THE CONTINGENT ORIGINS OF FINANCIAL LEGISLATION

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ABSTRACT

Courts and scholars often view major financial legislation warily. One popular theory holds that Congress only legislates in this area when pushed by opportunistic activists in response to crises that neither activists nor legislators fully understand. Another account contends that financial legislation is the well-designed product of deeply entrenched special interest groups that control the process with limited input from others. Further, the Supreme Court's application of antinovelty doctrine—which counsels that governmental structures without historical precedent are constitutionally suspect—sends a strong signal that creative solutions to these problems will be viewed with judicial skepticism.

This Article challenges the prevailing scholarly theories of financial legislation and reveals as irredeemably flawed the Court's related assumptions about legislative processes. This reassessment is based on historical analysis of seven watershed legislative enactments, from the Federal Reserve Act of 1913 to the CARES Act of 2020. By grounding these laws in their political contexts, we uncover neither a pattern of responding to crises nor a logic of grand design at the frontier of congressional authority. Instead, the sweep of history reveals reactions to unpredictable events, policy entrepreneurs with proposals that change substantially during the course of the legislative process, and temporary legislative coalitions that respond to perceived problems in largely ad hoc ways. The result is a flourishing of congressional experimentation at every turn. Temporary coalitions and historical contingencies are the primary themes in financial lawmaking. Novel legislative experiments are not the exception, but the rule.

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That insight exposes the impracticality of the ascendant antinovelty doctrine. Judicial insensitivity to the ubiquity of unpredictability and experimentation in legislative design risks curtailing Congress's legitimate and constitutional powers to shape the financial system in a democratically accountable way.

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INTRODUCTION

Over the past century, Congress has organized, upended, and reorganized again large segments of the American economy through the passage of financial legislation. Whether establishing a central bank to set monetary policy, mandating and removing again a division between investment and commercial banking, reinvigorating consumer financial protection, or responding to an unprecedented pandemic, Congress has moved aggressively and with outsized consequences for financial firms and the macroeconomy.

Law and finance scholars sometimes view these measures skeptically. One prominent group of scholars considers the purported conditions under which financial legislation is enacted as evidence of these statutes' infirmities. These scholars assert that major financial laws are often enacted in the midst of a financial or economic crisis, when voters' temporarily heightened outrage compels lawmakers to act hastily.[3] The result is ill-conceived "bubble laws."[4] Most notably, Roberta Romano's "iron law of financial regulation" focuses on populist, panicked overreactions to financial crises as the primary causal explanation for major financial legislation.[5]

A second theory, Charles Calomiris and Stephen Haber's "game of bank bargains," posits that financial legislation is the product of durable coalitions of disparate interest groups, e.g., community activists and large banks in the United States.[6] In their view, that these coalitions supposedly endure for decades or even centuries calls into question whether "reformers can hope to improve [financial] systems."[7]

Federal courts also can take a skeptical eye towards financial legislation, particularly when it involves congressional experimentation. Most recently, in *Seila Law LLC v. Consumer Financial Protection Bureau* (CFPB), the Supreme Court stated that the CFPB's particular mix of structural features—designed by Congress after the 2008 financial crisis to insulate the agency from presidential control—"lacks a foundation in historical practice," which is "[p]erhaps the most telling indication" of the structure's unconstitutionality.[8] The CFPB director's protections against presidential removal were thus held unconstitutional.[9] Similarly, the Supreme Court has found that the design of the Federal Housing Finance Agency (FHFA) and the Public Company Accounting Oversight Board also were too novel to pass constitutional muster.[10]

This Article advances a framework for understanding financial legislation that contradicts these scholarly and judicial critiques. This framework focuses on the fragility of coalitions and the variety of historical contingencies that afflict every aspect of financial lawmaking. Drawn from

3. *See, e.g.*, PAUL MAHONEY, WASTING A CRISIS: WHY SECURITIES REGULATION FAILS 149–51 (2015); Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25 (2014) [hereinafter Romano, *Regulating in the Dark*]; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) [hereinafter Romano, *Quack Corporate Governance*]; Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1782 (2011); ERIK GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION (2009).

4. Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77 (2003).

5. *See* Romano, *Regulating in the Dark*, *supra* note 3.

6. Charles W. Calomiris & Stephen H. Haber, *Why Banking Systems Succeed—and Fail: The Politics Behind Financial Institutions*, 92 FOREIGN AFFS. 97, 99–100 (2013) [hereinafter Calomiris & Haber, *Banking Systems*].

7. *Id.* at 110; *see also* CHARLES CALOMIRIS & STEPHEN HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT (2014).

8. 140 S. Ct. 2183, 2192, 2201 (2020).

9. *Id.* at 2208.

10. Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496, 505 (2010); *accord* Collins v. Mnuchin, 896 F.3d 640, 670 (5th Cir. 2018), *reh'g en banc*, 938 F.3d 553 (5th Cir. 2019), *cert. granted*, No. 19-422 (2020).

the rich history of financial legislation, from the Federal Reserve Act of 1913 to the CARES Act of 2020, this *coalitions-and-contingencies* framework consists of four principles.

First, political sensitivity to unpredictable events drives financial lawmaking. Financial crises are an important type of these events, as Roberta Romano, Paul Mahoney, and others have observed. But the class of events that triggers major new legislation in this area includes far more than crises. Close elections, a bank megamerger, and a pandemic, among other events, also spark major legislative efforts. Ex ante prediction of which events will trigger a legislative response, and which will not, is nearly impossible.[11]

Second, even after an unpredictable major event triggers legislative interest, "policy entrepreneurs" of various kinds—i.e., well-placed individuals who proselytize for new ideas within the corridors of power—play a pivotal role in developing those ideas into legislation.[12] Surprisingly, policy entrepreneurs rarely succeed in implementing their ideas off-the-rack, without substantial modification.[13] The process of idea generation is instead both active and reactive, responding to dynamics partly endogenous to social, political, and economic forces.[14]

Third, after the chance encounter between an unpredictable event and a policy entrepreneur eager to respond, coalitions form to propel ideas toward legislative passage. The coalitions typically do not map onto partisan identification or other established groupings. Instead, they tend to be

11. For instance, the 1990–1991 recession, which dominated the 1992 presidential election, *see* JACK GERMOND & JULES WITCOVER, MAD AS HELL: REVOLT AT THE BALLOT BOX (1992), produced no significant financial legislation. Neither did JPMorgan Chase's spectacular losses from its rogue "London Whale" trader. Nor did the closely contested 2000 presidential election. Indeed, predicting the occurrence of salient events at all is notoriously difficult; financial crises, scandals, and similar events become important in part because they are unsuspected. *Cf.* NASSIM TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE 62–84 (2010) (discussing the "narrative fallacy" that puts order on randomness and causation on correlation, essentially an application of the post hoc ergo propter hoc logical fallacy).

