owed to them,\textsuperscript{179} the value of bank-created money is fundamentally based upon the country's wealth as measured by its trade and business.\textsuperscript{180}

Banks, in creating money, perform a quasi-governmental function and were from the start "considered as some sort of public utility."\textsuperscript{181} It must be remembered, however, that banks were, and are, typically owned by stockholders. This has led one commentator to conclude that the reality is that "most of the bank founders were then, as later, after profit only."\textsuperscript{182} Profit-driven stockholders are expected to encourage their banks to seek profit from whatever source it legally may be obtained. Assuming some synergy between banking and commerce, the motivation to draw upon its financial benefits would seem to have existed from the dawn of banking. That is, if a bank can make more money by being in the automobile business, it would be motivated economically to go into that business and, unless barred by operation of some external force like a law, would probably have done so. If

\textsuperscript{178} See 1 Redlich, supra note 23, at 6-7 (discussing distinction between early "money banks" and "land banks").

\textsuperscript{179} See KLEBANER, supra note 11, at 25-27. For convenience at this point, the discussion excludes the role of deposit insurance in directly protecting accounts of $100,000 and less, and also in providing, indirectly, some measure of protection to accounts in higher amounts. See, e.g., FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 141(a)(4)(A)(ii), 105 Stat. 2236, 2273-74 (codified at 12 U.S.C. § 1823(c)(4)(A)(ii) (Supp. III 1991)) (restraining FDIC from "insuring" deposits in amounts above legal limit of $100,000).

\textsuperscript{180} This measure is based upon the so-called "mercantilist" theory of wealth. A contrasting theory is the concept of measuring wealth based upon land and property. The two concepts were hotly debated in the early days of the republic, with Madison and the mercantilist theory the clear victor. See Fritz Redlich, Essays in American Economic Theory 107-30 (1944) (arguing that early American banking was based on mercantilist theories).


\textsuperscript{182} 1 Redlich, supra note 23, at 8.
banks make such moves, there is no separation of banking and commerce; if they do not, either the synergy does not exist or there is an external barrier.

The synergy does exist and became apparent to American banks in the eighteenth century. The banks focused their attention on financial services that had a functional relationship to core banking. "[A]s the American economy grew, its individuals and corporations developed more sophisticated financial needs—for insurance and securities, as well as [for] traditional banking services." The benefits that result from the spread of risk, diversity of investment and even geographic dispersals are fundamental and obviously considered by the banking industry. There is undoubtedly also a countervailing tendency for every business to remain in its own sphere. There is no particular reason, for example, that a hardware store should open a lunch counter even if it appears to be profitable. Businesses, however, frequently perceive the benefits of diversification and so diversify. Banks, on the other hand, despite the benefits they may anticipate from being in commerce, have made extreme moves only rarely.

1. Early Prohibitions Against Mercantile Activities

Because a synergy does exist, it is necessary to look for external barriers. The historic source of the division between banking and commerce has been identified as the creation of the Bank of England in 1694. Before that time, bankers such as Italian merchant banking houses and English goldsmiths had engaged in commerce without limitation. The charter of the Bank of England contained various provisions limiting its operations to those generally deemed financial, as contrasted with commercial. For


Subsequent statutes reinforced the restriction of banking business to incorporated banks. See, e.g., The Bubble Act, 1720, 6 Geo., ch. 5 (Eng.). This Act was enacted after the financial disaster of the South Sea Company and the "bubble" its stock seemed to represent. The Bank of England was not, however, as adversely affected by the South Sea Company's bubble as was the First Bank of France, which participated more directly in the scheme and was ruined as a consequence in 1720. KNOX, supra note 24, at 7.
185. See Shull, supra note 184, at 258.
reasons that are not entirely clear, but related to its establishment as a government-sponsored entity, the charter also contained the limitation that the Bank "shall not at any time . . . deal or trade . . . in the buying or selling of any goods, wares or merchandise whatsoever."\textsuperscript{186}

2. \textit{General Approach of Early Bank Charters}

By 1790, the United States had four commercial banks located in the major cities of Philadelphia, New York, Boston and Baltimore.\textsuperscript{187} All were, of course, legislatively chartered. Three of the charters showed a clear intent to limit the banks to banking as contrasted with commerce.\textsuperscript{188}

The first of the new banks, actually chartered before the first Bank of the United States, was the Bank of North America. As noted previously, it was originally created by Congress, but five states also granted charters to this bank.\textsuperscript{189} It was the "first real bank, in the modern sense, on the North American continent."\textsuperscript{190}

The Bank of North America's short congressional charter says almost nothing about its powers and must be read carefully to discover that it is actually creating a bank.\textsuperscript{191} The state enactments largely reiterated the congressional approach and did not delineate the bank's specific powers or prohibitions.\textsuperscript{192} The principal state charter was the Pennsylvania charter enacted on April 1, 1872.\textsuperscript{193} The bank's place in supplying money and credit in the new country was controversial, however, leading to repeal of the Pennsylvania charter in 1785.\textsuperscript{194} The charter was renewed in 1787 as a result of a political compromise; the renewed charter

\begin{footnotes}
\item[186] The Tunnage Act, \textit{supra} note 184, § 26.
\item[187] \textsc{Hammond, supra} note 20, at 66.
\item[188] \textsc{Klebaner, supra} note 11, at 29.
\item[189] \textsc{Hammond, supra} note 20, at 51. \textsc{For a discussion of the Bank of North America, see supra notes 25-27 and accompanying text.}
\item[190] \textsc{Fischer, supra} note 38, at 9. \textsc{Congress had created the Pennsylvania Bank in 1780, but its functions were limited and it was liquidated in 1784. \textit{Id.}}
\item[191] \textsc{See 1 Documentary History, supra} note 25, at 139-44 (reprinting copy of charter).
\item[192] \textsc{See, e.g., Lawrence Lewis, Jr., A History of the Bank of North America 43 (1882)} (indicating that Connecticut's act declared that Bank of North America's notes could be used for payment of state taxes; that Rhode Island's act prohibited counterfeiting of Bank of North America's notes; and that Massachusetts created Bank of North America as corporation according to Massachusetts laws).
\item[193] \textsc{Hammond, supra} note 20, at 51.
\item[194] \textsc{Lewis, supra} note 192, at 55-56.
\end{footnotes}
was a more specific instrument.\textsuperscript{195} For example, the new charter reiterated the English-based prohibition against “buying or selling of any goods, wares or merchandise whatsoever.”\textsuperscript{196} In addition, after a recital of a series of other prohibitions, the charter affirmatively stated that “nothing herein contained shall any wise be construed to hinder the said corporation from dealing in” various described financial instruments and deposits.\textsuperscript{197}

Of the remaining three banks, the Banks of New York and of Massachusetts had similar versions of the provision against buying or selling merchandise.\textsuperscript{198} The third, the Bank of Maryland, had a much shorter charter which, although dealing with various banking functions, did not appear to limit the bank to those functions.\textsuperscript{199}

The first Bank of the United States was chartered in 1791.\textsuperscript{200} The charter, after according the bank the right to take deposits and discount notes, contained the following prohibition:

\textit{And be it further enacted, That if the said corporation . . . shall deal or trade in buying or selling any goods, wares, merchandise, or commodities whatsoever, contrary to the provisions of this act, all and every person and persons . . . who shall have been concerned as parties or agents therein, shall forfeit and lose treble the value of the goods . . . .}\textsuperscript{201}

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\textsuperscript{195} Id. at 73.
\textsuperscript{196} Act of Mar. 17, 1787, 1787 Pa. Laws ch. MCCLXVII, § 5.
\textsuperscript{197} Id.
\textsuperscript{199} Act of Feb. 17, 1790, 1790 Md. Laws ch. V (providing for establishment of bank in “Baltimore-town” with preamble observing that “the experience of commercial nations, for several ages, ha[s] fully evinced the utility of well regulated banks”).
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The Bank of the United States charter also contained limitations stating that the bank’s real estate uses "shall be only such as shall be requisite for its immediate accommodation,"\(^{202}\) and that its banking offices shall be established "for the purposes of discount and deposit only."\(^{203}\) These general charter provisions limiting banks to the banking business, which derived from the Bank of England charter, have served as a model for future bank charters in the United States.\(^{204}\)

Thus, there was a definite strain running through the early federal and state bank charters requiring banks to limit their activities to the banking business. At the same time, however, a substantial number of institutions existed that were permitted to engage in both commerce and banking. An excellent example was the Manhattan Company. Aaron Burr\(^ {205}\) was instrumental in obtaining a New York State charter for the Manhattan Company in 1799.\(^ {206}\) Its principal purpose was to supply New York City with water.\(^ {207}\) The company was authorized to use its surplus funds in any way it chose; it chose to create a bank which existed simultaneously with the water company.\(^ {208}\)

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203. Id. § 7, cl. XV, 1 Stat. at 195, reprinted in 1 DOCUMENTARY HISTORY, supra note 25, at 312.

204. Hammond, supra note 20, at 129.

205. Aaron Burr (1756-1836) held various public offices in the course of his life. He was Attorney General of the United States (1789-1791), a United States Senator (1791-1797) and Vice President of the United States (1800-1804). What would otherwise have been a distinguished public career was marred when he killed Alexander Hamilton in a duel in 1804, and later when he apparently attempted to conquer Texas, make it a separate republic and "dismember" the union. For this latter escapade, he was tried (and acquitted) for treason in 1807. Having been shunned by society for the better part of 25 years, he died in 1836. See CAMBRIDGE BIOGRAPHICAL DICTIONARY 234 (Magnus Magnusson et al. eds., 1990).


207. Symons, supra note 206, at 687.

208. Hammond, supra note 20, at 153-54; Symons, supra note 206, at 687. The operation of the bank by the Manhattan Company was challenged in a quo warranto proceeding. People v. Manhattan Co., 9 Wend. 351 (N.Y. Sup. Ct. 1832). The court held that the company’s unlimited statutory authority gave the company the power to operate a bank. Id. at 388. Hammond noted that "there was nothing grotesque in the union of a water works with a bank." Hammond, supra note 20, at 154-55.
ties, the Manhattan Company subsequently severed its connection with the water company and retained the bank.209

The experience of the Manhattan Company exemplifies other early American ventures that combined banking and commerce.210 For example, the early nineteenth century saw, among others, the creation of the Georgia Railroad and Banking Company, the Morris Canal and Banking Company (New Jersey), the Salem Steam Mill and Banking Company (Massachusetts) and the New Orleans Gas Light and Banking Company.211 The Miami Exporting Company, incorporated in Ohio in 1803, also had "banking privileges."212 American banking was said to have a "rich and lusty history of product diversification."213

209. Hammond, supra note 20, at 155. The Manhattan Company apparently chose to relinquish the water works because of the difficulty of combining banking with that type of commerce, a difficulty shared by many banks of the time that attempted such a combination. Id. By later merging with the Chase National Bank, the Manhattan Company became the Chase Manhattan Bank. Id. at 150.

210. Some of these early charters expressly allowed the entity to engage in banking and commerce. For example, the New York Manufacturing Company received a charter authorizing the company to engage in the "manufacturing of iron and brass wire, and of cotton and wool cards," and also to engage "in the general business of banking." Act of June 15, 1812, ch. CLXVII, § XI, 1812 N.Y. Laws 509, 510. For a discussion of the New York Manufacturing Company, see Hammond, supra note 20, at 161. The company later changed its name to the Phoenix Bank. Krooss & Blyn, supra note 25, at 25.

Other charters did not grant such explicit authority, but a banking-commerce mix was permitted based on a broad reading of the charter language. For example, the Kentucky Insurance Company "was supposed only to insure river boats and cargoes, [but] began also to do an open and profitable discount business." Hammond, supra note 20, at 169. The company's charter authorized the insurance business and also permitted "aiding and assisting individuals engaged in the commerce of this country." Act of Dec. 16, 1802, ch. LXVI, § 24, 1802 Ky. Laws 149, 159. The Ohio charter of the Miami Exporting Company of Cincinnati allowed the president and directors to "dispose of the funds of the company in such manner as they shall judge." Act of Apr. 15, 1803, ch. XXXIII, § 6, 1803 Ohio Acts 126, 131. This language was the basis of the corporation's banking business. Hammond, supra note 20, at 170.

211. Klebaner, supra note 11, at 32.

212. Sumner, supra note 206, at 59. Sumner writes: "The New Hope Delaware Bridge Company is a good specimen of one class of companies which were in fashion at the time. It had a charter for building a bridge across the Delaware river, with perpetual banking privileges, dating from 1812." Id. at 172.

213. Carter H. Golembe Associates, The Future of Bank-Related Activities 14 (Feb. 28, 1973) (unpublished report, on file with the Villanova Law Review). The authors suggest that the origins for this attitude [that banking and commerce should not mix] are to be found in treatises on banking which appeared during the 19th and early decades of the 20th century, which held that the ideal commercial banking institution is one which accepts funds from the public and makes short-term, self-liquidating loans. The fact that American commercial banks never really fitted this pattern—and in-
Bank Holding Company Act

The major forays by the banking system into extreme examples of commerce occurred during the second quarter of the nineteenth century. "It was not uncommon for the 'less financially orthodox' states to charter internal improvement companies to build canals, railroads, hotels, and turnpikes with powers to issue notes in order to raise capital or to require banks to invest in the stocks of various public works projects." Historical accounts of the early nineteenth century, unconcerned with this specific matter, fail to distinguish between banking and commerce to such an extent that it is frequently difficult to determine which of the two is being discussed. On the other hand, the health of banking-commerce institutions was reported to deteriorate with the health of their commercial projects. Integrated commercial and banking institutions went out of style before the Civil War.

In the six years following the panic of 1837, one quarter of the banks in the country—a percentage approaching that of the Great Depression—went out of business. Banks not combined with commerce were also subject to failures, thereby making

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it difficult to correlate bank failure with connections to commerce.\textsuperscript{218}

The "commercial" experience of early banking might be described as a combination of commercial banking with investment banking, meaning, simply, the investment of the bank's funds in business enterprises.\textsuperscript{219} For example, Redlich mentions the early nineteenth century investments by the Philadelphia Bank "in stocks of turnpike and bridge companies."\textsuperscript{220} The combination accomplished through bank investment in subsidiaries, common in early U.S. banking, continued, but to a constantly diminishing extent. The Banking Act of 1933 signalled the end of the practice as a major commercial banking activity.\textsuperscript{221}

3. Free Banking

The free banking system was spearheaded by the seminal New York Act of April 18, 1838.\textsuperscript{222} The specific prohibition against buying or selling merchandise was not part of that statute.\textsuperscript{223} The New York Act provided that a bank could be formed

\textsuperscript{218} The history of banking and commerce should probably be read with the caution of another bank scholar:

The historian searching for materials will usually find no difficulty in obtaining minute accounts of all the wars that have devastated the earth, but will find long intervals of silence in regard to the peaceful developments of mankind. So it is in banking history—the failures and losses seem to have been recorded with painstaking accuracy, but the great and incalculable benefits which banks have conferred upon the business of the country are seldom mentioned.

Knox, supra note 24, at 305.

\textsuperscript{219} For a discussion of early commercial and investment banking, see 2 Redlich, supra note 23, at 304-423.

\textsuperscript{220} 1 Redlich, supra note 23, at 13.

\textsuperscript{221} Banking Act of 1933, ch. 89, § 21, 48 Stat. 162, 189 (current version at 12 U.S.C. § 378 (1988)) (describing purpose of Act to provide safer and more effective use of bank assets, to regulate control and to prevent diversion of funds into speculative operations). The Banking Act of 1933 is also commonly referred to as the Glass-Steagall Act.


\textsuperscript{223} See 1838 N.Y. Laws 245. The Michigan statute took a restrictive attitude toward banks and provided that a bank "shall not directly or indirectly deal or trade in buying or selling any goods, wares, or merchandize." § 26, 1837 Mich. Pub. Acts 85. Such a provision was incorporated into the New York banking law in 1958, not as a general control on the powers of New York state banks, but only as a prohibition against activities that could be conducted in foreign branches of such banks. See N.Y. Banking Law § 96(10) (McKinney 1990) (current version) (stating that foreign branch office may engage in usual business of place in which branch is located except branch may not buy or sell goods, wares or merchandise).
through the incorporation process much like an ordinary business corporation, eliminating the necessity of a separate act of the legislature.\textsuperscript{224} The New York free banking act “spread like wildfire” through the states.\textsuperscript{225} After almost three decades, it served as the model for the National Bank·Act of 1864.\textsuperscript{226} It is generally credited with opening banking to the play of normal business competition.

New York included the following powers clause in its free banking statute: “Such association shall have power to carry on the business of banking, by discounting bills; . . . receiving deposits; . . . buying and selling gold and silver; . . . loaning money; and by exercising such incidental powers as shall be necessary to carry on such business.”\textsuperscript{227} As contrasted with the usual corporate empowerment clause which, except as specifically limited by its own terms, essentially allows a corporation to engage in any form of business,\textsuperscript{228} banks are typically limited to the business powers that are specifically granted to them in their charters and whatever others are incidental thereto.\textsuperscript{229} Thus, a statute providing for a bank and authorizing it to engage in banking is generally accepted as restricting a bank to the banking business, subject to what may be deemed a power “incidental” to banking. “Commerce” is generally not regarded as an “incidental” power.

\begin{itemize}
\item \textsuperscript{224} See § 16, 1838 N.Y. Laws 249.
\item \textsuperscript{225} Redlich, supra note 180, at 159.
\item \textsuperscript{226} National banks were created in 1863. For a discussion of the scope of national banks’ powers, see infra notes 238–42 and accompanying text. For political and public relations reasons, the original national bank enabling statute was called the National Currency Act. The Act went through a process of amendment and was reenacted in 1864 as the National Bank Act, a name it retains today.
\item \textsuperscript{227} See § 18, 1838 N.Y. Laws 249.
\item \textsuperscript{228} See, e.g., N.Y. Bus. Corp. Law § 201 (McKinney 1986) (“A corporation may be formed under this chapter for any lawful business purpose or purposes except . . .”).
\item \textsuperscript{229} “The enumeration of powers granted a bank incorporated under a legislative charter implies the exclusion of all others . . .” 4 Michie on Banks and Banking ch. 7, § 1, at 3 (1990). This principle was applied to New York State banks in O’Connor v. Bankers Trust Co. O’Connor v. Bankers Trust Co., 289 N.Y.S. 252, 269-73 (N.Y. App. Div. 1936), aff’d, 278 N.Y. 649 (1938). The court in O’Connor stated that the exercise of power not expressly granted to a bank is prohibited. Id. at 269. The court, however, noted that even though a statute does not authorize a bank to conduct certain activities, a bank may do so if the activity is necessary for the purpose of conducting the business of banking. Id. at 270. The court held that based on the facts of the case, a bank’s guarantee of a lender was necessary to conduct the business of banking. Id. at 272; see also Saxon v. Georgia Ass’n of Independent Ins. Agents, Inc., 399 F.2d 1010, 1013 (5th Cir. 1968) (holding that banks do not have implied power to act as insurance agents if state did not expressly grant that power).
\end{itemize}
The New York Court of Appeals tested the incidental power clause of the New York banking law in *Curtis v. Leavitt*.230 The North American Trust and Banking Company, chartered in New York under the free banking act, had borrowed money and, to evidence the debt, issued $1,000,000 in bonds whose validity was brought into question.231 The issue was whether, in view of the fact that no specific power to borrow money or issue bonds for that purpose was included in the bank charter, the bank could legally issue those bonds.232 The court held that borrowing money was an incidental power included within the language of the free banking act.233

Later controversies have dealt with whether *Curtis* should be read narrowly or broadly in defining what "banking" entails.234 As previously noted, the issue need not concern us.235 *Curtis* tests the reach of the banking powers granted under the particular statute. It does not suggest that those powers, including their adaptations through the incidental powers clause, extend beyond some form of financial service. It cannot be read to put banks into the farther reaches of commerce.236 The general approach

230. 15 N.Y. 2 (1857).
231. Id. at 17.
232. Id. at 24-25.
233. "The power of the North American Trust and Banking Company to borrow money may be maintained, as an incidental power necessary to carry on the business of banking," Id. at 210. For the text of the pertinent statutory language of the New York Act, see supra text accompanying note 227.
234. See, e.g., Harfield, supra note 172, at 567 (noting that *Curtis* stands for proposition "that there are no rigid limits as to the business of banking and that whatever is consistent with the mobilization of capital, use of credit and provision of financial services to the public—and not affirmatively prohibited by law—is appropriate for the business of banking"); Huck, supra note 172, at 537-38, 540-41 (stating that some commentators contend that term "business of banking" should be read narrowly when considering reach of incidental or implied powers of banks).
235. For a discussion of how far banks can go in the "business of banking," see supra notes 168-72 and accompanying text.
236. *Curtis* also touched on the omission from the free banking act, of the provision prohibiting banks from buying and selling merchandise. *Curtis*, 15 N.Y. at 211-13. The court held that inclusion of such a clause in prior statutes was unnecessary because "[t]he chartered banks would not have possessed the power to trade in goods and stocks, had this restrictive clause been omitted. Their powers were restrained by the nature and purposes of their incorporation." Id. at 211-12; see also Nassau Bank v. Jones, 95 N.Y. 115, 119-22 (1884) (holding that bank could not be stockholder in railroad corporation); Savings Banks Trust Co. v. Comptroller, 475 N.Y.S.2d 607, 607 (N.Y. App. Div. 1984) (stating that bank may not impose service charges "on unclaimed property held in its custody income clearance account"); O'Connor v. Bankers Trust Co., 289 N.Y.S. 252, 271 (N.Y. App. Div. 1936) (noting that in crisis, "a guaranty by one bank of the deposits of another is essential," and "the law does not withhold that
4. National Banks

Following the New York State free banking model, Congress did not include a prohibition against buying and selling merchandise in the National Bank Act of 1864. The National Bank Act did, however, contain a provision much like the New York powers clause quoted above that described the basic banking business and otherwise limited a national bank's powers to those "incidental powers as shall be necessary to carry on the business of banking." The powers of the national bank were clearly restrained

power"), aff'd, 278 N.Y. 649 (1938); N.Y. Op. Att'y Gen. 159, 159-61 (1947) (deciding that banks may not offer travel agency services because such activity was not necessary to business of banking).

237. See 1 JOHN T. MORSE, JR., A TREATISE ON THE LAW OF BANKS AND BANKING § 47, at 152 (1928). Morse discusses the incidental powers of banks: The heart of the law of banking is that a bank has such powers as are requisite for the safe and convenient attainment of the purposes of its incorporation, the chief of these being to provide a place of safety in which the public may keep money and other valuables, and to lend its own money, and that of others deposited with it . . . for a profit, and to act as agent in the remission and collection of money.

Id. at 155 (footnotes and emphasis omitted).

In 1884, the New York Court of Appeals, dealing with the powers of banks under the state's free banking statute, wrote a testament to the separation of banking from commerce that could stand today as a policy statement for the cogency of that position:

The legislature intended by the act in question to inaugurate in this State an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure and solvent depositaries for the custody of such moneys as were needed for current use by the business public. The solvency of these institutions was guarded by special provisions and limitations in the act authorizing their incorporation, and has ever since been the object of sedulous care, both on the part of the legislature and of the courts. The language employed in the act defines their power and duties, and excludes by necessary implication a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statute.

Nassau Bank, 95 N.Y. at 121 (citations omitted).

238. See National Bank Act of 1864, ch. 106, 13 Stat. 99. In 1962, a prohibition of this type was included in the Federal Reserve Act as a limitation on the powers of foreign branches of national banks. Federal Reserve Act of 1962, Pub. L. No. 87-588, § 25, 76 Stat. 388, 388 (codified as amended at 12 U.S.C. § 604a (1988)). The provision was based on the assumption that the bank itself could not engage in such merchandising operations. Although seeming to expand the powers given to foreign branches to make them competitive abroad, the statute implicitly limited their powers.

from a wide foray into "commerce." 240

The restriction of national banks to banking and their exclusion from commerce generally may be considered a constitutional truism. Chief Justice John Marshall maintained that the power of the national government to create banks was one of "the great objects for which the government was framed," within the realm of "a national government with sovereign powers." 241 If Congress were to include "commerce" (say, the ability to operate a fried chicken franchise) within the powers of national banks, one would have to search out its constitutional foundation. 242 Individual states, however, are not dependent upon the Federal Constitution for their power to create banks. In this sense, there is greater potential for state banks to mix banking and commerce.

5. State Bank Activities

The state bank system, at least until the FDIC Improvement Act of 1991, 243 consisted of some fifty separate legal jurisdictions, each bound by its own set of laws. In theory, if the State of X believed that its banks should engage in automobile manufactur-

240. Many decisions limit the reach of the incidental powers clause. See, e.g., Arnold Tours, Inc. v. Camp, 472 F.2d 427, 438 (1st Cir. 1972) (holding that incidental powers clause does not authorize travel agency business); Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc., 399 F.2d 1010, 1013-14 (5th Cir. 1968) (ruling that incidental powers clause does not authorize unlimited insurance agency business by bank).

More recently, the Comptroller of the Currency interpreted a national bank's powers broadly enough to permit it to write annuities. Interpretive Letter No. 499 to Goodhue County National Bank, 1990 OCC Ltr. LEXIS 1 (Feb. 12, 1990). Other and larger banks have built upon this power. See Linda Corman, NCNB, Citibank Selling Annuities: Delving into Market Despite Insurer's Legal Challenge, AM. BANKER, May 31, 1991, at 7 (noting number of large national banks that were entering annuities market despite opposition from insurance companies).


242. Though there may be little basis in the Constitution to support the idea of banks engaging in commerce, national banking activity in general finds ample support. See, e.g., Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 303 (1935) ("The broad and comprehensive national authority over . . . revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, [and] to regulate commerce with foreign nations and among the several States . . . ."); United States v. Kay, 89 F.2d 19 (2d Cir. 1937) ("In . . . making appropriations for the general welfare, Congress is not confined within the scope of the delegated powers but must merely act in furtherance of general or national . . . purposes."); vacated, 303 U.S. 1 (1938).

ing, it could pass a statute to that effect and no contrary federal regulation, at least prior to 1991, would have been able to trump it.\textsuperscript{245}

In the twentieth century, state banks have been active in exploring ways to add to bank powers. These advances have centered around activities that lie in the broad grey area somewhere between banking and commerce. Most recently, there have been bold advances in increasing banks' insurance activities.\textsuperscript{246} A study by the FDIC provides authority for the proposition that state banks may engage in insurance, securities and real estate activities beyond the extent permitted to national banks.\textsuperscript{247} The study also reveals that in 1987, eleven states permitted their banks to buy stock in other businesses; of these, seven permitted controlling interests to be acquired.\textsuperscript{248} According to the study, this power has been used principally to put banks into the real estate business, a business that is unquestionably closer to banking than, say, automobile manufacturing.\textsuperscript{249}

\textsuperscript{244} Id. Of course, for purposes of federal deposit insurance, the FDIC has always had a continuing, strong oversight role in ensuring that no insured bank (which essentially means all commercial banks) at the state level presents an undue risk to the fund. See 12 U.S.C. § 1828 (1988) (governing regulations for insured banks). Activities, therefore, must be evaluated for their risk potential. See, e.g., 52 Fed. Reg. 245 (1967) (reporting that Fed withdrew proposed regulation that would have prohibited state insured banks from engaging in real estate activities). This role requires independent action by the FDIC, and it seems quite impossible to predict how the FDIC would react to automobile manufacturing or hamburger frying by state banks.

\textsuperscript{245} This description of a dual banking system is somewhat idealized. It has been observed that the federal legal overlay is so pervasive that in reality the states cannot be considered the equivalent of a second and competing system. See Henry N. Butler & Jonathan R. Macey, The Myth of Competition in the Dual Banking System, 73 CORNELL L. REV. 677, 678 (1988) ("Federal preemption and uniformity, rather than competition and diversity, are the legal norms in banking regulation."); Ginsburg, supra note 65, at 1150-51 ("Since FDIC insurance is a practical necessity, Congress can regulate uniformly by conditioning FDIC insurance upon compliance with desired norms."). Moreover, one author devotes an entire chapter to the "Causes of the Growth of State Banks" but does not mention state bank expansion into commerce as a significant possibility. Geo. E. Barnett, State Banking in the United States Since the Passage of the National Bank Act 79 (J.H. Hollander et al. eds., 1902).

\textsuperscript{246} See Citicorp v. Board of Governors, 936 F.2d 66, 75 (2d Cir. 1991) (holding that Fed does not have authority to regulate or define state bank's subsidiary insurance activity), cert. denied, 112 S. Ct. 869 (1992).


\textsuperscript{248} Id. at 2-3.

\textsuperscript{249} Id. at 1. Since 1987, the Fed has been considering a regulation that would deem real estate investment as "closely related to banking" under BHCA § 4(c)(8). Such a regulation, if promulgated, would in all likelihood be encoded at 12 C.F.R. § 225.25(b)(25). A telephone conversation with Victor Saulsbury,
Even within a bank holding company subject to and regulated by the BHCA, a state bank has had full freedom, up until the 1991 FDIC amendments, to engage in whatever activities are authorized by its chartering state.\textsuperscript{250} The Fed has traditionally taken the position that it does not have to use, or does not choose to use, the power to affect or control the activities of state banks in a holding company system.\textsuperscript{251} The reach of the states' power here, and the position of Congress in not fully separating bank holding company activities from commerce, was summed up in a recent case:

There can be no doubt that the Bank Holding Company Act is "intended to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity." \textit{What is less clear}

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\footnotesize
\textsuperscript{250} This sweeping statement is subject to qualifications that do not detract from the rule. For example, this power does not permit the perpetration of fraud on the BHCA as may have been committed in Citicorp, 71 Fed. Res. Bull. 789 (1985). Citicorp was applying to the Fed, pursuant to § 3 of the BHCA, for approval of Citicorp's acquisition of American State Bank of Rapid City, a state bank chartered under the laws of South Dakota. \textit{Id.} The Fed denied the application because the Fed found that Citicorp's primary purpose in acquiring the state bank was to evade the BHCA's prohibition against national banks participating in the insurance industry. \textit{Id.} at 791. The Fed noted that American State Bank of Rapid City was of limited value to Citicorp as a banking concern and that South Dakota law permitted state banks to provide insurance coverage on a national scale. \textit{Id.}

\textsuperscript{251} See Merchants Nat'l Corp., 73 Fed. Res. Bull. 876, 878 (1987) (noting that "[i]n the Board's view, the nonbanking provisions of section 4, do not apply to limit the direct activities of holding company banks, except where the record demonstrates the type of evasion described in the \textit{Citicorp/South Dakota} case"). Under its "operating subsidiary" principle, the Fed has similarly disclaimed responsibility for subsidiaries of banks in bank holding company systems that are performing functions directly accorded to the parent banks by the state. 12 U.S.C. § 1843(c)(1)(C) (1988). A subsequent Fed attempt to retreat from this principle was rejected by the courts. See Citicorp v. Board of Governors, 936 F.2d 66, 75 (2d Cir. 1991) (concluding that Fed's view that BHCA did give it control over subsidiaries was "an entirely untenable construction"), \textit{cert. denied}, 112 S. Ct. 896 (1992); Independent Ins. Agents of Am., Inc. v. Board of Governors, 890 F.2d 1275, 1280-81 (2d Cir. 1989) (applying same principle to subsidiaries of banks that were performing functions other than those given to their parent banks), \textit{cert. denied}, 498 U.S. 810 (1990). The present position—that banks and their subsidiaries are not under BHCA power restrictions—would seem to comport with the BHCA's history. The House would have preferred to regulate both bank and nonbank subsidiaries in their product offerings. The Senate, however, ultimately prevailed in its view that only nonbank subsidiaries, and only those that are not in turn subsidiaries of bank subsidiaries, should be controlled. Golembe, \textit{supra} note 213, at 5.

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is the extent to which Congress has decided to implement that policy. [Petitioner] contends that Congress has required a nearly complete separation of banking and nonbanking activities . . . . The Board believes that Congress has not gone so far. In its view, Congress . . . did not wish to displace the traditional authority of state and national bank chartering authorities to determine what nonbanking activities could appropriately be engaged in by banks that are subject to their jurisdiction, even though such banks were owned by a bank holding company under the jurisdiction of the Fed.252

The states’s freedom to allow banks to enter into commerce, however, has not been used for over a century to empower banks to engage in the more extreme examples of commerce such as automobile manufacturing. The first expression of the banking-commerce separation as a banking principle seems to have occurred in 1943 when the Federal Reserve Board of Governors wrote in their Annual Report: “Accepted rules of law confine the business of banks to banking and prohibit them from engaging in extraneous businesses such as owning and operating industrial and manufacturing concerns.” 253

6. Conclusion on Banks and Commerce

It is fair to say that banking tradition since the middle nineteenth century has honored a division between banks and commerce. Before then, the division barely existed although its traces can be observed.