12. *See generally* JOHN KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 2010) (providing a leading account of agenda setting and policy entrepreneurship).

13. *See id.* at 182–83 (providing a leading account of agenda setting and policy entrepreneurship); David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 300–305 (2008) (summarizing the vast, sometimes conceptually hazy literature on policy entrepreneurship). For applications of the concept to securities and financial legislation, see MAHONEY, *supra* note 3, at 149–51 (arguing that policy entrepreneurs were responsible for the "market failure" hypothesis in generating much of the content of the securities acts in the twenty-first century); Romano, *Quack Corporate Governance*, *supra* note 3, at 1568–1571 (describing policy entrepreneurship as the impetus for legislative attention to the corporate governance provisions in the Sarbanes-Oxley Act that had generated a "lack of interest . . . shown by legislators during the floor debate").

14. Our contention that this process is reactive as well as active stands in contradistinction with other scholars who view the idea-generation process as "active rather than reactive." *See* Pozen, *supra* note 13, at 301 nn.76–77 (summarizing scholarship making this claim).

temporary, coalescing around the ideas and networks of policy entrepreneurs and others. They often are the product of a long, complex series of compromises and adaptations to push coalitions to the finish line. The need for legislative entrepreneurs to thread the needle so finely to assemble a winning coalition means that these coalitions are rarely built to last. Indeed, they sometimes disband even as legislation is debated.

Fourth, the consequence of these features is legislative diversity—the very novelty that jurists have found constitutionally suspect. Rather than moving through some well-worn arroyo, legislation is generated by unpredictability and historical contingencies. The result is that novel solutions and unique institutional designs are present throughout major financial enactments.

These principles challenge scholars' and jurists' understanding of financial lawmaking in several respects. The first principle—that a wide range of events spurs financial legislation—betrays the claim that these laws tend to be crisis-driven, and therefore ill-considered and hastily passed. The second and third principles—that a singular policy entrepreneur marshals support for a reform, and a temporary coalition then is assembled in support of the legislation—demonstrate that the system is not nearly as ossified and incapable of disruption as Calomiris and Haber claim.

The fourth principle—that financial legislation often involves experimentation and generates novel forms—provides a rejoinder to judicial critiques of novelty in financial regulatory institutions.[15] Simply put, administrative structures do not fit a pattern because legislation follows no clear template. Thus, the very novelty of congressional reaction to public policy challenges should be seen as a defining feature of lawmaking, not an unconstitutional defect.

Finally, the four principles *in toto* reveal a more optimistic picture of the prospects of financial reform than conventional wisdom suggests. Although passing major legislation is never easy, the door is not closed to nearly the extent that the crisis-legislation and bank-bargain accounts imply. That a wide variety of unpredictable events (not just crises) can serve as catalysts and that various temporary coalitions (not just a single, durable alliance of dominant interest groups) can be assembled to support financial bills should encourage would-be policy entrepreneurs.

The Article proceeds as follows. Part I outlines the major extant theories of legislation generally and financial legislation in particular. It also presents

15. Other scholars have challenged antinovelty doctrine from a constitutional perspective. *See, e.g.*, Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2139 (2015); Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1411 (2017). Our critique adds to theirs by focusing on institutional change, legislative processes, and legislative history.

the courts' antinovelty doctrine alongside the related judicial concept of historical-gloss, highlighting how these doctrines presume a particular theory of lawmaking. Part II briefly introduces our coalitions-and-contingencies framework in a more fully specified form. The framework builds upon the political science theories and contrasts with the extant law and finance literatures described in Part I. Part III, the bulk of the Article, illustrates the framework via seven case studies of major financial legislation through a century-long sweep. Part IV explores the theory's implications regarding the ascendant antinovelty doctrine—as well as another judicial doctrine, the intelligible principle standard, which appears to be on shakier ground.

I. FOUNDATIONS

Three sets of theoretical or jurisprudential concepts bear on Congress's production of financial legislation. *First*, financial scholars have developed dual theories to explain how and why Congress advances finance-related legislation specifically. They are, first, the thesis that major legislation occurs as an (over)reaction to crises, which Professor Romano labels "the iron law of financial regulation,"[16] and, second, that financial history is a product of a "bargain" between incumbent bankers and populist activists or other discrete groups.

Second, political science research on policy change in general offers several trans-substantive insights applicable to the specific case of financial legislation. Namely, individuals known as policy entrepreneurs often drive policy change. Their ideas then move onto the legislative agenda—and, occasionally, become law—through a disorderly process indelicately referred to as the "garbage can model." Although the law tends to change at a glacial pace, large-scale, rapid changes occasionally punctuate these long periods of relative stasis.

Third, judicial doctrine that the Supreme Court has applied in assessing the constitutionality of provisions of several major financial laws relies on strong assumptions concerning the process by which Congress passes legislation. Antinovelty doctrine considers government institutions lacking historical precedent to be constitutionally suspect. As the Supreme Court declared in *Printz v. United States*, where "earlier Congresses avoided use of [a] highly attractive power," courts "have reason to believe that the power was thought not to exist."[17] A related historical-gloss doctrine asserts that

16. Romano, *Regulating in the Dark*, *supra* note 3; *see also* MAHONEY, *supra* note 3, at 149–151; Romano, *Quack Corporate Governance*, *supra* note 3; Bainbridge, *supra* note 3; GERDING, *supra* note 3.

17. 521 U.S. 898, 905 (1997).

the political branches' practices with a long history, including a history of institutional rivals' acquiescence to their use, are presumptively constitutional.[18] Antinovelty and historical-gloss doctrines both rest on strong theoretical assumptions regarding the lawmaking process.

This Part presents these three approaches. It serves as an intellectual foundation to the later introduction of our own theory, which contrasts sharply with the dominant theories from financial-regulation scholarship and is in tension with the courts' antinovelty and historical-gloss doctrines. Instead, our theory builds on concepts from political science—while also departing from this literature in several notable ways to account for unique features of financial legislation.