With the FDIC Improvement Act of 1991, Congress has strongly reinforced this separation.254 The powers of national banks, excluded from commerce since their creation, were not expanded. As for state banks, their potential was reduced to correspond more closely with that of national banks. The essence of section 303 of the FDIC Improvement Act provides that an insured state bank may not engage in an activity prohibited to a national bank unless:

(1) the [Federal Deposit Insurance] Corporation has de-

253. 1943 FED. RESERVE SYS. BD. OF GOVERNORS ANN. REP. 36.
terminated that the activity would pose no significant risk to the appropriate deposit insurance fund; and
(2) the State bank is, and continues to be, in compliance with applicable capital standards prescribed by the appropriate Federal banking agency.255

To the extent that state banks have been perceived as leaders in new banking activities, this new prohibition represents a strong deterrent to further activity.256 It may even be looked upon as a threat to the dual banking system.257 Requiring FDIC approval as a prior restraint upon state bank activities heightens the federal supervision over state activity and diminishes whatever incentive the state banks have to explore new businesses.

Depending upon the season, Congress blows hot and cold on expanded activities for state institutions. The savings and loan crisis provides a striking example. In 1982, the Senate noted that "[t]he potential benefits to thrifts that can be gained by authorizing the powers . . . are illustrated by the experience of state-chartered savings and loan associations."258 In 1989, however, Congress concluded: "The results [of expanding the investment powers of the thrift industry] were tragic."259 However one may have felt about the state banks and their potential for leading the industry down new paths, it is obvious that Congress has most recently laid a heavy hand upon their options. For the foreseeable future, it seems unlikely that there will be any bank advancement into the farther reaches of commerce.260

255. Id. § 303, 105 Stat. at 2350.
256. See, e.g., ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, STATE REGULATION OF BANKS IN AN ERA OF DEREGULATION 3 (1988) ("The Commission finds that the nation’s dual banking system has many benefits for citizens, states, and local communities. That system has been conducive to state experimentation, banking innovation, regulatory competition, and vitality in both banking regulation and banking activity.").
257. See Melanie L. Fein, NEW BANKING LAW IMPOSES RESTRICTIONS ON STATE BANK POWERS, BANKING POL’Y REP., Feb. 3, 1992, at 1 (describing FDIC Improvement Act of 1991 as “a significant erosion of the dual banking system”).
260. It is not inconceivable, however, depending upon the outcome of political pressures, that banks will engage in securities and insurance activities. Whether such activities are better defined as “banking” or “commerce” is beyond the scope of this discussion.
E. Bank Holding Companies and Commerce

When a bank's holding company or a nonbank subsidiary of that holding company engages in nonbanking "commerce" activities, the "commerce" is separated from banking. Banking is conducted in one corporate entity; commerce in another. The separation is defined by the systems of law that deal with corporate entities generally and with banking in particular.\footnote{261} If one is convinced that banking has been historically separate from commerce, the issue then becomes whether their separation through a holding company system honors that historical principle.

The United States has looked more favorably on the relationship of commerce and banking through the holding company structure than when commerce is engaged in by the bank itself. One reason for this more liberal view is that in a bank holding company, the character of the bank itself as an independent entity does not change. It remains a bank, chartered by either state or federal law; and that law continues to define and limit its powers. The holding company umbrella affects only the relationship of the bank with its sister corporations.

That relationship, however, is not insignificant. The bank may favor its sister over other entities, may lend to its sister improvidently, may cause its trusts to invest in its sister's stock or may lend to its depositors to buy that stock. Moreover the market, customers of the bank and even the bank regulators, may view the holding company and the bank as a single entity.\footnote{262} Recently, these facets of a bank holding company structure have been criticized as indirectly threatening the bank insurance system and perverting the "safety net" of federal regulation designed to protect banks but not their nonbank sister corporations.\footnote{263} The distorted relationship, if multiplied through numer-
ous bank holding company systems, may become systemic and affect the economy at large.

This issue, however, does not affect the current discussion. We are exploring the contribution of history to the issue of whether banking and commerce are separated in the U.S. banking system. This section describes the banking history leading to the development of the bank holding company structure and then considers the modern implications of this history.

1. Early Ownership of Banks

A primary goal of early bank statutes was to promote widespread individual stock ownership. The first Bank of the United States was chartered by Congress on February 25, 1791. One person could not own more than 1000 of the authorized 25,000 shares.264 The second Bank was chartered on April 10, 1816. One person could not own more than 3000 of the authorized 350,000 shares.265 One senior official currently active in bank holding company issues has interpreted these early restrictions on stock ownership as demonstrating the intent of Congress to separate banking from commerce.266 Restrictions on the proportion of the Banks' capital that could be owned by one person did not, however, imply any intent to separate banking from commerce. Rather, the restrictions reflected the congressional intent that the Banks create money and establish credit for the benefit of the community at large instead of merely for the interests of a few.267

A review of the legislative debates supports the proposition that Congress was not concerned with possible banking-commerce mixtures. The debates on the establishment of the first Bank took place between February 1 and 8, 1791, primarily in the House of Representatives. The major subjects debated were the

267. In the 18th century and the first half of the 19th century, banks generally were established by legislative charter. For a discussion of this banking history, see supra notes 24-34 and accompanying text. Ownership was typically closely held and the banks were operated with due regard for the needs of their stockholders. See generally CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 19-51 (1914) (discussing economic interests of wealthy colonists in Revolutionary War era).
general desirability of moving the economy of the new country towards one based upon paper and credit as contrasted with land and specie\textsuperscript{268} and the constitutionality of the Bank as an instrument of the United States.\textsuperscript{269} Other debated issues included the relationship of the federal government and the states,\textsuperscript{270} the benefits of the Bank to farmers as contrasted with manufacturers,\textsuperscript{271} the benefits to specialized regions of the country\textsuperscript{272} and the powers of chartered as contrasted with unchartered institutions.\textsuperscript{273} The debates do not contain discussions of concern about banking-commerce mixture.

Throughout the debates, there was a continuing apprehension that the Bank might achieve monopoly power and be used for the benefit of specific groups. Congress was particularly concerned about this risk because the Bank was specifically established to accomplish certain functions generally perceived to be governmental, primarily the creation of money and credit. Congress addressed this concern by requiring the Bank's stock to be widely dispersed and not closely held.\textsuperscript{274}

The debates on the establishment of the second Bank focused primarily on what the legislature could learn from the failure of the first Bank.\textsuperscript{275} In addition, Congress discussed the

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\item \textsuperscript{268} See 2 Annals of Cong. 1894-95 (1791).
\item \textsuperscript{269} Id. at 1893. The Supreme Court resolved the dispute over the constitutionality of the Bank in \textit{McCulloch v. Maryland}. See \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819). Mr. Chief Justice Marshall, in his famous analysis of the implied powers of Congress, noted that "[t]he government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means [to do that act]." \textit{Id.} at 409-10.
\item \textsuperscript{270} See 2 Annals of Cong. at 1897, 1917.
\item \textsuperscript{271} Id. at 1891.
\item \textsuperscript{272} Id. at 1919, 1938.
\item \textsuperscript{273} Id. at 1917, 1920.
\item \textsuperscript{274} See \textit{Joseph S. Lawrence}, Banking Concentration in the United States: A Critical Analysis 257-88 (1930) (discussing anti-monopolistic provisions in first bank charters). In connection with the charter of the first national bank, Alexander Hamilton had also expressed concern that the traditional one share, one vote principle of corporate law might render "a combination between a few principal stockholders, to monopolize the power and benefits of the bank, too easy." David L. Ratner, \textit{The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"}, 56 Cornell L. Rev. 1, 6 (1970). This view is additionally supported by the fact that the stock of both the first and second Banks could be transferred freely after its original issue. \textit{See Act to Charter the Bank of the United States}, Feb. 25, 1791, ch. X, 1 Stat. at 195, \textit{reprinted in 1 Documentary History, supra} note 25, at 311; \textit{Act to Charter the Second Bank of the United States}, Apr. 10, 1816, ch. 44, 3 Stat. at 272, \textit{reprinted in 1 Documentary History, supra} note 25, at 469.
\item \textsuperscript{275} See 28 Annals of Cong. 671 (1814).
\end{itemize}
issues of regional perks, state rights, the constitutionality of the Bank and the policy behind an economy based upon credit. A significant portion of the debate dealt with the capitalization of the second Bank. In these capitalization debates, a statement by a Representative Wright confirms that the reason for limiting subscriptions had nothing to do with the separation of banking from commerce. As Mr. Wright was reported to discuss:

Mr. W. was desirous not only that the United States but that the agricultural interest of the country should hold a due proportion in the stock of this bank, to keep it out of the exclusive control of the commercial class, which he intimated was generally in the British interest, and not a few actually connected in business with British houses. The landed and manufacturing interest, he argued, ought to be at least equally interested in the bank with the commercial.

The quotation additionally suggests that, at least in Representative Wright's perception, commerce and banking had a synergistic and beneficial connection so long as it was commerce of the many, not of the few.

The history of the state bank chartering mechanisms reveals a similar picture. Initially state banks were established only through legislative charter. This process quickly gave rise to concerns about the risks of closely held ownership if not outright monopoly. In response to this concern, state legislators added

276. Id. at 247-48 & 596.
277. Id. at 242, 244, 612, 1004, 1023.
278. Id. at 1022 (stating that lack of constitutional basis was one reason for termination of first Bank's charter); id. at 260 (same). But see id. at 1340 (asserting that "inexpediency" of first Bank was cause of its rejection).
279. Id. at 239-40, 248 & 592.
280. Id. at 592-94, 599-602, 609-11, 628, 635 & 1015.
281. Id. at 614-15. Throughout the debates on both the first and second Banks, the question regularly arose whether the Banks should be owned by the United States government or by private interests. The conclusion, for both Banks, was that they should be owned by both, but that the Banks should represent a national interest and not the interests of any lesser group. Id. at 1144. In response to an argument that the Banks should be entirely owned by the government, one legislator stated that private interests should be represented because "those institutions which derive their principle of action from private interest are more active in pursuit of their object, more vigilant in the detection of error, and more likely to prosper, than those which derive their impulse from the spirit of patriotism and have in contemplation solely the public good." Id.
282. For a discussion of the establishment of banks through legislative
charter provisions to ensure widespread stock ownership. The same type of provision can be found in the free banking acts that replaced state legislative charters. For example, the New York State free banking Act of 1838 contained a provision stating that "any number of persons may associate to establish [banks]."

The original national bank statutes also reveal a focus on widespread ownership and a lack of concern regarding banking-commerce activities. When national banks were first authorized in 1863 and 1864, the statutes gave private individuals the right to form an unspecified number of such banks. These banks were clearly private in nature. Congress gave little consideration to the issue of bank ownership, stock dispersion or other activities of the stockholders. One provision which might be found to address the issue of nonbanking activities gave the Comptroller the power to deny a proposed bank its charter if "the shareholders thereof have formed the same for any other than the legitimate objects contemplated by this act." An objection to this provision was denied, and the language included in the Act. Such language exists in the current version of the United States Code with the most minor of modifications. It seems plain that

283. See Hammond, supra note 20, at 574 (describing New York bank legislation which included provision requiring that in any new bank charter, commissioners appointed must "assure that fair opportunities were afforded the public to purchase stock").

284. Act of April 18, 1838, ch. 260, § 15, 1838 N.Y. Laws 249. For a discussion of the New York Act, see supra notes 222-33 and accompanying text. Experience prior to the New York free banking act had "led men to inquire into the propriety of granting, by legislative enactment, exclusive rights to any class of men whatsoever." 2 Jabez D. Hammond, The History of Political Parties in the State of New York 489 (1842). The Act, however, did not provide for the review of the incorporators or the stockholders by any regulatory authority. This type of regulatory authority was provided in 1864. See National Bank Act of 1864, ch. 106, § 34, 13 Stat. 99, 109-10 (requiring all associations incorporated under Act to make detailed reports to Comptroller of the Currency).

285. See Act of Feb. 25, 1863, ch. 58, § 5, 12 Stat. 665, 666 (stating that "associations for carrying on the business of banking may be formed by any number of persons"). For a further discussion of the statutory establishment of national banks, see supra notes 238-42 and accompanying text.


289. See 12 U.S.C. § 27(a) (1988) ("[T]he comptroller may withhold [authorization] whenever he has reason to suppose that the shareholders have
early restrictions on stock ownership had nothing to do with concerns over the combination of banking and commerce.

2. Corporate Ownership of Banks

The typical bank holding company structure consists of corporate ownership of one or more banks. These systems were infrequent before the twentieth century. One early example is today’s Chemical Bank, which was created in 1824, by a chemical manufacturing company. Whether the structure was a true holding company is unclear. In the 1800s, “[t]he development of the bank holding company depended upon amendments to state laws to permit one corporation to purchase the stock of another corporation. In 1889 New Jersey became the first state to grant this power to corporations.”

The corporate bank holding company developed slowly through the first quarter of the twentieth century. By 1929, twenty-eight such holding company systems were reported, thirteen of them in the Pacific states. Although information is scant, possibly deliberately so, at least some of the early holding companies were involved in businesses other than banking.

formed the same for any other than the legitimate objects contemplated by [the Act]."

290. Another type of bank holding company is one owned by an individual rather than a corporation. Few historical accounts exist to establish just when individuals, or groups of individuals, began to perceive the benefits of owning as many banks as they chose or could afford. Fischer, supra note 38, at 5. This form of bank holding, known as chain banking, did exist in the early nineteenth century and continues today without significant legal interference. For a further discussion of bank ownership by individuals, see infra notes 401-05 and accompanying text.


292. See id. (noting that “Chemical Bank was chartered . . . as a subsidiary of a chemical manufacturing company”). A Chemical Bank house document adds the following: “The manufacturing company operated separately from the bank, which was run by a small group of New York City merchants. Under a liberalized banking law passed in 1838 and modified in 1840, the bank’s directors liquidated the chemical company and obtained a charter in 1844 to engage exclusively in banking.” Chemical Bank Corp., History Capsule, Chemical Bank 1824-1986 1 (1986) (on file with the Villanova Law Review). For a further discussion of Chemical Bank, see Sumner, supra note 206, at 171.


295. In view of the use of bank holding companies to circumvent bank branching limitations, early developments of the idea tended to be conducted in some secrecy. Id. at 97.

296. Foremost was Transamerica Corporation, “organized in 1928 by A.P.
One possible source of information on early bank holding companies and their banking-commerce activity is the congressional hearings of the time. A search of these documents, however, reveals little such discussion. For example, in fifteen hearings by the House Banking Committee in 1930 on the subject of Branch, Chain, and Group Banking the subject of banking and commerce was barely touched upon. \( ^{297} \) These Hearings are a logical place to look because group banking and chain banking were the most common structures to utilize the holding company format. "Chain banking [is] characterized as the ownership of more than one bank by an individual or small group of individuals." \( ^{298} \) "Group banking, the early term for a bank holding company, is the ownership of two or more banks by a separately organized corporation . . . ." \( ^{299} \) One reason why there was so little discussion of banking and commerce may be that the Hearings were focused on concentration in banking rather than on its relationship to commerce. \( ^{300} \) Another possibility is that group banking was, at the time, such a recent phenomenon that an in-depth study hardly seemed called for. \( ^{301} \)

Where the subject of holding companies and commerce was mentioned in these 1930 Hearings, albeit indirectly, it does not


297. Branch, Chain, and Group Banking: Hearings Before the House Comm. on Banking and Currency, 71st Cong., 2d Sess. 1017-21 (1930) [hereinafter 1930 Hearings] (statement of John W. Pole, Comptroller of the Currency). Not once in the entire statement, entitled "Banking and the New Financial Era," did Comptroller Pole mention the subject of banking and commerce. Such discussion was also missing from the scholarly work of the time. See, e.g., H. PARKER WILLIS & JOHN M. CHAPMAN, THE BANKING SITUATION 381-93 (1934) (discussing group banking and chain banking, but failing to address the combination of banking and commerce); see also KLEBANER, supra note 11, at 183 (stating that during that time period, use of holding company device by banks "hoping to expand their nonbank operations" did not suggest any danger).

298. Savage, supra note 293, at 23.

299. Id. at 24.

300. See, e.g., 1930 Hearings, supra note 297, at 1038 (statement of Robert O. Lord, President, Guardian Detroit Union Group) ("Banking, too, has felt the pressure toward larger units and closer interconnection of units . . . .").

301. See id. at 1020 (statement of John W. Pole, Comptroller of the Currency) (stating that "[w]e have witnessed within the last two years an amazing development in the concentration of control over groups of unit banks"); see also id. at 1681 (testimony of Max B. Naum, Vice President, Citizens National Bank, Bowling Green, Ky.) ("Group banking is only two years old—less than that.").
appear that the participants perceived the existence of any problems, although the evidence is equivocal. Comptroller Pole, for example, testified:

Where a State corporation is permitted to buy stock, I think it would be legal for it to purchase stock in a national bank with which it might be affiliated. As to whether or not I would deem that advisable if carried too far, is of course another question.\textsuperscript{302}

The dominant interest of Congress, as well as the testifying witnesses, was clearly the use of group or chain banking, both of which allowed for the purchase of multiple banks, as a substitute for branching. Bank branching was limited by both federal and state law and was, as now, largely prohibited interstate.\textsuperscript{303} The concerns raised included discussions of: whether group banking might supply a quasi-legal substitute for illegal branching; whether ownership of banks in separate states might evade the interstate branching prohibitions; whether competition would be increased or decreased; and whether bank holdings would result in undue aggregations of power and affect interest rates.\textsuperscript{304} The fact that the parent corporation or other controlling interest could engage in "commerce" was occasionally assumed\textsuperscript{305} but it was a distinctly subsidiary issue. Congress certainly displayed no indication that it was improper or dangerous to combine banking and commerce within the same holding company structure. This lack of concern, however, might be related to the tendency of these corporate holding companies to limit their nonbanking activities to those closely related to banking. When on occasion a witness was asked whether he was interested in engaging in activities outside the banking field, the answer was generally "No."\textsuperscript{306}

\textsuperscript{302} Id. at 142 (statement of John W. Pole, Comptroller of the Currency).
\textsuperscript{303} For a discussion of interstate branching, see supra notes 42-66 and accompanying text.
\textsuperscript{304} See 1930 Hearings, supra note 297, at 23-27 (opening statement of Comptroller of the Currency Pole).
\textsuperscript{305} Id. at 755. For example, during the testimony of L.E. Wakefield, Vice President of First Bank Stock Corporation, Minneapolis, Minn., Representative Letts asked: "You are authorized to do almost any kind of business, are you not?" Mr. Wakefield replied, "Well, sir, I have not read what the lawyers put into the powers of that corporation; but I imagine they will let you do almost anything." Id. at 954.
\textsuperscript{306} For example, the Articles of Incorporation of Northwest Bancorporation, a bank holding company, were printed in the record. They contained a corporate authorization to "organize, incorporate, and reorganize subsidiary corporations for all lawful purposes." When E.W. Decker, representing the corporation, was asked whether the corporation had "engaged in any business up to
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In 1938, the Federal Reserve conducted a study of group banking and again seemed unconcerned about any potential problems with the combination of a commercial nonbanking corporation with a bank or banks.307 Another study, performed in 1941, also did not address banking-commerce combination issues.308 Once again, this lack of concern may be based on the banking-related nature of the nonbanking activities. For example, in a 1955 Fed survey of the eighteen federally registered bank holding companies, only one of the companies was engaged in manufacturing and one was in the fish business—and they may have been the same company. The rest were in bank-related businesses, assuming that insurance is bank-related.309

These hearings and studies reveal an apparent lack of concern during the early development of bank holding companies about the mixture of banking and commerce within these corporate structures. Congress was, however, developing a belief that the bank holding company structure should be regulated by federal legislation. The next section discusses the major bank holding company legislation enacted to address this concern.

3. The Bank Holding Company Act

The statute that today restricts bank holding companies from combining banking and commerce within the same holding company structure is the Bank Holding Company Act of 1956.310 The

this time other than the banking business and the handling of securities," he answered, "No." Id. at 848; see also id. at 1501 (testimony of James A. Bacigalupi, Vice Chairman of the Advisory Committee of Transamerica Corp.) (stating that Transamerica would not take over other lines of industry "unless they are akin to banking").


308. C.E. Cagle, Branch, Chain, and Group Banking, in BANKING STUDIES 113 (Board of Governors of the Federal Reserve System ed., 1941). This study described the development of bank holding companies. Id. Observing that "little is known about the early development of group banking," the study reported that a bank holding company existed as early as 1892 and that the "extensive development" of the device occurred between 1927 and 1930. Id. at 134. As of December 31, 1939, however, there were only forty-one "group banking systems" in the United States. Id. at 136; see also WILLIS & CHAPMAN, supra note 297, at 373 (reporting that "group banking as we know it today has had its principal growth since the end of 1926").

309. See 1955 Hearings, supra note 67, at 92 (listing one company as being involved in "[m]etals manufacturing," and another as being involved in "catching, processing, and selling fish").

following subsections discuss the predecessors of the BHCA and show how this restriction on banking and commerce activities developed.

a. 1933 Bank Holding Company Legislation

The Banking Act of 1933 contained the first federal bank holding company legislation.311 Section 19 of the Act required a bank holding company, defined in section 2(b) as an entity owning or controlling one member bank,312 to receive a permit from the Federal Reserve System before voting its bank stock.313 The Fed, before issuing a permit, typically required the applicant to enter into an agreement that provided, among other matters, that it would not engage in the securities business.314 The Fed did not prohibit entry into other forms of commerce.

The 1933 legislation resulted in little meaningful control of bank holding companies for three reasons. First, it applied only to ownership of member banks. Nonmember banks were also in holding company structures but were not regulated. Second, if a state bank was a member bank and wanted to join an unregulated bank holding company, it could simply give up its voluntary “member” status. Third, holding companies could control member banks without formally voting their stock and, therefore, never need the permit. Because of these concerns, Congress considered corrective legislation for many years.315 In 1966, well after passage of the BHCA, the voting stock permit provisions were finally repealed.316

312. Id. § 2(b), 48 Stat. at 162 (emphasis added). “Member” banks are those banks that are members of the Federal Reserve System.
313. Id. § 19, 48 Stat. at 186-88. Section 19 also provided that a national bank’s holding company must have assets (excluding its bank stock) that were worth at least 25% of the par value of the bank stock, presumably to give support to the national bank. Id.
314. Cagle, supra note 308, at 133. Cagle noted that the purpose of the requirements and conditions was “that the holding company and its subsidiary banks and other organizations [should] maintain a sound financial condition and proper operating principles.” Id.
315. See Regulation and Control of Bank Holding Companies: Hearings on S. 2398 Before the House Comm. on Banking and Currency, 82d Cong., 2d Sess. 9 (1952) [hereinafter 1952 Hearings] (statement of J.L. Robertson, Member, Board of Governors of Federal Reserve System) (“Over the past 15 years Congress has considered numerous bills on this subject [of the bank holding company].”).
b. 1933 Securities Legislation

In another part of the Banking Act of 1933, generally referred to as the Glass-Steagall Act, Congress included provisions limiting the opportunity of banks and companies affiliated with member banks to engage in securities-related activities.\footnote{317} Although permitting all banks and their affiliates to engage in the brokerage of securities, the Glass-Steagall Act: prohibited member banks from owning stock in most, but not all, commercial enterprises;\footnote{318} prohibited member banks from underwriting most, but not all, commercial securities\footnote{319} and limited the ability of affiliates of member banks to underwrite commercial securities.\footnote{320}

The Glass-Steagall Act is occasionally referred to as creating a wall between banking and commerce.\footnote{321} This separation did not occur. The Act was a congressional reaction to the Great Depression and the high-flying securities speculations engaged in by some banks and their affiliates during the 1920s that Congress considered partly responsible for the economic crisis.\footnote{322} It was a consequential, but limited, statute designed to correct a particular problem: commercial banks doing investment banking. In areas where Congress did not consider problems to exist, it left both banks and their affiliates free to act, even in the securities business. Nonmember state banks were not—and are not today—prohibited by the Glass-Steagall Act from owning "commercial" enterprises.

\footnote{317} Banking Act of 1933, § 5, 48 Stat. at 164-66.
\footnote{318} Id. § 16, 48 Stat. at 184-85.
\footnote{319} Id. §§ 5, 16, 21, 48 Stat. at 164-66, 184-85, 189.
\footnote{320} Id. §§ 16, 20, 32, 48 Stat. 184-85, 188-89, 194.
\footnote{321} See H.R. Rep. No. 387, 91st Cong., 1st Sess. 2 (1969) ("This principle [the separation of banking and commerce] has been embodied in Federal law since the Glass-Steagall Act was passed in 1933."); Thomas E. Wilson, Separation Between Banking and Commerce Under the Bank Holding Company Act—A Statutory Objective Under Attack, 33 CATH. U. L. REV. 163, 166 (1983) ("After the enactment of the Banking Act of 1933 (Glass-Steagall Act), the principal federal law that reestablished a rigid separation between banking and commerce, . . . banking and nonbanking enterprises remained relatively separate until World War II."); Mary J. Wetmore, Note, Banking and Commerce: Are They Different? Should They Be Separated?, 57 GEO. WASH. L. REV. 994, 996 (1989) ("[T]he Glass-Steagall Act [is] the principal federal law reestablishing the rigid separation between banking and commerce.").
\footnote{322} See Investment Co. Inst. v. Camp, 401 U.S. 617, 630 (1971) ("The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act.").
c. The Federal Reserve Board and Transamerica

Between 1933 and 1956, the Fed was the prime moving force in favor of restrictive bank holding company legislation. Its first major push occurred in 1943 when, in its Annual Report to Congress, it argued that, under “accepted rules,” bank holding companies should not be permitted to own institutions in commerce.\(^{323}\)

The focus of the Fed’s dissatisfaction appears to have been the unregulated activities of Transamerica Corporation. In 1943, the Chairman of the Federal Reserve Board first expressed disapproval to a congressional committee about the “improper and unsound policy” of Transamerica Corporation “in their purchase of stock of banks and in their purchase of stock of corporations that have nothing whatever to do with banks.”\(^{324}\) Transamerica, the largest bank holding company of its time, by 1953 controlled forty-one percent of all banking offices and thirty-nine percent of all bank deposits in a five state area.\(^{325}\) The company also owned a number of other businesses engaged in commerce: a manufacturer of tractors, aircraft parts and metal products; the producer of ferrous and nonferrous casting and forgings; an operator of foundries and producer of diesel engines, oil burners and other equipment; and a fishery operator.\(^ {326}\)

In 1952, the Fed prosecuted Transamerica for violating section 7 of the Clayton Antitrust Act.\(^ {327}\) The allegations in the antitrust case were based upon a perceived lessening of competition through the purchase of stock in many other banks, not the commerce-related activities of the bank holding company. The latter was not against any law. The concerns verbalized by the Fed dealt with the concentration of banking power.\(^ {328}\) A verdict of guilty in a departmental hearing,\(^ {329}\) which ordered divestment of the banks and not the subsidiaries in commerce, was reversed by the Third Circuit.\(^ {330}\) The Third Circuit opinion does not even

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\(^{325}\) Transamerica Corp. v. Board of Governors, 206 F.2d 163, 167 (3d Cir.), cert. denied, 346 U.S. 901 (1953).


\(^{327}\) Id. at 368.

\(^{328}\) Id. at 391.

\(^{329}\) Id. (directing Transamerica to divest all of its stock in certain banks).

mention the subsidiaries involved in commerce.\textsuperscript{331}

Transamerica’s ownership of companies engaged in commerce, however, was a continuing controversy between the Fed and Transamerica. A key objective in the Fed’s attempts to obtain bank holding company legislation was to prevent Transamerica from engaging in both banking and commerce.\textsuperscript{332} One commentator stated that “the Bank Holding Company Act was aimed principally at this institution, though public officials deny it.”\textsuperscript{333} It is likely that the commerce activities of Transamerica’s operations provided additional incentive to the Fed to initiate the Clayton Act proceeding.

d. The Bank Holding Company Act of 1956

In a 1938 special message to Congress, President Roosevelt asked for legislation imposing greater curbs upon bank holding companies.\textsuperscript{334} The concept fell upon receptive congressional ears and, while hearings were not held until 1947,\textsuperscript{335} they were regularly held thereafter by both the Senate and House Banking Committees until enactment of the BHCA in 1956.\textsuperscript{336} The reason

\textsuperscript{331} See, e.g., id. at 170 (“We conclude that since the Board failed to find the facts as to lessening competition and tendency to monopoly in the areas of effective competition actually involved, its order is unsupported by the necessary findings and cannot stand.”).

\textsuperscript{332} See M. Walton Cloke, Transamerica Denies Stifling of Competition in Banking Field, N.Y. TIMES, Mar. 17, 1950, at 35, 38 (“[L]egislation under consideration was ‘aimed’ at Transamerica” and “would require the company to give up some of its holdings in non-banking enterprises.”).

\textsuperscript{333} FISCHER, supra note 38, at 104.

\textsuperscript{334} S. Doc. No. 173, 75th Cong., 3d Sess. 8-9 (1938). President Roosevelt recommended that Congress enact at this session legislation that will effectively control the operation of bank holding companies; prevent holding companies from acquiring control of any more banks directly or indirectly; prevent banks controlled by holding companies from establishing any more branches; and make it illegal for a holding company . . . to borrow from or sell securities to a bank in which it holds stock.

\textit{Id.}

\textsuperscript{335} Providing for Control and Regulation of Bank Holding Companies: Hearings on S. 829 Before the Senate Comm. on Banking and Currency, 80th Cong., 1st Sess. (1947).


In 1953, 14 companies, who identified themselves as representing 72% of the bank officers and 62% of the resources of the bank holding companies registered with the Fed, presented a statement to the House Banking Committee regarding holding company legislation. 1953 Hearings, supra, at 143 (statement of
for the delay may have been that commercial firms did not begin to acquire subsidiary banks in any significant number until after the end of World War II in 1945.\textsuperscript{337} Bank holding company activity increased through the post-war period and, while not a fundament of the banking system until much later, increased substantially over what had existed in 1930.\textsuperscript{338} By 1950, if one adopts a broad definition of "commerce," most of the holding companies were engaged in some form of it.\textsuperscript{339} In 1950, the Chairman of the Federal Reserve Board maintained that when a bank holding company applied for a permit, the Board would examine the degree to which commerce or other business was conducted within the holding company system.\textsuperscript{340} Despite the apparent restriction, there was concern that bank holding companies would circumvent the regulation.\textsuperscript{341}

A first step in structuring comprehensive federal bank holding company legislation was to define which holding companies would be regulated. A bill introduced and reported favorably by the Senate Banking Committee in 1947,\textsuperscript{342} first established a principle that would continue in all proposed bank holding company legislation until 1970. Mere ownership of a bank would not cause the controlling entity to be considered a regulated bank holding company.\textsuperscript{343} Until 1970, Congress required that the subsidiary banking entity meet some designated size requirement.\textsuperscript{344}

\textsuperscript{337} See Wilson, supra note 321, at 166 ("After the war . . . commercial and industrial enterprises began with increasing frequency to acquire banks.").

\textsuperscript{338} For a discussion of the early development of bank holding companies, see supra notes 290-309 and accompanying text.

\textsuperscript{339} The Fed reported that as of December 31, 1950, 28 groups were considered bank holding companies. 1952 Hearings, supra note 315, at 13. Of these 28 groups, 20 received voting permits and of those 20, 16 owned a total of 79 nonbanking organizations. Id. at 13, 31. These organizations included businesses closely related to banking, like "life insurance" and "home financing," and others more separate, like "fish catching and processing." Id. at 13.

\textsuperscript{340} See id. at 3-4 (requiring that subsidiary bank operate at least one branch in order for owner to be considered bank holding company).

\textsuperscript{341} See id. at 3-4 (requiring that subsidiary bank operate at least one branch in order for owner to be considered bank holding company.

\textsuperscript{342} See S. Rep. No. 300, 80th Cong., 1st Sess. 1 (1947) (reporting that "need" for S. 829, regulating bank holding companies, was "both pressing and clear").