A. Finance-Specific Theories

1. Financial Crises

A group of prominent legal scholars contend that financial crises and legislative reforms are connected.[19] This account, which one of us, writing with Michael Ohlrogge, terms the *crisis-legislation hypothesis*, [20] can be traced to Stuart Banner's survey of the origins of securities regulations during a centuries-long span of Anglo-American legal history.[21] Banner finds that these regulations tend to be rooted in financial crises.[22]

Roberta Romano extended this framework with one of the most cited articles in corporate law, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance."[23] Romano argues in this pathbreaking article that the Sarbanes-Oxley Act of 2002 was a mistake born of haste and encouraged by opportunists who sought to take advantage of an opening in the policy window in the wake of several public company accounting scandals.[24]

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18. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18–22 (2020).

19. *See generally* Romano, *Regulating in the Dark*, *supra* note 3; MAHONEY, *supra* note 3, at 149–51; Romano, *Quack Corporate Governance*, *supra* note 3; Bainbridge, *supra* note 3; GERDING, *supra* note 3.

20. Peter Conti-Brown & Michael Ohlrogge, *Crises and Financial Legislation: An Empirical Evaluation*, 3 J. FIN. CRISES (forthcoming 2021).

21. *See generally* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS (1998).

22. *See* Stuart Banner, *What Causes New Securities Regulation? 300 Years of Evidence*, 75 WASH. U. L.Q. 849, 850 (1997) [hereinafter Banner, *Causes*].

23. Romano, *Quack Corporate Governance*, *supra* note 3; *see also* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1496 (2012).

24. Specifically, Romano contends that the law was a mistake because it departed from the prevailing disclosure-based regime for federal securities law and entered into the traditional state

Professor Romano later expanded her focus to major financial legislation generally, positing that such measures follow an "iron law" with two pre-enactment features. First, such legislation is "invariably crisis driven, adopted at a time when there is a paucity of information regarding what has transpired."[25] Second, opportunistic policy entrepreneurs sell their "off-the-rack" policy proposals as "solutions" to the present exigency, with little regard for these "ready-made" proposals' actual suitability.[26]

Paul Mahoney and Stephen Bainbridge adopt similar conclusions: financial legislation tends to be enacted "in the wake of a financial crisis."[27] Public anger compels Congress to *just do something*.[28] The predictable result of legislating in these frenzied circumstances is ill-conceived laws.[29]

Even legal scholars who are more supportive of recent major financial laws adopt a key element of Romano, Mahoney, and Bainbridge's framework: that financial and economic crises drive the passage of financial legislation. For these scholars, the concern is that the (supposedly post-crisis) burst in activity will wane over time.[30] As memories of the crisis fade, they claim that Congress turns its attention elsewhere—and regulated firms use that inattention to influence agencies to attenuate their rulemaking and enforcement efforts.[31]

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domain of corporate governance. *See* Romano, *Quack Corporate Governance*, *supra* note 3, at 1597–99. By acting hastily, Congress failed to take into account evidence that the innovations in corporate governance that Sarbanes-Oxley represented were not only not responsive to the scandals that prompted congressional action but were in fact harmful to that end. *See id.*; *see also* KINGDON, *supra* note 12, at 20–21 (coining the term "policy window").

25. Romano, *Regulating in the Dark*, *supra* note 3, at 56. The other elements of the iron law are: (2) that the legislative or regulatory process "result[s] in 'off-the-rack' solutions often poorly fashioned to the problem at hand; (3) with inevitable flaws given the dynamic uncertainty of financial markets; (4) but [that are] arduous to revise or repeal given the stickiness of the status quo in the U.S. political framework of checks and balances." *Id.*

26. Roberta Romano & Simon Levin, Sunsetting as an Adaptive Strategy (Aug. 25, 2020) (forthcoming research paper) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3655900; Romano, *Regulating in the Dark*, *supra* note 3, at 32. Romano's iron law also has two post-enactment features: major financial legislation will "inevitabl[y] [have] flaws given the dynamic uncertainty of financial markets; [and it will be] . . . arduous to revise or repeal. . . ." *Id.* at 56.

27. MAHONEY, *supra* note 3, at 37; Bainbridge, *supra* note 3, at 1796.

28. *See* MAHONEY, *supra* note 3, at 5, 37; Romano & Levin, *supra* note 26, at 8; Romano, *Quack Corporate Governance*, *supra* note 3, at 1528.

29. *See, e.g.*, Romano, *Regulating in the Dark*, *supra* note 3; Romano, *Quack Corporate Governance*, *supra* note 3; Bainbridge, *supra* note 3.

30. *See generally* GERDING, *supra* note 3; John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012).

31. *See* Coffee, *supra* note 30, at 1028.

2. *Bank Bargains*

The other major finance-focused theory emphasizes the impact that negotiations among interest groups have on the contours of new financial legislation. In *Fragile By Design*, financial historians Charles Calomiris and Stephen Haber articulate a view of the intrinsically public nature of banking.[32] They begin with the observation that the politics of financial regulation involves conflicts among various interest groups, sometimes including competition among various types of financial institutions to extract political rents at their competitors' expense.[33]

The space for resolving these conflicts is, in Calomiris and Haber's nomenclature, "the game of bank bargains."[34] The core of financial legislation, they write, is the result of an interactive negotiation that involves "the group in control of the government, bankers, minority shareholders, debtors, and depositors,"[35] among other groups, such as "urban activist[s]"[36] or "agrarian populists."[37] Those groups then tussle in the game of bank bargains to determine "which other groups must be included in the government-banker partnership and which can be left out in the cold because the rules of the political system make them powerless."[38]

The winning coalition in this game has been remarkably stable in the United States. For most of the nineteenth and twentieth centuries, small banks and agrarian populists teamed up to control financial policy.[39] Later, megabanks and big-city community activists formed a winning alliance.[40] Importantly, these coalitions are *enduring*. According to Calomiris and Haber, the "design" of banking law is not "the result of unforeseen and extraordinary circumstances, like earthquakes and hailstorms."[41] The result is that countries "choose" their banking systems by resolving durable conflicts of interest in ways that favor some groups over others.[42]

32. CALOMIRIS & HABER, *supra* note 7. This is a view widely shared and elaborated on by legal scholars, particularly after the crisis. *See, e.g.*, MEHRSA BARADARAN, HOW THE OTHER HALF BANKS (2015); John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113 (2021).