\textsuperscript{343} See id. at 13 (28 groups).
The size requirement changed in various ways with subsequent legislation. Under the 1947 bill, if the subsidiary bank had at least one branch the holding company was a regulated bank holding company.\textsuperscript{345} This provision was amended in 1949 to require at least four branches.\textsuperscript{346} A further amendment, introduced in 1950, stated that for a company to be a "bank holding company" it must either own or control two or more banks or one bank with four or more branches.\textsuperscript{347} In the 1956 BHCA, the requirement was that the entity own at least two banks.\textsuperscript{348}

Throughout the hearings, the proposed bank holding company legislation had two stated objectives. The first was to prevent undue concentration in banking, and to prevent banks from getting too large and wielding inordinate power through the holding company system. The second was to prevent the mixture of banking and commerce. Restricting coverage of the legislation to multiple bank systems or to banks with branches clearly honors the first goal. But the legislation does not honor the second objective when it permits a company that owns a single bank to engage in commerce.\textsuperscript{349} As the Second Circuit observed "what is less clear is the extent to which Congress has decided to implement that [second] policy."\textsuperscript{350}

Banks, through their holding company systems were, as has been discussed, well involved in commerce. Congress was pressured by various interests led by the Fed to prohibit such a relationship.\textsuperscript{351} The proposed bills, however, did not contain such comprehensive provisions. Bank holding companies owning one bank while engaging in commerce were consistently defined out of bank holding company legislation from the enactment of the

\begin{thebibliography}{9}
\item \textsuperscript{345} Id.
\item \textsuperscript{346} 1950 Hearings, supra note 336, at 12.
\item \textsuperscript{347} Id. at 1.
\item \textsuperscript{348} BHCA, ch. 240, \$ 2(a), 70 Stat. 133, 133.
\item \textsuperscript{349} This concept was actually incorporated into the 1933 bank holding company legislation that limited such companies to those that owned member banks, thereby leaving the owners of nonmember banks free of regulation. See Banking Act of 1933, ch. 89, \$ 2(b)(1), 48 Stat. 162, 165-66.
\item \textsuperscript{350} Independent Ins. Agents of Am., Inc. v. Board of Governors, 890 F.2d 1275, 1280 (2d Cir.), cert. denied, 498 U.S. 810 (1990).
\item \textsuperscript{351} For example, the following testimony appears in the 1953 Hearings:
\begin{quote}
Senator Goldwater: We find, for instance, packing companies in banks, mercantile companies in banks. . . . The legislation should be written, then, to limit banks to banking. . . .
\end{quote}
Mr. Robertson: That is one of the purposes.
\end{thebibliography}

\textit{1953 Hearings, supra note 336, at 24-25} (statement of J.L. Robertson, Member, Board of Governors of the Federal Reserve System).
BHCA in 1956 until its 1970 revision.\textsuperscript{352}

The \textit{principle} that banking and commerce should not be combined was, however, almost unanimously espoused throughout the hearing process.\textsuperscript{353} Several points should, however, be made relative to this. First, the principle was derived from laws previously adopted for \textit{banks}, not bank holding companies.\textsuperscript{354} Federal Reserve Chairman Thomas B. McCabe made this apparent in a report to Congress that provided: "Under the bill, the bank holding companies would be put in practically the same situation in this respect as the banks which they control."\textsuperscript{355} The possibility that bank holding companies would present considerations different from banks was barely touched upon. There clearly was insufficient appreciation of the fact that, whatever the validity of the argument that banks and commerce had traditionally been separated in the United States, the argument had considerably less weight and introduced new considerations when applied to bank holding companies. Banks and bank holding companies are not the same. Bank holding companies, through their corporate structure, do separate banking from commerce. To an undue degree, however, banks and bank holding companies were treated by Congress as if they were the same.\textsuperscript{356} The behavior of Congress, as contrasted with the rhetoric, demonstrates that it was the dangers of size that were paramount in its eyes, not the mixing of

\begin{itemize}
\item \textsuperscript{352} See Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101, 84 Stat. 1760, 1760 (changing requirement to include companies that own "any bank").
\item \textsuperscript{353} See, e.g., 1950 Hearings, supra note 336, at 59 (discussing danger of bank involvement in nonbanking activities).
\item \textsuperscript{354} See id. (noting that commerce restrictions applied to banks, not bank holding companies).
\item \textsuperscript{355} Id.; see also 1952 Hearings, supra note 315, at 20 (statement of J.L. Robertson, Member, Board of Governors of the Federal Reserve System) (stating that "[o]ur banking laws have long recognized the desirability of prohibiting banks from engaging in extraneous business" (emphasis added)). This theme runs through the hearings on bank holding company legislation. See 1955 Hearings, supra note 67, at 328 (statement of Rep. Brent Spence, Chairman of the House Banking Committee) ("While you are not a bank you can be considered a bank that doesn't do any banking business."); 1953 Hearings, supra note 336, at 60 (statement of D. Emmert Brumbaugh, President of the Independent Bankers Association of America) ("This bill is designed to forbid holding companies from doing anything that banks cannot do themselves ... ").
\item \textsuperscript{356} "Surely there is no lack of logic in the request that bank holding companies be prevented by effective laws from doing what a bank cannot do under Federal and State banking laws. This is simply applying the good old-fashioned American rule of fair play." 1955 Hearings, supra note 67, at 207 (statement of D. Emmert Brumbaugh). \textit{But see} 1969 Hearings, supra note 70, at 905 (statement of Robert H. Volk, President of Union Bancorp) (distinguishing between banks and their holding companies).
\end{itemize}
banking and commerce. Through the original drafting of the BHCA, a holding company owning one bank without branches, and after its passage, a single bank regardless of the number of branches, were free to engage in commerce through the holding company system. Up to 1970, the only banks held subject to BHCA limitations were banks that presented risks resulting from their size.\textsuperscript{357}

Second, no evidence of loss or bad banking was presented to prove that banking and commerce were dangerous bedfellows.\textsuperscript{358} This aspect of the BHCA was and continues to be based upon congressional speculation. In 1952, Governor Robertson opined that "the very nature of the holding company mechanism makes certain abuses possible and gives rise to certain problems which, we believe, should be considered and dealt with by Congress."\textsuperscript{359} The Senate Report on the 1970 amendments stated: "It is clearly understood that the legislation is to prevent possible future problems rather than to solve existing ones."\textsuperscript{360} The same focus on future prevention existed in 1986.\textsuperscript{361}

Examples of combinations of banking and commerce were occasionally available for examination. For example, in a 1953 Senate Banking Committee hearing, Senator Goldwater stated: "We find, for instance, packing companies in banks, mercantile companies in banks."\textsuperscript{362} There is no evidence, however, that

\textsuperscript{357} For a discussion of the number of subsidiaries required to make an entity subject to bank holding company legislation, see \textit{supra} notes 342-48 and accompanying text.

\textsuperscript{358} It is impossible to know everything that was submitted to Congress. For example, one report listed cases that occurred "not too long ago," cases from the early 1930s and some securities-related cases that the Banking Act of 1933 "aimed at preventing." \textit{H.R. Rep.} No. 609, \textit{supra} note 66, at 4, 5.

\textsuperscript{359} \textit{1952 Hearings, supra} note 315, at 19. The counter-position that when banks enter commerce they acquire strength was then, as now, a contested issue. See \textit{1950 Hearings, supra} note 336, at 155 (statement of Samuel B. Stewart, counsel to Transamerica Corp.) ("May I suggest, gentlemen, that this committee should face the problem squarely and decide, first, whether diversification of assets in a bank holding company is a source of strength and safety to the banks and their depositors or a source of weakness.").

Federal Reserve Board Chairman Thomas B. McCabe testified in 1950 that the bank holding companies then owning nonbanking businesses "might be subjected to strong temptation" to favor those businesses. However, no example of succumbing to temptation was given. \textit{Id.} at 59 (emphasis added).


\textsuperscript{361} See \textit{1986 Hearings, supra} note 173, at 16 (statement of George D. Gould, Under Secretary for Finance, Department of the Treasury) (discussing fear of bank holding company "misuse" of subsidiary banks).

\textsuperscript{362} \textit{1953 Hearings, supra} note 336, at 24.
such combinations hurt the banks, the packing or mercantile companies, or, for that matter, society.\textsuperscript{363}

Given our nation's long and often troubled banking history, examples of irregularities in the operation of bank holding companies do, of course, appear. In Georgia in 1926, a chain banking system collapsed apparently because its owners syphoned off funds into their real estate investments.\textsuperscript{364} One commentator noted that "the head office which exercised control over all of these banks was itself not under the supervision of the banking department because, theoretically at least, it did no banking business."\textsuperscript{365} Instances of this type of abuse are available, but they are not central to the operation of the banking system. They may, on one hand, be considered no more than examples of isolated cases of wrongful behavior that are either inevitable in any large human operation or are controllable through existing bank regulatory devices. On the other hand, such abuses may support the need for a BHCA and the separation of banking and commerce. This core question deserves the discussion it has never received.

Congress dealt with the perceived holding company problem, however, without receiving evidence of real widespread abuse. The general absence of abuse continues. In fact, the Chairman of the FDIC wrote in 1955, that "on the whole, banks owned and directed by holding companies have presented fewer problems as to capital funds, asset condition, and management than have unit banks under independent management and control."\textsuperscript{366} A subsequent Chairman took an even stronger position and actually advocated repeal of the BHCA, a suggestion that was

\textsuperscript{363} See generally 1986 Hearings, supra note 173, at 2 (opening statement of Chairman Barnard) (noting that separation of banking and commerce may be outdated).

\textsuperscript{364} Haynes McFadden, The Chain Bank Crash in Georgia, Am. Bankers Ass'N J., Sept. 1926, at 137.

\textsuperscript{365} Cartinhour, supra note 294, at 87. Cartinhour relates this kind of abuse more to chain banking (ownership by individuals) than group banking (ownership by a corporation). Id. at 89. As later discussed, however, the contemporary equivalent of chain banking is permitted under the BHCA. For this discussion, see infra notes 401-05 and accompanying text.

\textsuperscript{366} Control of Bank Holding Companies: Hearings on S. 880, S. 2350 & H.R. 6227 Before a Subcomm. of the Senate Comm. on Banking and Currency, 84th Cong., 1st Sess. 99 (1955) (statement of H.E. Cook, chairman of FDIC). It was also reported that during the Depression "[t]he failure rate of holding company subsidiary banks appear[ed] . . . to be about one-half that for all banks." Savage, supra note 293, at 90. Furthermore, a bank with greater product diversification had and has the potential of being stronger than a less diversified bank. Litan, supra note 183, at 97.
later softened, possibly in light of political pressures.\textsuperscript{367}

Third, through the years leading to the original enactment of the BHCA in 1956, the proponents of restrictive legislation—comprising almost all the witnesses in the 1950 and 1952 Hearings\textsuperscript{368}—were hard put to find bank holding companies that had actually entered commerce through the holding company device. Indeed, this is probably one reason why no pattern of abuse existed. There simply was not enough activity to represent any tradition.\textsuperscript{369}

The BHCA, as it was enacted in 1956, did not separate banking from commerce. It left companies owning only one bank free from activity restriction.\textsuperscript{370} This provision represents the single most definitive statement by Congress that further separation of bank holding companies and commerce was not required in the absence of actual abuse and the absence of a requirement that they become more separate in principle. Perhaps Congress did see a need for such separation but perceived the risks of combining banking and commerce to be present only in larger institutions. With such an argument, however, the issue becomes size, not the mixture of banking and commerce.\textsuperscript{371}

\textsuperscript{367} See Nathaniel Nash, \textit{FDIC's Chairman Suggests Eliminating Bank-Holding Laws}, N.Y. Times, Aug. 22, 1987, at A1. A pamphlet was published the same year by the FDIC which asserted that “direct regulatory or supervisory authority over nonbanking affiliates is not necessary.” \textit{Federal Deposit Ins. Corp., Mandate For Change: Restructuring the Banking Industry} 95 (1987). Additionally, the pamphlet observed that “[t]he main vehicle for controlling and limiting the activities of affiliated organizations is the Bank Holding Company Act.” \textit{Id.} at 96 n.1.

\textsuperscript{368} See 1952 Hearings, \textit{supra} note 315, at 265 (statement of Senator Tobey) (“[O]nly two organizations appeared here in opposition to this bill.”).

\textsuperscript{369} See id. at 48 (statement of Harry Harding, President, First National Bank of Pleasanton, California). Mr. Harding testified:

As far as engaging in nonbanking business is concerned, there are really only a few, very, very few companies, that engage in nonbanking businesses in a large way. The Equity Corp., which owns the Morris Plan Banks, and Transamerica Corp., particularly. Some of the others do to a lesser degree, but those two organizations do it in a very large way, and practically everybody is agreed on the divestment of nonbanking businesses as something that is essential to protect the banks of the country.

\textit{Id.}

\textsuperscript{370} For a discussion of the size requirements, see \textit{supra} notes 342-48 and accompanying text.

\textsuperscript{371} In 1955, one year before the BHCA’s enactment, the House Banking Committee issued a report that the United States would, through bank holding company expansion, become like “England whose many banks became the Big Five,” and would no longer be “served by home-owned and home managed banks.” \textit{H.R. Rep.} No. 609, \textit{supra} note 66, at 2, 6.

Subsequent BHCA amendments suggest continuing congressional intent to
This historical review reveals that the primary goal of the BHCA was to prevent undue concentration in banking. The BHCA pursued this goal through a system of regulatory review of the creation and operation of holding companies involving more than one bank. 372 This is not to deny that there was continuing verbiage to the effect that the BHCA had two goals; with the second concerning the combination of banking and commerce. As noted previously, for example, some legislators stated that the BHCA was designed to impose the same commerce-related restrictions on bank holding companies that had previously been placed on banks. 373 This design, however, was not adopted by Congress.

e. The 1970 Amendments

The 1970 BHCA amendments eliminated the one-bank holding company exemption, making the BHCA applicable to holding companies that owned only one bank. 374 Between 1956 and 1970, Congress intermittently had considered applying the BHCA requirements to one-bank holding companies. As a 1966 Senate Report explained:

The Committee heard many witnesses and received many letters and statements in connection with the pro-

372. Because banks, through a combination of the federal McFadden Act and state banking laws, could not, with the most minor exceptions, branch across state lines, there was little fear that one bank could grow large enough to present an undue concentration of power. The BHCA, therefore, was directed at the multi-bank holding company which could, but for the BHCA, cover more than one state and bypass the McFadden Act. For a discussion of the McFadden Act's branching restrictions, see supra notes 47-64 and accompanying text.

373. See 111 Cong. Rec. 20,541 (1965) (statement of Sen. Morse) ("[T]he act places on bank holding companies some of the same restrictions placed on banks.").

positional to repeal the exemption for one-bank holding companies . . . . After considering all of this testimony, the committee came to the conclusion that there was no substantial evidence of abuses occurring in one-bank holding companies. Furthermore, the committee received much testimony to the effect that repeal of the exemption would make it more difficult for individuals to continue to hold or to form small independent banks.375

The Report shows that the Banking Committee utilized a cost-benefit analysis.376 The Committee found that the benefits of the one-bank exemption outweighed the detriments and consequently proposed no corrective legislation.377 In addition, the Committee found no abuses in the one-bank system.378

This lack of actual abuse did not prevent continued attempts to bring one-bank holding companies within the regulatory framework. The expressed concern still focused on the potential for future abuse. In re-proposing such legislation in 1970, the Senate Banking Committee, consistent with its earlier findings, once again reported: “This step is being taken in order to guard against the possible future perpetration of abuses occasioned by a company’s unregulated control of a single bank.”379 A Fed study submitted to Congress in 1986, reviewed the history of the BHCA and the combination of banking and commerce and made the same point: “[T]he potential of the holding company device to undermine the historic separation of banking and commerce . . . was


377. Id.; see also 1955 Hearings, supra note 67, at 13 (statement of Federal Reserve Board Chairman William McChesney Martin) (cautioning that “further regulation of bank holding companies should be kept to a minimum necessary to meet whatever problems may exist in this field”).

378. S. Rep. No. 1179, supra note 371, at 5, reprinted in 1966 U.S.C.C.A.N. at 2389 (“[T]he committee came to the conclusion that there was no substantial evidence of abuses occurring in one-bank holding companies.”). As noted previously, abuses had not been uncovered for even the multi-bank holding companies when the BHCA was first considered. For a discussion of this lack of actual abuse, see supra notes 358-67 and accompanying text.

of such concern to the Congress that the restrictions of the Bank Holding Company Act were deemed necessary.\textsuperscript{380}

Potential abuse is, of course, a legitimate concern.\textsuperscript{381} Congress is fully justified, having perceived a risk, in taking appropriate action to prevent its occurrence. What exists with the BHCA, however, is a lack of evidence of actual abuse despite prolonged periods of unregulated banking and commerce activities, by all bank holding companies prior to 1956 and by one-bank holding companies prior to 1970. Admittedly, the size of bank holding companies grew mainly after 1960, but it is that growth in size that really concerned Congress, not the combination of banking with commerce.\textsuperscript{382}

Actual abuses did not seem to exist in 1970 any more than they had in 1966. This is not to say that purported actual abuses were not reported to the Congress when the one-bank amendments were considered. These "abuses," however, were those suffered by competitors of banks who found themselves losing their own business in the market. "As we see it," said one spokesman, "we are literally fighting for our lives."\textsuperscript{383} Primarily, these competitors were securities dealers, insurance agents, sellers of data processing equipment and supporting software, travel agents, accountants, income tax preparers and providers of courier services. All of these had josted, and some continue to joust, with the banks and the bank holding companies before the regulatory

\textsuperscript{380} 1986 Hearings, supra note 173, at 398 (emphasis added).
\textsuperscript{381} See Corrigan supra note 17, at 7 (discussing risks associated with commercial firms controlling banks).
\textsuperscript{382} For a discussion of the growth of bank holding companies, see infra notes 406-13 and accompanying text.
\textsuperscript{383} 1969 Hearings, supra note 70, at 718 (statement of Morton White).
in the courts and before Congress with varying degrees of success, continuously asserting violations by the banking system. The BHCA, however, was not enacted to protect competitors. Moreover, the businesses that were considered appropriate for BHCA protection did not report abuses. No allegations of practices such as special favoritism to businesses within the holding company or the denial of credit to businesses outside the holding company were reported; all was, and continues to be, speculation.

What did occur in 1970, as contrasted with 1966, and the earlier years was the increasing congressional concern about the rapid expansion of one-bank corporate agglomerations. Congress remained concerned, however, with maintaining the benefit to small independent banks as discussed in the 1966 committee meeting.


385. See, e.g., Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 214 (1984) (affirming Fed holding that authorized acquisition of nonbanking affiliate engaged in securities brokerage by bank holding company because securities brokerage is "closely related" to banking); American Ins. Ass'n v. Clarke, 865 F.2d 278, 281-82 (D.C. Cir. 1988) (holding that national bank holding company proposal to offer municipal bond insurance was permissible because proposed activity did not violate National Banking Act); Association of Data Processing Serv. Org., Inc. v. Board of Governors, 745 F.2d 677, 689 (D.C. Cir. 1984) (considering question of whether data processing activities proposed by bank holding company were "closely related to banking" and therefore permissible); National Retailers Corp. v. Valley Nat'l Bank, 411 F. Supp. 308, 315 (D. Ariz. 1976) (finding that national banking association could provide data processing service to bank depositors unless the "performance of the data processing service is not 'convenient or useful,' or does not bear a direct relationship to the bank's performance of any of the express powers specified in the National Bank Act"), aff'd in part and dismissed in part, 604 F.2d 32 (9th Cir. 1979).


387. Other laws, however, were enacted for the purpose of protecting competitors. See, e.g., 15 U.S.C. § 1 (1988) (Sherman Act) ("Every contract . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."); id. § 14 (Clayton Act) (forbidding sale or lease of goods on agreement that purchaser or lessor not use competitor's goods). Certain ties between banking and insurance, one of the practices particularly objected to by the insurance industry, are also made illegal. See 12 U.S.C. § 1972 (1988) (prohibiting certain tying arrangements); see also Joseph C. Chapelle, Note, Section 1972: Augmenting the Available Remedies for Plaintiffs Injured by Anticompetitive Bank Conduct, 60 Notre Dame L. Rev. 706 (1985) (examining anticompetitive statutory protections and interpreting § 106(b) of 1970 BHCA amendments).
Indeed, Congress struggled in 1970 to accommodate small banks and their holding companies. Grandfather provisions were incorporated into the amendments to protect modestly sized bank holding companies that were engaged in commerce. Overall, however, the dominant factor that led to the 1970 amendment was the perceived risks resulting from the expansion of some one-bank holding companies.

The fear of the large banks, and not of the connection between banking and commerce, is evident in the following statement of House Banking Committee Chairman Patman:

What chance will the small banks of the country have in the future if the big banks in New York spread out over the 50 States and take off the cream of the business in all the States and different communities? What chance will the moderate size bank and the little bank have?

Obviously Chairman Patman was not concerned about abuses that might occur if banking combined with commerce or the risk that a bank might favor its affiliates in commerce to the detriment of competitors without bank connections. His concern was with the size and geographic spread of banks irrespective of whether this occurred through banks alone or through banks combined with other businesses. Congress enacted the 1970 amendments to include one-bank holding companies within the regulatory net because the one-bank holding companies had grown large and were growing larger, not because banking and commerce were mixed.

390. The Senate Committee reported that, in 1966, only two of the 51 banks in the United States with deposits of over $1 billion were owned by one-bank holding companies. Id. at 2-3. By 1970, this number had grown to 23. Id. at 3.
391. 1969 Hearings, supra note 70, at 1105.
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4. Holding Company Systems in Commerce Today

Today, in spite of the 1970 BHCA amendments, there remain two significant areas where, without measurable abuse, bank holding company systems unite banking and commerce under the law. 392 This section discusses these areas.

a. Savings and Loan Holding Companies

Whether a savings and loan association is, strictly speaking, a "bank" is a definitional question whose subtleties need not be discussed. 393 Under statutes in 1980 and 1982, however, Congress, subject to certain limitations, gave federal savings and loan companies (S&Ls) broad powers, including those of accepting demand deposits and making commercial loans. 394 Since the statutes' enactments, S&Ls have engaged in activities that, by any definition, are the essence of banking.

The law regulating S&L holding companies limits the "commerce" activities in which they may engage. 395 Those limitations do not apply, however, to an S&L holding company that controls only one S&L. 396 That S&L holding company is free, as was the

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392. Although two areas are significant for purposes of this discussion, there are seven areas in which it is permissible for bank holding companies to mix commerce and banking in the United States. These areas are:
1. "Nonbank banks" having federal deposit insurance but not falling within the coverage of the Bank Holding Company Act;
2. State chartered nonmember banks;
3. State holding companies that are grandfathered as to certain activities;
4. Foreign bank holding companies that own U.S. banks;
5. Overseas operations of U.S. banks and holding companies;
6. Edge corporations; and,
7. Unitary savings and loan holding companies.

See 1986 Hearings, supra note 173, at 386-87 (letter to Federal Reserve Board Chairman Volcker from House Subcommittee Chairman Barnard).

393. Under the BHCA, an S&L, although meeting the preliminary definition of "bank" as an institution accepting demand deposits and making commercial loans, is excluded from the definition as an insured institution. 12 U.S.C. §§ 1841(c)(1)(B) & 1841(c)(2)(B) (1988).


395. See 12 U.S.C. § 1467a(c)(1) (Supp. III 1991). This section prohibits S&L holding companies from commencing "any business activity" other than those exempted. Id. § 1467a(c)(1)(B). The exempted activities include insurance, assets or properties management and acting as a trustee. Id. § 1467a(c)(2).

396. Id. § 1467a(c)(3)(A).
one-commercial-bank holding company before the 1970 BHCA amendments, to engage in commerce without restriction.

Thus, the one-S&L holding company has been free from restrictions upon its activities in commerce since the original S&L holding company legislation was enacted in 1959. This is consistent with the original purpose of the statute, "to promote and preserve local management of savings and loan associations by protecting them against encroachment by holding companies." At that time, however, federal S&Ls were not in "banking"—they did not take demand deposits, make commercial loans or engage in many of the other activities that define commercial banking. When those powers were given to the S&Ls in 1980, it was apparently deemed unlikely that the new powers would create problems regarding banking and commerce combinations within the S&L industry. Therefore, the one-S&L holding company was left and still remains free to engage in commerce.

b. Individual and Family Bank Owners

Individual and family-owned bank holding companies represent the other significant area where banking and commerce can mix under the law. It was noted as early as 1950:

I daresay, without fear of successful contradiction, that the most frequent instances of single domination or control over both banking and nonbanking interests in the United States today exist among the individual owners of relatively small unit banks who devote only a part of their attention to the banking business, and the rest of it to diverse other activities in which their ownership of a bank is useful in the making of personal profits. Yet such individuals are expressly exempted by the proposed bill from any regulation of any kind.

Throughout the history of the BHCA, and obviously before

399. See Carl Felsenfeld, The Savings and Loan Crisis, 59 Fordham L. Rev. S7, S10 (1991) ("The federal S&L system was essentially restricted to making loans on the security of first mortgages on the security of their borrower's homes.").
401. 1950 Hearings, supra note 336, at 152-53 (statement of Samuel B. Stewart, counsel to Transamerica Corp.).
its inception, an individual could own banks and simultaneously engage in commerce without legal restrictions. In the early periods of American banking, stock in banks was typically in "even distribution . . . among a considerable number of members of the wealthy mercantile class."\textsuperscript{402} It is likely that this class was not unmindful of the needs of their own separate enterprises.

Today, a bank holding company is limited under the BHCA to a "company," defined as a "corporation, partnership, business trust, association, or similar organization."\textsuperscript{403} Individual owners of banks are excepted. A substantial number of today's smaller banks exist within this structure.\textsuperscript{404} With an individual rather than an entity as the bank owner, there is less fear of undue concentration of power.\textsuperscript{405} As this Article has suggested, undue concentration of power is the real concern of Congress in dealing with the BHCA. The connection of banking and commerce nevertheless exists and, it appears, with no particular problem.

5. Modern Growth of Bank Holding Company Systems

Why, then, was there so little mixing of banking and commerce through corporate holding companies over the many years when it was legal? The question, a perfectly obvious one, was naturally asked in the congressional hearings. House Banking Committee member Widnall asked Federal Reserve Board Governor Robertson on June 24, 1952: "Well if it has a tendency to crush the smaller bank and absorb that bank, why hasn't there been more marked progress in that direction over a period of 20 years?"\textsuperscript{406} The answer, which I shall neither quote nor attempt to summarize, can only be described as mush.

One approach to answering this question is that its underly-

\textsuperscript{402} 1 Redlich, supra note 23, at 17.
\textsuperscript{403} 12 U.S.C. §§ 1841(a)(1) & 1841(b) (1988).
\textsuperscript{404} A proposal to make individual owners subject to BHCA restrictions was introduced in the House by Representative Doug Barnard in 1991 as an amendment to the Treasury proposals. The amendment would expand the word "company" in § 2 of the BHCA to include individuals. The amendment was opposed by the major banking trade groups, who asserted that "half of the nation's 10,000 community banks would feel the negative impact." Jim McTague, Individuals Face Tough Sledding as Bank Owners, Am. Banker, Sept. 16, 1991, at 1.
\textsuperscript{405} But see Cartinhour, supra note 294, at 89 (commenting on unscrupulous practices by individuals who own chain bank systems and favor their own separate businesses). Despite reports such as this, these types of unregulated chain bank systems remain legally in place while similar holding company systems with corporate ownership are tightly controlled by the BHCA.
\textsuperscript{406} 1952 Hearings, supra note 315, at 34.
ing assumption is wrong; banking and commerce are massively and inextricably combined. If one eliminates the extreme examples of commerce like manufacturing automobiles and cooking hamburgers, everything that banks do—with the exception of taking deposits\textsuperscript{407}—is done by other businesses in all branches of commerce. Loans, investment advice, credit card activities, the movement of money, the sale of travelers checks and, of course, securities activities and insurance are all examples of “banking” activities performed by nonbank businesses. Nonbank institutions such as finance companies, credit unions, insurance companies, mutual funds and even department stores actively compete with banks in some or all of these bank functions.\textsuperscript{408} At the same time that these institutions perform bank functions, they simultaneously engage in commerce.

One scholar of the banking scene has suggested that in the earlier years of holding company evolution, the major banks were careful not to stimulate bank holding companies unduly for two reasons. First, the potential breadth of bank holding company activities would bring them into conflict with the major banks. Second, if the idea caught on, other banks might form holding company systems themselves that would offer new competition.\textsuperscript{409}

Into the 1950s, there was no great movement into bank holding company structures.\textsuperscript{410} Those holding companies that did exist were clearly interested in acquiring banks principally as a method of expanding into areas that were not limited by the re-

\textsuperscript{407} Perhaps even deposit taking can be done by nonbanks. See, e.g., Letter from the Board of Governors of the Federal Reserve System to Joseph Diamond concerning the Merrill Lynch Cash Management Account 1 (July 13, 1977) (on file with the Villanova Law Review) (concluding that proposed program involving cash transfer to brokerage firm did not violate banking regulations); see also 42 Op. Att’y Gen. 273 (1981) (finding that balances in Merrill Lynch Cash Management accounts consisting of proceeds from securities margin accounts, money market funds and credit card accounts were not “deposits”).

\textsuperscript{408} The invention by investment bankers of money market funds in the late 1970s is an example of a function that smacks of banking. Investments with brokers can, through the ingenious interrelationship of money market funds with banks, be accessed with bank checks and used for credit card purchases. Although these actions by the investment banking community have not resulted in their direct supervision by banking authorities, they have been closely scrutinized to see whether such regulation might not be appropriate. See Letter from the Board of Governors to Joseph Diamond, supra note 407 (dealing with Merrill, Lynch, Pierce, Fenner & Smith fund).

\textsuperscript{409} FISCHER, supra note 38, at 78.

\textsuperscript{410} See Savage, supra note 293, at 39-40 (observing that despite broad definition of what constituted bank holding company, there were only 46 holding companies nationwide by 1954).
strictive McFadden Act branching laws and comparable state legislation. The ability to enter into “commerce” was not a significant factor.

The major growth in bank holding companies, which happened after 1960, occurred for various economic reasons. First, the improvements in electronic technology played a central role in bank holding company growth because the technology increased the variety of business activities available to banks and facilitated interfacing those activities with existing business equipment. Second, a long term flattening of available markets for traditional bank offerings stimulated a quest for new markets in new areas. Congress experienced a concern, natural in a body well entrenched in the historic American support of the small bank, about the growing size of these institutions. Insofar as the combination of banking and commerce is concerned, however, there is no sign that the attitude of Congress changed from 1956, when banking and commerce could clearly combine, to 1970, when a higher level of Fed supervision was introduced. The rhetoric of 1956 was repeated in 1970; so, it would seem, was the underlying philosophy.

6. The Nonbank Bank

Congress did draw its actions closer to its rhetoric in 1987 when it disposed of the “nonbank bank.” Prior to the Competitive Equality Banking Act of 1987, “bank” was defined in the BHCA as an institution that

(1) accepts deposits that the depositor has a legal right to withdraw on demand, and
(2) engages in the business of making commercial loans.

Thus, prior to 1987, it was possible for institutions to engage in the commercial banking business and refrain from either the

411. Id. at 54, 57.
412. See Rose, supra note 166, at 140 (indicating that although such activities increase holding company flexibility, they also may increase bank risk).
business of accepting demand deposits or the business of making commercial loans, and thus not be defined as a bank under the BHCA. Because such an institution was still a chartered bank,\(^{416}\) it was dubbed the "nonbank bank."\(^{417}\)

The Fed perceived the nonbank bank as a legal loophole that permitted banking institutions to engage in commerce because they were not banks under the BHCA and were therefore, not covered by the BHCA’s restrictions on combinations of banking and commerce.\(^{418}\) Others argued that the nonbank bank could only be a small bank because either it could not issue demand deposits or it could not make commercial loans, and banks of appreciable size must be able to perform both activities. This argument maintained that Congress did not intend the BHCA to reach banks that stayed inconsequential by their natures. Therefore, the nonbank bank—far from being a legal loophole—was within the intent of the BHCA framers.\(^{419}\)

In 1987, Congress definitively sided with the Fed and legislated the nonbank bank out of existence by redefining a BHCA "bank."\(^{420}\) In taking this action, Congress reiterated some of its earlier positions. First, Congress failed to distinguish between a bank and a bank holding company system.\(^{421}\) In so doing, Congress still did not acknowledge the effects of the separation present between the chartered, insured bank and its parent holding company. The legislators seemed uninterested in the differences between the bank risks that might occur if the bank itself engaged

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\(^{416}\) The charter could be obtained under either state or federal law.

\(^{417}\) See Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) ("Rather than defining ‘bank’ as an institution that offers the functional equivalent of banking services, however, Congress defined with specificity certain transactions that constitute banking subject to regulation.").

\(^{418}\) See Carl Felsenfeld, Nonbank Banks—An Issue in Need of a Policy, 41 BUS. LAW. 99, 100 (1985) (describing Fed’s attempts to curtail ability of “banks” to use this device).

\(^{419}\) See id. at 120-22 (arguing that nonbank banks are both within contemplation of BHCA and important in banking system because nonbank banks do not present same risks as commercial lending institutions).

\(^{420}\) Competitive Equality Banking Act of 1987, § 101(a), 101 Stat. at 554. Section 101(c) of the Act provides a grandfather clause for already existing nonbank banks and some of them live on. It is difficult to find reason behind Congress’ decision to eliminate nonbank banks. Consumer thrifts, like S&Ls, are analogous to banks without commercial loan operations. These thrifts, however, are not banks and can exist in a one-bank holding company setting with their parent companies engaged fully in any line of commerce. For a discussion of S&L holding companies, see supra notes 393-400 and accompanying text.