33. *See* CALOMIRIS & HABER, *supra* note 7; *see generally* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

34. CALOMIRIS & HABER, *supra* note 7, at 13.

35. *Id.*

36. *Id.* at 18.

37. *Id.* at 158.

38. *Id.* at 13.

39. *See id.* at 158.

40. *See id.*at 208.

41. *Id.* at 3.

42. *See id.*

In one sense, Calomiris and Haber's thesis is more optimistic than the crisis-legislation hypothesis; it holds that financial policy is the result of deliberate and intentional choices, rather than ill-conceived reactions to media frenzy.[43] That rent-seeking interest groups play the leading role in these choices, however, is troubling. "If deeply rooted political and historical forces largely determine the quality of countries' banking systems," the authors write, "it is fair to ask how reformers can hope to improve those systems."[44]

B. Political Science Theories

Three political science theories concerning the lawmaking process offer insights concerning major financial legislation. These theories concern the central role of policy entrepreneurs, the garbage can model of the legislative process, and the punctuated-equilibrium model of policy change. Our framework then builds on these concepts, accounting for finance-specific features of the legislative process that we observed in our historical case studies.

1. Policy Entrepreneurs

A prominent group of political scientists posit that Congress occasionally is able to overcome its tendency toward stasis though the efforts of policy entrepreneurs.[45] These highly motivated, politically skilled actors are willing to bear the costs associated with organizing collective action. Thus, they serve pivotal roles in advancing major legislation.[46]

Much like entrepreneurs in business, policy entrepreneurs invest their own resources and reputation in pursuit of a potential future "return."[47] Although they may be situated both inside and outside of government, most of the scholarly attention has focused on entrepreneurs located in the legislative and executive branches. Gregory Wawro asserts that successful entrepreneurs in Congress masterfully utilize their deep policy expertise to

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43. *See* Romano, *Quack Corporate Governance*, *supra* note 3, at 1528.

44. Calomiris & Haber, *Banking Systems*, *supra* note 6, at 110. The solution, they conclude, "require[s] more than good ideas or brief windows of opportunity. What is crucial is persistent popular support for good ideas." *Id.* That need for persistent popular support evinces a captured policy area with a status-quo bias.

45. *See* KINGDON, *supra* note 12.

46. *See id.* at 122.

47. *See id.*

bundle issues, devise solutions at the appropriate level of complexity, and build political coalitions.[48]

Why would reelection-seeking lawmakers devote their energies to crafting complex legislation?[49] Although the reelection imperative often motivates workaday, low-impact activities—advertising, credit-claiming, and position-taking, in David Mayhew's classic formulation[50]—it also encourages legislators to invest resources in innovative, large-scale policies under certain circumstances.[51]

The connection between the reelection imperative and policy entrepreneurship influences the content of laws, sometimes in surprising ways. For instance, although one might think that reelection-focused legislators would favor enactments that deliver concentrated benefits to electorally important subgroups and offload costs to a less attentive general public,[52] that is not always the case.[53] Instead, lawmakers sometimes promote policies with general benefits, particularly where voters or donors can trace an observed policy effect back to the lawmaker.[54]

Another surprise is that the enactment of a party platform or program may be less important to legislative entrepreneurs than conventional wisdom suggests.[55] Although signaling one's agreement with one's party often is electorally advantageous, a legislator may have little incentive to go beyond cheap talk. For politicians focused on their own reelections, it is sometimes more beneficial to receive credit for their own signature

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48. Gregory J. Wawro, Legislative Entrepreneurship and Campaign Finance 8 (July 21, 1997) (unpublished) (presented at the 1997 Political Methodology Summer Conference) https://www.researchgate.net/publication/2466149; *see also* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 14 (2001) (describing a similar skill set among bureaucratic entrepreneurs, who tend to possess "strong organizational reputations embedded in an independent power base").

49. *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5, 17 (1974) (positing that legislators' "single-minded" objective is to win reelection).

50. *See generally id.*

51. *See* Robert A. Prentice & David B. Spence, *Sarbones-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843, 1848–49 (2007); DAVID R. MAYHEW, DIVIDED WE GOVERN 103 (1991); DAVID PRICE, WHO MAKES THE LAWS?, CREATIVITY AND POWER IN SENATE COMMITTEES (1972). One such circumstance, for instance, is that political action committees reward successful law-drafters with campaign contributions. *See* Janet M. Box-Steffensmeier & J. Tobin Grant, *All in a Day's Work: The Financial Reward of Legislative Effectiveness*, 24 LEGIS. STUD. Q. 511, 511–12 (1999).

52. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 128 (1965) (positing that collective action problems lead democratic systems to favor the former groups at the expense of the latter).

53. *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982) (presenting case studies that confirm or cast doubt on Olson's theory to varying degrees).

54. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 27 (1992).

55. *See* Jonathan Woon, *Issue Attention and Legislative Proposals in the U.S. Senate*, 34 LEGIS. STUD. Q. 29, 29 (2009) (showing that committee assignment best predicts senators' bill sponsorship activities, whereas party status "play[s] little or no role").

initiatives than to advance the party's agenda, which is a quintessential collective good.[56]

2. *Garbage Cans*

Even if well-placed policy entrepreneurs advance a proposal, that measure must compete with others to capture the attention of the relevant committees, both houses of Congress, and the President. Of the innumerable ideas circulating in political networks, how do a small number reach the desk of a supportive president while others do not?

Under the conventional framework, policymaking follows a sequence: a problem is identified, various potential solutions are proposed, and these proposals' consequences are weighed so that a rational decision can be reached. Such an orderly process is rarely an accurate description of the legislative process, however.[57]

Instead, the *garbage can model*, a leading theory of organizational choice, sees the agenda-setting process as "organized anarchy."[58] In this account, Congress passes laws when several separate "streams"—the problem stream, political stream, and policy stream—intermingle.[59] The problem stream consists of the identification of the specific policy problems that need resolution, including by those with vested interests in the articulation of those problems. The political stream attends to the electoral elements of specific problems and solutions. And the policy stream involves the process of how and by whom specific solutions are adopted.[60]

When these streams combine, the results are chaotic. Accordingly, the public policy agenda at any given moment consists of a "garbage can into which various kinds of problems and solutions are dumped by participants as they are generated."[61]

3. *Punctuated Equilibria*

A third theory of policy change begins with the observation that, although policymaking is generally characterized by stasis or incremental change, it is occasionally interrupted by tectonic shifts. Drawing on

56. *See* MAYHEW, *supra* note 49, at 99.
57. *Id.*
58. Michael D. Cohen, James G. March & Johan P. Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 1 (1972).
59. *Id.*; KINGDON, *supra* note 12.
60. KINGDON, *supra* note 12, at 87-88.
61. Cohen, March & Olsen, *supra* note 58, at 2.

evolutionary biology,[62] Frank Baumgartner and Bryan Jones' *punctuated equilibrium model* offers an explanation for this feature of the policymaking process.[63] Essentially, once policymakers receive informational "signals" from the external environment, they must aggregate, interpret, and prioritize them.[64]

In so doing, two cognitive limitations—"selective attention" and "attention-driven choice"—come into play. Policymakers cannot process all available information, and thus lock into certain environmental features that serve as heuristics, letting other features go unmonitored. In other words, they pay selective attention.[65] Thus, sometimes even powerful signals are ignored for a time, and the policy system resists change.[66]

As these signals are overlooked, errors pile up until they can be ignored no more. With these mounting errors serving to alert policymakers to the previously unmonitored signals, the system lurches to refocus its attention, i.e., policymakers engage in attention-driven choice. They enact sweeping changes—perhaps overreaching—and the system then settles into a new status quo.[67]

C. Judicial Doctrine

Although not full-throated theories, the judicial doctrines of historical-gloss and, especially, antinovelty are grounded in a theory of congressional behavior. The Supreme Court has applied these doctrines to several important constitutional challenges to provisions of major financial legislation. Given these stakes, this Section introduces historical-gloss and antinovelty doctrines and examines the assumptions regarding the legislative process that the doctrines presume.

In brief, historical-gloss doctrine presumes that a statute's durability (or that of an executive-branch action), along with other actors' acquiescence concerning its legitimacy, weighs in favor of its constitutionality.[68]

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62. *See* STEPHEN JAY GOULD, THE PANDA'S THUMB 20-21 (1980) (describing evolutionary systems as producing "[o]dd arrangements and funny solutions . . . paths that a sensible [creator] would never tread but that a natural process, constrained by history, follows perforce").

63. *See generally* FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (2d ed. 2009).

64. FRANK R. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF ATTENTION 7 (2005).

65. *Cf.* HERBERT A. SIMON, MODELS OF MAN 198 (1957) (introducing the term "bounded rationality").

66. BAUMGARTNER & JONES, *supra* note 64, at 113.

67. *Id.* For more on applying punctuated equilibria and evolutionary theory to the study of law and macroeconomics, see Peter Conti-Brown, *Institutions: A Research Program for Law, Macroeconomics, and History*, 83 LAW & CONTEMP. PROBS. 157 (2020).

68. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 613 (1952) (Frankfurter, J., concurring) (opining that longstanding and unchallenged executive branch practice, even if not

Essentially, a presumption of constitutionality attaches where the structure or action in question is longstanding and the political branches have recognized, or at least acquiesced to, its use.

Antinovelty inverts that statement, claiming that a statute's lack of historical antecedent makes it "constitutionally suspect."[69] "[C]ontemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction . . ." the Supreme Court explained in *Printz*.[70] "Conversely [sic] if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."[71]

The Supreme Court's use of antinovelty has accelerated in the past decade. Except for the recently appointed Justice Amy Coney Barrett, all of the other justices have written or joined at least one opinion endorsing the doctrine.[72] The doctrine has played a particularly prominent role in invalidating provisions in several major financial laws.

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expressed in "the words of the Constitution," may be considered a "gloss" on the President's constitutional powers, thereby becoming a valid "part of the structure of our government"). Although the approach's original context concerned executive action, the concept has since been extended to assess the constitutionality of Congress's enactments. Bradley & Siegel, *supra* note 18, at 18, 22.

69. Katyal & Schmidt, *supra* note 15, at 2139; Litman, *supra* note 15, at 1411; *see also* Printz v. United States, 521 U.S. 898, 905 (1997); New York v. United States, 505 U.S. 144, 177 (1992) (noting the uniqueness of the challenged statute, but not invoking a presumption of unconstitutionality); Aziz Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701, 710–11 (2019) (referring to the Supreme Court's endorsement of the notion that "absence of historical practice lends credence to a constitutional challenge" as "gloss's negative use"). *But see* Mistretta v. United States, 488 U.S. 361, 385 (1989) ("Our constitutional principles of separated powers are not violated . . . by mere anomaly or innovation.").

70. *Printz*, 521 U.S. at 905 (quoting Myers v. U.S., 272 U.S. 52, 175 (1926).

71. *Id.* Technically, *Printz*'s focus on "the earliest Congresses" suggests its use of constitutional liquidation, which is distinct from, albeit similar to, historical-gloss. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 63–66 (2019).

72. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) (Roberts, C.J., joined in relevant Part by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.) ("Perhaps the most telling indication of a severe constitutional problem . . . is a lack of historical precedent to support it. An agency with a structure like that of the CFPB is almost wholly unprecedented.") (citation omitted); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1333 (2016) (Roberts, C.J., dissenting) ("There has never been anything like [this statute] before. . . . That fact alone is perhaps the most telling indication of [its] severe constitutional problem . . . ."); Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015) (Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) ("[T]he most striking thing about the history of [the action under review] is what is absent from it: a situation like this one . . . ."); NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.) (referring to a "few scattered examples as anomalies . . . in light of historical practices"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549–50 (2012) (Roberts, C.J., writing only for himself in Part III-A) ("Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes the most telling indication of a severe constitutional problem . . . is the lack of historical precedent for Congress's action. At the very least, we should pause to consider the implications of the Government's arguments when confronted with such new conceptions of federal power.") (citation omitted); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010) (Roberts, C.J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 166 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). *See also* Medellín v. Texas, 552 US. 491, 532 (2008); Printz, 521 U.S. at 905.