\(^{421}\) See S. REP. No. 19, 100th Cong., 2d Sess. 8, reprinted in 1987 U.S.C.C.A.N. 489, 498 ("Most corporations are free to engage in any lawful business; banks, by contrast, are limited to the business of banking.").
in commerce and the bank risks if the bank's parent holding company engaged in commerce. Second, despite over half a century of dealing with various combinations of banking and commerce, Congress still did not find any actual abuse. Congress once again was concerned with potential risk that would occur, this time through the new institutional framework: "[The nonbank bank] raises the risk that banks' credit decisions will be based not on economic merit but on the business strategies of their corporate parents."422

The mix of the nonbank bank structure was essentially new to Congress. It involved a necessarily small bank combined with a company that knew no size limit. This suggests that Congress was really concerned with the growth of large organizations in banking, and not the mixture of banking and commerce. "The impetus for nonbank banks stems primarily from large diversified companies wanting to invade the banking business while avoiding the regulatory restraints of the Bank Holding Company Act."423 If it was not size that concerned Congress, but rather the entry by small banks into commerce, Congress' action in outlawing the nonbank bank represents a strangely puristic adherence to the doctrine that banking and commerce should be kept separate.424

7. Today—The Treasury Proposal

Under the BHCA, before a bank holding company may engage in an activity through a company that is not a bank it generally must satisfy the Fed that it has met the two standards established by section 4(c)(8): that the activity is "closely related to banking or managing or controlling banks"425 and that it also

422. Id. at 8, reprinted in 1987 U.S.C.C.A.N. at 498.
423. Id. at 6, reprinted in 1987 U.S.C.C.A.N. at 496. One of the first companies to take advantage of the nonbank bank format was Gulf & Western. See Letter from the Board of Governors of the Federal Reserve System to Robert C. Zimmer, counsel for Gulf & Western (Mar. 11, 1981) (on file with the Villanova Law Review) (describing Fed approval of nonbank so long as bank continued to refrain from engaging in commercial loan activities).
424. For an example of this puristic adherence to separation, see Competitive Equality Banking Act of 1987, § 101(c), 101 Stat. at 557-64 (grandfathering existing nonbank banks, but limiting their future asset increases to 7% per year).
425. 12 U.S.C. § 1843(c)(8) (1988). In applying this test, the Fed usually follows a set of rules laid down in National Courier Ass'n v. Board of Governors. See National Courier Ass'n v. Board of Governors, 516 F.2d 1229 (D.C. Cir. 1975). The court identified three factors that can be used to determine whether an activity is closely related to banking:
1. Banks generally have in fact provided the proposed services;
2. Banks generally provide services that are operationally or function-
is a "proper incident thereto." The burden of meeting these conditions precedent to doing business has weighed heavily upon the banking community since 1970, when the tests were introduced into law. It is not surprising, therefore, that proposals to modify the burdens have been introduced from time to time. By and large, the Treasury Department has taken the lead in recommending these BHCA changes. It proposed in 1981, for example, removing Fed approval as a condition precedent to many nonbank financial activities within a holding company structure. Congress rejected this approach. Other proposals to lighten the BHCA burden followed with little success.

In 1991, the Treasury Department proposed revisions to the BHCA that would allow commerce and banking to coexist in a holding company system. This Article maintains that there has been no tradition of keeping banking and commerce separate when the relationship is through holding companies. The current idea that banking and commerce relate through such a system is an evolution out of a past in which holding companies have combined banking and commerce. Only in recent years have holding companies been somewhat restrained from the combination. The Treasury Department's approach is harmonious with this rationale. Its 1991 proposal recommends that industrial firms be provided services as to equip them particularly well to provide the proposed service; and

3. Banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form.

Id. at 1237.


427. Jay Rosenstein, Treasury Proposes Legislation to Greatly Expand Bank Holding Company Services, AM. BANKER, Nov. 18, 1981, at 1 (indicating that in lieu of Fed approval on case-by-case basis, Fed should establish broad list of types of "financial services that bank holding companies could offer").

428. See Litan, supra note 183, at 49-50 (describing rejected proposals that would have given bank holding companies ability to perform broad range of financial activities through separate corporate subsidiaries).

429. In addition to recommending a banking-commerce mixture in holding companies, the Treasury Department's proposal also recommended nationwide banking through both bank branching and holding companies systems. For a discussion of these aspects of the 1991 Treasury Department's proposals, see supra notes 153-64 and accompanying text.
mitted to own bank holding companies: “The time is right to permit broader combinations of banking and commerce. Commercial companies have been an important source of capital, strength, management expertise, and strategic direction for a broad range of non-banking financial companies as well as thrift institutions.”

Significantly, for the first time, in the Treasury Department’s proposal, a major bank regulator looked at the actualities of abuse rather than at the potential for abuse. The latter has been the approach taken throughout BHCA consideration and review. In surveying the experience of permissible combinations of commerce and financial institutions, the Treasury Department stated: “Indeed, none of the hypothetical problems of combining banking and commerce has been evident among the commercial companies that currently own depository institutions (thrifts, nonbank banks, and industrial banks).”

The Treasury Department proposed the combination of banking and commerce by creating a new form of holding company called a “diversified holding company” (read General Motors or Sears-Roebuck). A diversified holding company could engage in businesses prohibited to ordinary bank holding companies (read Citicorp or BankAmerica) and could, subject to qualifications not germane to this Article, acquire such ordinary bank holding companies (read General Motors can acquire Citicorp without curtailing the businesses of either).

This approach separates the diversified bank holding company from the bank by requiring that they retain the traditional

430. Modernizing the Financial System, supra note 154, at 56; see also S. 713, 102d Cong., 1st Sess. §§ 201-202 (1991) (proposing as part of Treasury bill that industrial firms be allowed to own bank holding companies).

431. For a discussion of the focus on potential abuse throughout the consideration of the BHCA, see supra notes 358-67 and accompanying text. As contrasted with the specters of abuse that resulted in the BHCA, it has been observed that “throughout the savings and loan debacle, not a single thrift that was a subsidiary of a commercial firm failed.” 1991 Hearings, supra note 174, at 86-94 (statement of Peter J. Wallison).

432. Modernizing the Financial System, supra note 154, at 56-57. For a discussion of savings and loan holding companies, see supra notes 393-400 and accompanying text. For a discussion of nonbank banks, see supra notes 414-24 and accompanying text. An industrial bank is a limited powers state institution that can take deposits and operates principally a consumer loan business.

433. S. 713, § 201(a)(1)(B). S. 713 is the bill introduced to Congress by the Treasury Department that includes the concepts of the Treasury Department’s proposal in legislative form.

434. Id. at § 203 (imposing special capital requirements).

435. Id.
bank holding company layer between them. The proposal does not permit a business in a nonfinancial area of commerce to own a bank directly. Only a bank holding company can directly own a bank.\footnote{436} The proposal also creates some additional barriers between the diversified bank holding company and the bank, the most significant of which is a strengthened set of "firewalls."\footnote{437} The term "firewalls" describes legally imposed separations between business activities. Even with these "firewalls," the Treasury Department's proposal essentially breaks the wall imposed by the BHCA between banks and commerce.

The proposed combination of banking and commerce was approved by the House Banking Committee,\footnote{438} with dissent.\footnote{439} It was, however, disapproved by the Senate Banking Committee.\footnote{440} The proposal was not enacted in either house.\footnote{441} As with the Administration's proposals on interstate banking, its reintroduction has been proposed.\footnote{442}

F. Conclusion on the Traditions of Banking and Commerce

Although the evidence is less than conclusive, it is fair to say that the United States has a tradition that banks themselves should not be in commerce. As to bank holding companies and the relationship of their bank and nonbank subsidiaries, it is difficult to conclude that such a tradition exists. Bank holding companies were not introduced in any number until the twentieth century, and at least some of the early holding companies were engaged in commerce. When federal bank holding company legislation was first considered in 1931, four bills were introduced. None of them suggested that holding companies should be sepa-
rated from commerce.\textsuperscript{443}

Situations existing today combine commerce both with banks and with other institutions that are almost carbon copies of banks. These are generally small organizations, which supports the conclusion that Congress' true concern is with undue size—not with the combination of banking and commerce. As noted earlier, commerce in a bank holding company is separated from banking. History illustrates that within the U.S. tradition this degree of separation is sufficient.

Whether banking and commerce should be separate but related through the holding company structure and, if so, under what conditions of separation, can best be described as a continuing issue, not a debate that history has settled. The Treasury Department has taken one side; the Congress, led by the Federal Reserve Board, has most recently taken the other. There should be an ongoing open dialogue on whether the BHCA serves a public purpose in sustaining the separation.

\section*{IV. Continuing Bank Regulation}

\textbf{A. Introduction}

Eliminating the BHCA would leave the great bulk of bank regulation intact. The regulations that treat banks as special institutions and those that regulate banks along with the remainder of U.S. business would be left undisturbed. Much of this body of law deals with the kinds of problems regularly identified as requiring the BHCA for resolution. Therefore, even without the BHCA, the size of banks and their concentration in the marketplace will continue to be monitored as will the relationship of banks with their affiliates.\textsuperscript{444} The following sections survey that other body of law.

\footnote{443. For a discussion of the four 1931 bills, see Cartinhour, supra note 294, at 189-91.}

\footnote{444. Professor Clark made this monitoring point when he considered the usefulness of the BHCA. See Robert C. Clark, The Regulation of Financial Holding Companies, 92 Harv. L. Rev. 789 (1979) (arguing for strengthened bank holding company regulation to ensure financial stability of holding companies). Professor Clark asserted that the goal of separating financial holding companies from other business is tied to antitrust policies and that the goal could be advanced "by general antitrust regulatory techniques and does not justify very much special legislation directed at financial holding companies." Id. at 791. Professor Clark further noted "that important features of existing law serve no legitimate purpose and should be abolished." Id.}
B. Sections 23A, 23B and Other Firewalls

Section 23A of the Federal Reserve Act,\(^445\) enacted as part of the Banking Act of 1933, regulates certain transactions between a bank\(^446\) and its affiliates. It requires that loans\(^447\) from a bank to its nonbank affiliates\(^448\) be collateralized at a percentage between 100 and 130\%—a heavy requirement that is not imposed on loans to unaffiliated third parties.\(^449\) Section 23B\(^450\) imposes a more generalized duty that loans to, and many other transactions with, affiliates be on terms substantially comparable to such transactions with nonaffiliated companies.\(^451\) Section 23B was added to the Federal Reserve Act in 1987 and, consequently, will not be part of the historical discussion that follows.

One recent observer has written that in 1933 a primary purpose behind section 23A was "[t]o separate as far as possible national and member banks from affiliates of all kinds."\(^452\) With this stated purpose, it is curious that section 23A received so little attention during the gestation of the BHCA. This suggests that a more accurate understanding of the BHCA's effects would have reduced the perceived need for it, and that Congress was virtually steamrollered into approving the BHCA concept. Notably, the existing protections of section 23A were discussed in the 1950 Hearings by one of the few BHCA opponents, who suggested that if section 23A were deemed to be inadequate, it could be strengthened.\(^453\) An opponent to the BHCA's amendment in


\(^{447}\) 12 U.S.C. § 371c-1(a)(2) (stating that §§ 23A and 23B apply to set of transactions basically including loans and purchases of assets).

\(^{448}\) 12 U.S.C. § 371c(d) (excluding loans to bank affiliates from collateralization requirement).

\(^{449}\) 12 U.S.C. § 371c(c). The collateral rule for loans to nonbank affiliates has been described as "a chilling requirement that many bankers would regard as a virtual prohibition on loans to affiliates." Clark, supra note 444, at 805.


\(^{452}\) Veryl V. Miles, Banking Affiliate Regulation Under Section 23A of the Federal Reserve Act, 105 BANKING L.J. 476, 481 (1988). As noted, § 23A now also applies to nonmember banks. FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 306(k), 105 Stat. at 2236. Although Professor Miles provided a thorough analysis of the regulatory mechanisms and the role of § 23A, she did not discuss the BHCA.

\(^{453}\) 1950 Hearings, supra note 336, at 152 (statement of Samuel B. Stewart,
1966 made a similar point.\textsuperscript{454}

The relationship of section 23A to the BHCA has been insufficiently explored. The major congressional reports on each of the statutes make no mention of the other.\textsuperscript{455} The joint congressional report developed when the BHCA was adopted in 1956 does not indicate that section 23A is any part of the BHCA's history.\textsuperscript{456} Section 23A's restraining effect upon the connection of banking with commerce could be instructive should the BHCA be reviewed. This Article previously commented on the absence of actual abuses throughout the history of the BHCA.\textsuperscript{457} Section 23A may have played a useful role in this absence of abuse.

Section 23A, while the dominant firewall, is not the only one. Through the years, bank regulators have established others as needed. Examples include the firewalls (also called Chinese walls) that were: 1) created by the Comptroller of the Currency in separating lending from trust activities in national banks;\textsuperscript{458} 2) established by the FDIC in authorizing nonmember state banks to set up underwriting affiliates;\textsuperscript{459} and 3) established by the Fed in administering the Glass-Steagall Act.\textsuperscript{460} In its 1991 proposal, the Treasury Department also proposed new firewalls to keep bank-
ing sufficiently separate from commerce. As prudence warrants, even without the BHCA, the general rule-making authority of federal and state bank regulators is sufficient to add additional firewalls as needed.

C. General Bank Regulation

It would be almost comical to suggest that the repeal of the BHCA would leave banks, including their relationships with their nonbank affiliates, as unregulated businesses. A vast body of statutes, regulations, orders, cases and tradition would remain in place.

For example, the chartering provisions under both federal and state law limit what banks can do. These provisions include restrictions on the ability of banks to open new branches. Both federal and state banks are subject to "convenience and advantage" (C&A) requirements which have the effect of protecting existing banks from new competition. The new bank or branch must prove that it will benefit the community; undue or illicit methods of competition are inconsistent with this requirement. A bank making loans to sweetheart companies rather than to other needy applicants is not satisfying its communal duty. Current law construes C&A, not as a one-shot test to be satisfied in order to get a charter or branch, but as an ongoing commitment.

Federal and state chartering provisions also provide the responsible agencies with broad investigative and regulatory pow-

461. Modernizing the Financial System, supra note 154, at 57.
462. See, e.g., 12 C.F.R. §§ 1.1-35.8 (1992) (regulations of Comptroller of the Currency applicable to national banks); id. §§ 201.1-281.2 (regulations of Federal Reserve System applicable generally to member banks but also occasionally to other financial institutions); id. §§ 303.0-360.2 (regulations of FDIC applicable to federally insured bank and thrift institutions).
464. For a discussion of the C&A requirements, see supra notes 82-86 and accompanying text.
465. Under § 3(c) of the BHCA, the Fed is directed to factor in the C&A requirements in evaluating the acceptability of bank acquisitions. BHCA, ch. 240, § 3(c), 70 Stat. 133, 135 (current version at 12 U.S.C. § 1842(c) (1988)). There is confusion engendered by this standard because it was created for one purpose and applied in another. See, e.g., Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255, 1262 (5th Cir. 1981) ("The [BHCA] twice uses the same term, 'convenience and needs' only a few lines apart. The term is first used to state circumstances that may outweigh even Clayton Act anticompetitive effects. It is next used to state a criterion to be applied 'in every case.' ").
466. See, e.g., 12 U.S.C. § 2901(a)(3) (1988) ("[R]egulated financial institutions have continuing and affirmative obligations to help meet the credit needs of the local communities in which they are chartered.")]
ers. The Fed has additional authority to regulate member banks. Major congressional enactments in 1989 and 1991 have added to the range of regulatory restrictions and also to the regulators' enforcement powers. Finally, the FDIC has regulatory authority over insured banks, whether or not these banks are members of the Federal Reserve System. Overall, the bank regulators have extensive and continuing powers of examination. As the Supreme Court noted:

But perhaps the most effective weapon of federal regulation of banking is the broad visitatorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order "a thorough examination of all the affairs of the bank," whether it be a member of the FRS or a nonmember insured bank. Such examinations are frequent and intensive.

When transactions are more closely related to the BHCA, the Bank Merger Act applies Clayton Act and Sherman Act antitrust standards to insured bank consolidations and mergers. Similar standards are applied by the FDIC to changes in the control of insured banks. Depending upon the type of bank involved,

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468. FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified in scattered sections of 12 U.S.C.). In addition to its assault on the dual banking system, the Act requires each appropriate federal banking agency to prescribe standards relating to internal controls and audit systems, loan documentations, credit underwriting, interest rate exposure and compensation for executive officers, employees, directors and principal shareholders. Id.

When considering the federal deposit insurance system in this regard, § 1818(a) and § 1818(b) are of particular note. The former empowers the FDIC to withdraw insurance from a bank conducting "unsafe or unsound" practices. 12 U.S.C. § 1818(a)(2) (Supp. III 1991). The latter is a roughly parallel provision directing the other federal regulators to take their own action upon their perception of such practices. Id. § 1818(b)(1).

469. For a discussion of some aspects of the FDIC's regulatory authority, see supra notes 243-44 & 254-55 and accompanying text.


the appropriate federal agency must perform some type of anti-trust evaluation prior to approving the acquisition. Capital standards imposed by federal regulators also limit the operations of banks and their ability to acquire other businesses. State reviews of mergers and acquisitions exist. Finally, if a bank considers entry into certain specialized businesses that have traditionally been considered on their own merits, the bank may find such businesses to be governed by special legislation. Debate on the propriety of mixing banking and these other businesses has, and may continue to have, its own special life.