That role began in 2010 with *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[73] That case presented a constitutional challenge to the Board's structure, which was established within the Securities & Exchange Commission (SEC) as part of a set of public-company accounting reforms in the Sarbanes-Oxley Act of 2002.[74] To insulate the Board from political pressure, Congress provided a for-cause removal provision; the SEC could remove Board members only for "inefficiency, neglect of duty, or malfeasance."[75] The President, in turn, by longstanding custom can remove SEC commissioners only for one of these reasons.[76]

The Court struck down the Board's removal protection as unconstitutional, holding that the Board's dual-level insulation from White House control prevented the President from fulfilling her Article II duties.[77] For the Court, "[p]erhaps the most telling indication of the severe constitutional problem with the [Board] is the lack of historical precedent . . . ."[78]

Antinovelty also played a central role in the Court's invalidating the for-cause removal restriction concerning the CFPB's director in *Seila Law*.[79] Congress included several provisions in Dodd-Frank—including a single director with for-cause removal protection, independent litigation authority, and budgetary autonomy—intended to insulate the CFPB from political influence.[80] As in *Free Enterprise*, the *Seila* Court emphasized the "lack of historical precedent" for the CFPB's particular constellation of structural features as "[p]erhaps the most telling indication" of the structure's unconstitutionality.[81] According to the Court, the "CFPB's single-Director structure is an innovation with no foothold in history or tradition."[82] To align the CFPB's "novel" structure with longer-established agency structures, the

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73. 561 U.S. 477 (2010).
74. Sarbanes-Oxley Act of 2002 § 101(e)(6), 15 U.S.C. § 7211(e)(6) (2018).
75. *Free Enter. Fund*, 561 U.S. at 493 (internal quotation omitted).
76. *Id.* Interestingly, *Free Enterprise* involved both antinovelty (concerning the Board's removal procedure) and historical-gloss (concerning SEC commissioners' removal procedure). *See also* SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988) (noting that, although no statute places removal restrictions on SEC commissioners, for-cause removal has been established by historical practice).
77. *Free Enter. Fund*, 561 U.S. at 496.
78. *Id.* at 505 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).
79. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).
80. Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 148 (2015).
81. *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483).
82. *Id.* at 2202.

Court struck down the CFPB's for-cause removal provision.[83] Likewise, in holding unconstitutional the FHFA director's for-cause removal protection, the Court approvingly quoted *Seila*'s antinovelty rationale in *Collins v. Yellen*.[84]

Historical-gloss and antinovelty require several strong assumptions concerning the legislative process. For one, both doctrines assume that constitutional considerations, at least in part, motivate Congress. Antinovelty assumes that the absence of a given structure in previous enactments provides evidence that past Congress believed the structure to be unconstitutional[85]—rather than simply that lawmakers' priorities lay elsewhere, the structure was politically inexpedient, or that it simply had not occurred to them.[86] Relatedly, it also assumes that, if a past Congress believed that the Constitution permitted it to legislate in a given area, that Congress would have done so to the maximum extent allowable, leaving no constitutionally permitted authority unrealized.[87]

Similarly, historical-gloss assumes that lawmakers draft statutes that they believe to be constitutional and presidents acquiesce or object to statutes based on their beliefs concerning the statutes' constitutionality. Although these considerations need not be at the forefront of their minds, they still must be present, as the doctrine implies intentionality in one political branch's actions and in the other's objection or acquiescence.[88]

Historical-gloss also asks judges to identify historical practices by connecting dots involving different lawmakers at different times. That

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83. *Id.* at 2201. In so doing, the Court dismissed other agencies with similar for-cause provisions as "only a handful of isolated incidents." *Id.*

84. 141 S. Ct. 1761, 1783 (2021); *see also* Collins v. Mnuchin, 896 F.3d 640 (5th Cir. 2018), *reh'g en banc*, 938 F.3d 553, 567 (5th Cir. 2019) (stating that FHFA's single director with removal protection "is a new innovation" that stretches the independent-agency pattern beyond what the Constitution allows"); *id.* at 606 (Oldham and Ho, JJ., concurring in part and dissenting in part) (stating that the Supreme Court precedent "emphasize[s] a suspicion of novel agency structures," and thus concluding that FHFA's "novel agency structure … raises similar suspicions"); *Collins*, 896 F.3d at 670 ("The FHFA is sui generis, and its unique constellation of insulating features offends the Constitution's separation of powers.") (per curiam).

85. *See, e.g.*, Printz v. United States, 521 U.S. 898, 905 (1997) ("[If] earlier Congresses avoided use of [a] highly attractive power, we would have reason to believe that the power was thought not to exist."); *see also* Plaut v. Spendthrift Farm, 514 U.S. 211, 230 (1995) (Congress's "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed").

86. *See* Huq, *supra* note 69, at 711 ("The absence of practice is generally taken solely as circumstantial evidence that many generations of political leaders believed a power to be without constitutional authority, which must be considered in light of other potential reasons for government inaction.").

87. *See* Litman, *supra* note 15, at 1427 (referring to the doctrine's "assumption that the legislature exercises the full scope of its powers").

88. *See* Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 674 (2016) (arguing that the doctrine is flawed unless one only takes past practice as "indicative of acquiescence if there is evidence that the branches were at least aware of the constitutional issue at hand and, if so, that they were likely motivated by constitutional analysis, as opposed to apathy, politics, other legal authority, or coercion").

exercise assumes a "degree of unity and coherence within institutions, and from one action to another."[89]

Taken together, these assumptions reveal a judicial view on how Congress operates. Specifically, (1) Congress is cognizant of the constitutionality of the laws that it considers; (2) it possesses both the desire and capacity to legislate right up to the Constitution's line; and (3) a degree of unity and coherence across Congresses allows judges to determine a consistent and deliberate historical practice. As we will see, historical practice casts cold water on all of these assumptions.

II. FRAMEWORK

With this background, we return to a broader framework for evaluating financial legislation based on fragile coalitions and high-variance historical contingencies. This Part elaborates on our coalitions-and-contingencies approach. It then highlights our framework's substantial points of departure—as well as some commonalities—with the prevailing theories.

A. Elements

The coalitions-and-contingencies framework includes four fundamental attributes:

1. Unpredictable events from across the spectrum—scandals, close elections, financial crises, pandemics, and the like—spark new proposals;

2. Specific individuals, known as policy entrepreneurs, play a crucial role in advancing major financial legislation;

3. Legislative coalitions that advance major financial legislation are temporary and brittle; and

4. Legislative outcomes, driven by randomness, are novel and reflect the diversity of inputs inherent in the legislative process.

The common themes among these features are the role of uncertainty and, relatedly, the idiosyncratic, context-specific manner in which financial legislation develops. Historical contingencies—which are often unpredictable ex ante—are present throughout.

89. Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 78 (2013).

Here, we view the legislative process through both the lenses of risk and uncertainty articulated by Frank Knight in 1921.[90] There are "measurable risks" that are capable of study.[91] The likelihood that bills sponsored by the minority party in the House will reach the President's desk is one example. But of greater importance to the legislative process are those uncertainties that are not subject to objective, actuarial assessments.

Two forms of uncertainty, in the Knightian sense, drive the legislative process. Just as the "rate of interest twenty years hence" is unknown and unknowable, to quote John Maynard Keynes's articulation of Knightian uncertainty,[92] we cannot know, first, what type of event will trigger congressional action and, second, once triggered, what ultimate course the legislative process will take. Elements within these processes may lend themselves to probabilistic analysis, but the processes themselves are largely uncertain.

This declaration of agnosticism does not mean we aim to replace predictive theory with nihilism. Indeed, the notion that uncertainty is pervasive has a rich social-scientific pedigree. For instance, Philip Tetlock's exhaustive study of tens of thousands of predictions concerning politics, macroeconomics, and international relations reveals that experts' forecasts have a lower success rate than random chance.[93]

Here, the intellectual payoff for focusing on fragile coalitions and historical contingency is the attention it focuses on the *reaction* to unpredictable events, particularly the negotiation among coalitional groups—both in support of and in opposition to a specific legislative outcome. These reactions are a process of activating and manipulating preexisting intellectual streams promoted by policy entrepreneurs whose views exist at the periphery of legislative action until activated by these random events. When unpredictable events activate ideas, coalitions form, subject to the whims of an ongoing stochastic process. Legislation is the outcome.

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90. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 18 (1921). Legal scholars have employed the concept of Knightian uncertainty in a variety of contexts. *See, e.g.*, Nabil I. Al-Najjar, *A Bayesian Framework for the Precautionary Principle*, 44 J. LEG. STUD. 337 (2015); Chris William Sanchiricio, *Optimal Tax Policy and the Symmetries of Ignorance*, 66 TAX L. REV. 1 (2012); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441 (2010).

91. KNIGHT, *supra* note 90, at 20.

92. John Maynard Keynes, *The General Theory of Employment*, 51 Q. J. ECON. 209, 214 (1937).

93. *See* PHILIP TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (2005).

B. Alternatives

Our theory contrasts sharply with the prevailing law-and-finance accounts. For one, whereas the crisis-legislation hypothesis focuses on financial turmoil as a catalyst for legislation—even positing an "iron law" that financial legislation "is invariably crisis-driven"[94]—we recognize a diverse set of events as providing the spark.

Some of these events are fairly labeled exogenous to the political system; for instance, the coronavirus pandemic spurred passage of the CARES Act. Others, like close elections, are endogenous. Still other events straddle the line. For example, although in one sense bank megamergers and Wall Street scandals are exogenous in that they occur outside of political institutions, they are endogenous in that law structures the behavior of private-sector actors that induces these events.[95]

A unifying feature of these events is that they shake up a complacent status quo. Even where policymakers acknowledge that a status quo policy is suboptimal, Congress may be reluctant to act where disruption will generate clear losses to some parties. That reluctance may be particularly pronounced where the worse-off parties include particularly powerful and vocal groups, which, consistent with prospect theory, value avoiding losses more than receiving gains.

To be sure, we are far from the first scholars to note the importance of unpredictable events for legislative change.[96] As a matter of emphasis, we argue that this insight carries particular weight regarding financial-services legislation. Finance is a rare industry in which competition—and thus the potential for political rent extraction—occurs on two levels: not only do firms (with different organizational forms and thus subject to differing regulatory regimes) compete with each other, but—unusually—so do a veritable alphabet soup of federal and state regulators.[97] A given policy change, therefore, is likely to disadvantage some firms *and* some regulatory

94. Romano, *Regulating in the Dark*, *supra* note 3, at 56.

95. *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 232–33 (2010).

96. *See, e.g.*, Prentice & Spence, *supra* note 51, at 1849. The concept has taken root particularly in related scholarly areas of securities and corporate-governance legislation. *See, e.g.*, JONATHAN CHARKHAM, KEEPING BETTER COMPANY 5 (2005); Banner, *Causes*, *supra* note 22, at 850; Stephen J. Choi, *Behavioral Economics and the Regulation of Public Offerings*, 10 LEWIS & CLARK L. REV. 85, 123 (2006); Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 102 (2005); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1589 (2005); Romano, *Quack Corporate Governance*, *supra* note 3, at 1524.

97. *See* Edward Kane, *The Evolving U.S. Legislative Agenda in Banking and Finance*, *in* REGULATORY SUPERVISION OF FINANCIAL INSTITUTIONS IN THE NAFTA COUNTRIES AND BEYOND 182 (George von Furstenberg ed., 1997) (explaining how "[s]tatutory inefficiencies . . . serve identifiable . . . interests," and thus "are not purged unless and until they generate a political opposition intense enough to overcome the intensity of their evolving political support").

agencies, providing well-resourced potential opponents on two dimensions.[98]

Lawmakers, therefore, may be particularly averse to disrupting the financial-services status quo. An unanticipated major event, however, may shift the ground, compelling lawmakers to act where they otherwise would prefer to leave well enough alone.

Our theory also departs from Calomiris and Haber's bank-bargain theory. Our focus on historical contingencies—namely, the crucial roles of unpredictable events and individual policy entrepreneurs—contrasts with their emphasis on conscientious institutional *design*. Indeed, focusing the history of financial legislation on the ubiquity of uncertainty undercuts the notion of "design" at all.