One perceptive commentator noted that as banks are permitted, either directly or through their affiliates, to enter into other fields—and as other businesses are permitted to enter into functions that smack of banking—the watchful eye of government is necessarily broadened to survey these additional areas. Supervision becomes more pervasive without the need to enact new laws or regulations because an expanding scope of activities becomes subject to the “imposition of reserve requirements, deposit insurance, access to Federal Reserve services that accompanies these restrictions, and all the related regulations that are now viewed as necessary to protect the deposit fund.”

The concern that will naturally be felt when repeal of the BHCA is even considered may be tempered with some relief stemming from the existence of this vast regulatory structure.


475. For example, sections of the Glass-Steagall Act exemplified a congressional attitude that certain combinations of commercial banking and investment banking should be prohibited. See Banking Act of 1933, ch. 89, §§ 5(c), 16, 20, 21 & 32, 48 Stat. 162, 164, 184, 188-89 & 194 (codified as amended at 12 U.S.C. §§ 24(7), 78, 335 & 377-378 (1988)). Today, the specialized businesses most frequently at issue are securities operations and insurance. Insurance restrictions have been injected into the BHCA but could easily be covered by separate legislation should the BHCA disappear. See 12 U.S.C. § 1843(c)(8) (1988).

476. Shull, supra note 184, at 276.

477. Id.

478. One must wonder about the utility of the continuing proliferation of laws. A bank problem is regularly met with new laws that are designed for yesterday’s issues and are of questionable value tomorrow. This approach seems to be more widely accepted than the possibility of utilizing the existing laws more efficiently. The S&L crisis, the most recent example of this form of behavior, was met with the massive FIRREA legislation. Ultimately, particularly in areas of
In no way would banks be left to the play of the free market.

D. Banking Crimes

The deterrent effects of an established body of criminal law also provides continuing protection to bank operations. As one commentator observed:

Banks enjoy greater protection under federal criminal statutes than do any other commercial enterprises. Among the most important criminal provisions applying to banks are those that proscribe wrongdoing by insiders: bank officers, directors, employees and agents.\(^{479}\)

This same protection extends to the banking activities of bank holding companies and will continue to do so if the BHCA disappears.

E. The Antitrust Laws

1. Core Laws

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition,"\(^{480}\) the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks.\(^{481}\) There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry."\(^{482}\) A proposal to remove the BHCA, however, is not a

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\(^{481}\) Id. at 323-24; Transamerica Corp. v. Board of Governors, 206 F.2d 163, 165-66 (9th Cir.) (applying Clayton Act antitrust restrictions to banks), cert. denied, 346 U.S. 901 (1953).

suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect.483

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable.484 In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws.485 He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce.486 Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today.487

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates.488 The general

483. For a discussion of other antitrust limitations in banking laws, see supra notes 100-04 and accompanying text.
484. 1969 Hearings, supra note 70, at 738 (statement of Robert Pitofsky). Professor Pitofsky, later Chairman of the Federal Trade Commission, was writing on behalf of the Independent Insurance Agents Association. Id. at 734.
485. Robert A. Hammond, Antitrust Laws Sufficient to Limit Acquisitions By One-Bank MC's, Am. Banker, May 12, 1970, reprinted in One-Bank Holding Company Legislation of 1970: Hearings Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 247 (1970) (hereinafter 1970 Hearings). In a later statement at the same hearings, Mr. Hammond commented that for effective antitrust supervision over bank holding companies, the market would have to be redefined to include more than the line of commerce consisting of a "cluster of products," such as checking accounts and trust administration, "denoted by the term commercial banking." Id. at 873-74. As banking changes its nature, this process is under way. See, e.g., Republic of Texas Corp. v. Board of Governors, 649 F.2d 1026, 1046 (5th Cir. 1981) (affirming Fed's refusal to redefine product market to include thrifts when considering anticompetitive effects of bank acquisition).
486. See 1970 Hearings, supra note 485, at 298 (statement of Richard W. McLaren) (cautioning against wholesale elimination of bank holding company regulations). This Article proposes a more searching investigation into the antitrust issues raised by Mr. Hammond and Mr. McLaren.
487. The BHCA imposes standards of competition even more severe than those in the Sherman and Clayton Acts. See Dibidale of Louisiana, Inc. v. American Bank & Trust Co., 916 F.2d 300, 305 (5th Cir. 1990) ("[A]nti-tying provisions of the BHCA were intended to regulate conditional transactions in the extension of credit by banks more stringently than had the Supreme Court under the general antitrust statutes."); modified, 941 F.2d 308 (5th Cir. 1991).
488. See Merger Guidelines, supra note 138, at 20,571 ("The analytic process
approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws’ disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA’s antitrust tests satisfied.\(^\text{489}\) For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department.\(^\text{490}\) In July 1991, the Justice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act.\(^\text{491}\) As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. **Federal Trade Commission Act**

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Commission described in [these guidelines] ensures that the Agency evaluates the likely competitive impact of a merger within the context of economically meaningful markets . . . " After establishing the relevant market, the Justice Department uses the Herfindahl Index to evaluate the effect of a merger and the change in the relevant market in order to determine whether a challenge is appropriate. \textit{Id.} at 20,573-75.

489. 12 U.S.C. § 1849(b) (1988). With reference to an identical Justice Department power under the Bank Merger Act, it was observed: “Such antitrust actions maintained after the banking agency has approved the merger are common.” Jung, Note, \textit{supra} note 139, at 737.

490. United States v. First Hawaiian, Inc., 1991-1 Trade Cas. (CCH) ¶ 96,457, at 65,924 (D. Haw. 1991) (requiring banking organization to terminate banking service franchise agreement and divest six branches in order to acquire commercial bank).

mission Act (FTC Act). In its broad scope the FTC Act is inapplicable to banks. The FTC, however, may require banks to produce documentary evidence required during agency investigations. The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA—the perpetration of "unfair methods of competition."

Despite its limited applicability to banks in its major prohibitions, the FTC Act could have considerable significance to bank holding companies (which are generally not banks) and to their nonbank affiliates. One would think that an exclusion for banks would not exclude companies that are not banks. The author is unaware of any clear holding on this subject, although at least one FTC opinion letter and a District Court holding on the same case have reached opposite conclusions on the question.

The FTC Act supplements the Sherman and Clayton Acts.


493. 15 U.S.C. § 45(a)(2) (1988) (exempting institutions such as banks, S&Ls and credit unions from FTC’s regulatory power). Banks “were doubtless excluded from the provisions of the [FTC] act, because [they were] subject to the direction and control of a separate commission similar to that of the Trade Commission.” T.C. Hurst & Son v. FTC, 268 F. 874, 877 (E.D. Va. 1920) (refusing to block enforcement of FTC sanctions). The case was given a more current status through its citation in United States v. Philadelphia National Bank, 374 U.S. 321, 336 n.11 (1963). This comment upon the bank regulatory structure might well be utilized by bank regulators as an incentive to perform the duties assigned to the FTC for nonbank entities.


495. For a discussion of the current BHCA antitrust tests, see supra notes 92-99 and accompanying text.


498. See FTC v. Citicorp, 1979-1 Trade Cas. (CCH) ¶ 62,671, at 77,800 (S.D.N.Y. 1979) ("We are skeptical of the view asserted in the FTC's letter opinion that a bank holding company is not within the Section 6 exemption for banks.")
When alleged restraint of trade is at issue the antitrust acts require the presence of some form of contract or combination;\(^{499}\) the FTC Act merely requires violative behavior.\(^{500}\) Thus, if insurance agents or stock brokers asserted some form of illicit competition through a bank holding company, the FTC Act (assuming its application to nonbank affiliates of banks) would apply even if the antitrust acts did not.

F. Conclusion on Continuing Bank Regulation

The special prior restraints of the BHCA may not be necessary in view of both the forcefulness and the flexibility of the various antitrust and other bank regulatory laws.\(^{501}\) The nature of the banking market—a set of relatively concentrated markets when local markets are considered, but a highly un concentrated market when considered on a national scale—will be the norm, and the antitrust laws will, by their very nature, impose a continuing restraint upon those who attempt its change.\(^{502}\)

It has been asserted that banks are specially protected by federal deposit insurance and the other federal and state regulatory controls (the "safety net") that exist for the benefit of banks. The argument continues that it is fundamentally unfair to expect competitors of banks to deal in the same markets opposite this system.\(^{503}\) Whatever truth is present in this approach, the BHCA does not fundamentally deal with the unfairness; it is dealt with by the remaining legal structure.

Banks themselves, protected by deposit insurance, exist now, and will continue to exist without the BHCA, with whatever special status they get from deposit insurance. Holding companies are not banks and have no deposit insurance. This too will not change. Where the activities engaged in through the holding

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501. There is no support for statements like that of Congressman Bruce F. Vento in opposition to the 1991 Treasury Department proposal. He stated that if the bill were enacted, "our nation's banking system would be totally deregulated." H.R. Rep. No. 157, supra note 161, at 383 (dissenting view of Rep. Vento).

502. For discussions of bank numbers, bank markets and bank concentrations, see LaWare, supra note 10, at 932-35. For a general discussion of the topic, see supra notes 111-52 and accompanying text.

503. 1970 Hearings, supra note 485, at 259 (statement of Richard W. McLaren) ("Banks are protected by regulation from free entry of other competitors, and therefore from the full rigors of unregulated competition.").
company are "closely related to banking," they will, as they do today, continue to benefit from whatever advantage they derive as a result of the affiliated bank's deposit insurance. Unanswered questions that are not addressed by the BHCA would remain if the BHCA is repealed. For example, to what extent do finance company activities such as the discount of retail installment paper, the offering of credit cards or the making of small loans give a bank affiliate competitive benefits over companies without bank affiliates that are conducting the same activities? Where special problems result from the entry of banks, or for that matter bank holding companies, into a particular field, is regulation through special legislation like the Glass-Steagall Act for securities activities sufficient, or is a BHCA wall more appropriate?

The Sherman and Clayton Acts together with the FTC Act and the numerous bank regulatory statutes supply a heavy layer of protection. This Article again suggests an open dialogue directed at the need for the BHCA. The new perception of banks as profit-making businesses engaged in competition with foreign behemoths on a world stage sustain an argument for a lessening of the regulatory framework which keeps banks smaller than other businesses and, in their affiliations, constrained beyond their needs. If, as Senator Fulbright asserted in 1960, banks are different from other businesses and require different antitrust legislation, the availability of the rest of the legal landscape can reasonably be viewed as supplying such legislation.

504. E. Gerald Corrigan, President of the Federal Reserve Bank of New York, considers the relationship to be not only of competitive importance but also a risk to the "safety net" provided by the deposit insurance fund and the other bank regulatory legislation and regulations. Corrigan, supra note 17, at 2.

Various legal provisions do establish intercorporate relationships in a holding company system, but they do so in such a way as not to impose risk upon the safety net or the insurance fund. For example, § 206(e) of FIRREA requires each insured bank in a holding company system to guarantee to the FDIC insurance losses of other insured banks, but the guaranty does not extend beyond insured banks. 12 U.S.C. § 1815(e) (Supp. III 1991). 12 C.F.R. § 225.4(a) (1992) requires a holding company to serve as a "source of strength" to its subsidiary banks. Here, however, the obligation is to the insured institutions, not by them. See Kieran J. Fallon, Note, Source of Strength or Source of Weakness? A Critique of the "Source of Strength" Doctrine in Banking Reform, 66 N.Y.U. L. REV. 1344, 1349 (1992) (arguing against "enhanced source-of-strength powers" for federal banking regulators).

505. 106 Cong. Rec. 9711 (1960) (statement of Sen. Fulbright) ("Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.").
V. Conclusion

I have tried throughout this Article to avoid an opinion on (1) whether banks should be larger and more concentrated; and (2) whether they should be in commerce. Massive studies have addressed those two issues and considerable literature is easily available. What I have tried to do is to demonstrate two propositions.

First, the general perception has shifted so that now, as contrasted with fifteen years ago, there is a respectable body of opinion that banks should become larger and more concentrated. The United States has seen a reduction in the number of banks from over 30,000 in 1920, to fewer than 25,000 in 1929, to under 14,000 today. What seems to be different is the growing perception, as banks grow larger and more concentrated, that this development is more desirable than not. If anything, one senses shock, perhaps even shame, that our banks are losing in international competition.

Second, banking has never really been separated from commerce. Ford Motor Company and Sears-Roebuck own institutions that take demand deposits and make commercial loans. There is another respectable body of opinion that supports the growth of such activities.

The Bush Administration, through the Treasury Department, was the leading advocate in both of the foregoing propositions. The current Administration should openly acknowledge this and go where the propositions lead. The propositions undercut the two foundations of the Bank Holding Company Act of 1956. Changes in our thinking require a reevaluation of that Act, and the Treasury Department is the natural bellwether.

The BHCA does, perhaps not inconsequentially, serve purposes beyond its enumerated major functions. Through the BHCA, the Fed has dealt with illegal branch banking. Through it, the Fed is attempting to require bank holding companies to supply capital to their subsidiaries. The bulk of the recent Fed

506. For a good discussion of both issues, see Litan, supra note 183, at 60-98.
507. For a discussion of U.S. bank concentration, see supra notes 9-10 and accompanying text.
509. MCorp Fin., Inc. v. Board of Governors, 900 F.2d 852 (5th Cir. 1990) (holding that BHCA does not authorize Fed to require holding company to
decisions seems devoted to the goals of the Community Reinvestment Act and the record of applicant institutions in meeting local credit needs. It has been maintained that through the separation of banking from commerce the Fed is better able to implement monetary policy.\footnote{See Wetmore, Note, supra note 921, at 995 ("There is also a concern that by allowing banking and commercial activities within one company, the ability of the [Fed] to coordinate monetary policy . . . will be hampered.").} Furthermore, the Fed has, in no small measure, based its quest to apprehend the Bank of Credit and Commerce International on its duties under the BHCA. This type of benefit is certainly at best incidental to the reasons for the original BHCA.\footnote{Any extra benefits of the BHCA have been offset by bureaucratic overkills on behalf of the BHCA. For example, bank activity approved by the Comptroller of the Currency under the National Bank Act has then been attacked by the Fed under the BHCA. See, e.g., Synovus Fin. Corp. v. Board of Governors, 952 F.2d 426, 428 (D.C. Cir. 1992).} To utilize these benefits as reasons to retain the massive structure of the BHCA smacks of justifying the characters in Charles Lamb’s essay burning down their homes in order to enjoy the taste of cracking.\footnote{Charles Lamb, A Dissertation Upon Roast Pig, in 3 The Complete Works and Letters of Charles Lamb 203, 203-04 (1860) ("[He] let some sparks escape into a bundle of straw, which kindling quickly spread the conflagration over every part of their poor mansion, till it was reduced to ashes. . . . [F]or the first time in his life . . . he tasted—crackling [pig]!").}

One may also assert that the BHCA has lifted the Fed into its current place as the generally acknowledged senior bank regulator, and that this centralization of authority in one agency is desirable. This position should not be discounted. It should not, however, cause one to assume the permanent presence of the BHCA with its allied detriments. The appropriate role of the Fed in our bank regulatory system is another subject to be evaluated along with the BHCA itself.

Most of the policy questions raised in this Article are not new. Views are frequently expressed on whether there should be interstate branching, whether the remaining restrictions on interstate banking that is not branching should be relieved and whether banks should be permitted further into commerce. The arguments, however, generally assume continued retention of the BHCA. This Article suggests that the issues can be productively addressed in the context of whether that bulwark of the current bank regulatory system should remain.

One may assume that, even without the BHCA, bank holding transfer assets to troubled bank subsidiaries), \textit{aff'd in part and rev'd in part}, 112 S. Ct. 459 (1991).
companies will remain a consequential part of the banking system. What banks may do will continue to be governed by the laws, both federal and state, that define banks. As those laws evolve, they may or may not widen the power of banks to include securities, insurance, real estate investment, data processing and other activities. If the BHCA restrictions are removed, other businesses could be conducted only outside the bank itself by affiliated companies within a holding company structure. Such operations will, as contrasted from today's approach, be established as the market dictates.

The commercial banking system is faced with serious problems. It is not, however, in a state of crisis. Now is a good time to deal with fundamental questions of bank regulation. The BHCA should be thoroughly reviewed "calmly and with great care and restraint" to establish whether it should remain as part of our bank regulatory structure.

513. Approximately 500 banks out of a total of 13,000 have failed over the last three years. This represents a fundamentally different picture from the S&L crisis, in which there has been a collapse of some 50% of the savings and loan system.

514. 101 CONG. REC. 8032 (1955) (statement of Rep. Rains). With those words, Congressman Rains presented the BHCA to Congress. Congressman Rains encouraged Congress to act on the BHCA "while our economy is generally healthy [and] while competition still exists." Id.