Further, we see a much more fragile and uncertain choice set of legislative coalitions than Calomiris and Haber do. They reject the notion of financial politics as "temporary, idiosyncratic alliances," instead viewing financial policy as set by durable coalitions.[99] Their "strange bedfellows" approach to political coalitions is a good starting point, but there is much more variation and instability in these coalitions than Calomiris and Haber recognize. There is no grand, enduring bargain in American financial legislation.[100]

Our account has more in common with political science theories. As with the garbage can model, we see elements of unpredictability and randomness in both the circumstances under which ideas move from proposal to adoption and in the coalitions that support the various streams that Kingdon identifies.[101] Similarly, our focus on policy entrepreneurs naturally draws on that political science literature, which legal scholars have mostly overlooked.[102]

Nonetheless, important differences exist. Unlike these accounts, we emphasize the lack of control that boosters of various policy solutions that spark the legislative process have over the eventual statute. Yes, sometimes the original proposals that policy entrepreneurs introduce strongly resemble

98. *See id.*

99. Calomiris & Haber, *Banking Systems*, *supra* note 6, at 98.

100. This temporariness distinguishes legislative coalitions from parties and interest groups, which demonstrate greater durability. *See* Brian D. Feinstein & Eric Schickler, *Platforms and Partners: The Civil Rights Realignment Reconsidered*, 22 STUD. AM. POL. DEV. 1 (2008) (glacial change in parties); David C. King & Jack L. Walker, *An Ecology of Interest Groups in America*, *in* MOBILIZING INTEREST GROUPS IN AMERICA 57–74 (Jack L. Walker, Jr. ed., 1991) (similar point regarding interest groups).

101. *See* KINGDON, *supra* note 12.

102. *But see* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 865, 869–70 n.13 (2016); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 12-13 n.36–37 (2014); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 266 (2009); David B. Spence, *Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 408 n.42 (2002).

the final enacted legislation. But that outcome is rare. Much more often, policy entrepreneurs are themselves reacting against outside events. There are very few, if any, preconceived ideas that exist outside the legislative process that emerge unchanged by it.

Why would the legislative process for financial legislation differ so significantly to require a separate, finance-specific theory? Put simply, because finance is different. As Dan Awrey and Kathryn Judge show, "dynamism, complexity, and unknowns" are defining features of modern finance.[103] So many new financial products are designed expressly to receive favorable regulatory treatment,[104] and regulatory arbitrage has a remarkably deep pedigree in finance.[105] Further, competition among well-resourced financial firms with different legal forms and charter types may discourage a stable equilibrium in which any one particular segment of the industry captures the policymaking process.[106]

These features present unique challenges for policymakers that are not present to nearly the same degree concerning other sectors.[107] Appropriately, therefore, our theory of financial lawmaking sounds similar notes: unpredictable events, brittle coalitions, and legislative outcomes that are novel and reflect a diversity of inputs. In other words, the elements of our account mirror features of the financial sector.

This symmetry between the financial-service sector and financial legislation is not coincidental. The inherent instability of finance—e.g., that the sector is characterized by cyclicality and innovation, both in terms of new products and new opportunities for regulatory arbitrage[108]—may stymie the integration of financial regulatory politics into "normal" political channels. Whereas the regulation of more stable industries follows more predictable patterns—with policy ideas developing slowly as multiple voices in Washington's institutional ecosystem make incremental contribution—the endemic disruptions in the financial sector present openings for policy entrepreneurs and strange-bedfellow coalitions that simply are not present in more routinized policymaking domains. These uncommon attributes call for a theory of *financial* legislation, distinct from theories about lawmaking writ large.

103. Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short* 7 (Eur. Corp. Governance Inst., Working Paper No. 494, 2020).

104. *See* Kathryn Judge, *Information Gaps and Shadow Banking*, 103 VA. L. REV. 411, 437 (2017).

105. *See* Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93, 97 (2008).

106. *See* Kane, *supra* note 97.

107. Awrey & Judge, *supra* note 103.

108. *Id.* at 7–11.

III. APPLICATIONS

Having presented an alternative approach to evaluating financial legislation that focuses on fragile coalitions and historical contingency, we turn to assessing how well this framework fits the historical record. Accordingly, this Part applies the four principles articulated above to a broad sweep of major financial legislation across a 107-year timespan, beginning with the creation of the Federal Reserve in 1913 and ending with Congress's most recent effort to reshape significant aspects of the financial system in the passage of the CARES Act of 2020.

By practical necessity, these vignettes do not exhaustively document every piece of financial legislation. They do, however, exhibit balance across time period and subject matter and include deregulatory as well as regulatory matters. Although there are nuances and exceptions, on balance the picture that emerges depicts uncertainty throughout—unpredictable events provide the spark, historically contingent policy entrepreneurs introduce new ideas, and brittle, temporary coalitions coalesce—with novel legislation being the outcome.

A. Federal Reserve Act of 1913

The Federal Reserve Act provides an early demonstration of the importance of focusing on the four principles of our framework. Along its way to passage, the Act bore the fingerprints of policy entrepreneurs with ideas ready "off the shelf"—Paul Warburg, for example—as well as those who came to the legislative process with few preconceived notions, such as Woodrow Wilson. And the shape the Fed took after 1913 could not have been predicted, coming as it did as a compromise between factions that did not even know they disagreed on the particulars before they began their negotiation.

1. The Panic of 1907

Following the *fin de siècle* political failure of the quest for bimetallism—perhaps the dominant economic policy question of the late nineteenth century[109]—ideas regarding financial legislation receded from the political agenda. Intellectual debates outside the main policy currents did not, however, disappear. Investment banker Paul Warburg was a major

109. MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN 45–80 (2007); JEFFRY A. FRIEDEN, CURRENCY POLITICS 104–37 (2015).

participant in these debates.[110] Warburg's ambitions were not novel: he wanted only to see the Bank of England founded in New York City.[111]

More experienced politicians scoffed at the idea, given the received wisdom that President Andrew Jackson had killed central banking in the United States forever. The Panic of 1907 changed this view, at least in part. The crisis began when an unpredictable shock—the San Francisco earthquake followed by the collapse of overexposed public companies—ripped through a financial system replete with poorly regulated and highly fragile trust companies.[112] When the largest of these trusts failed, a general run on trusts resulted in a panic.[113] Contagion spread throughout the system.[114]

In the conventional account, the Fed came as Congress's answer to the problem of J.P. Morgan's mortality. In this telling, Morgan saved the U.S. financial system following the 1907 panic. Congress then recognized that it couldn't count on Morgan forever, so it passed the Federal Reserve Act of 1913.[115]

The problem with that story is that while some of the bare facts are true, the arc of the narrative is not. There was a financial panic in 1907, Morgan was involved, and the Federal Reserve Act was passed in 1913. What the story misses is just how much activity intervened between 1907 and 1913.[116]

To be sure, the Panic did indeed trigger prompt legislation that would add policy entrepreneurship to the discussion of ultimate financial reform. Six months after the crisis peaked in November 1907, Congress created the National Monetary Commission to research "what changes are necessary or

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110. *See, e.g.*, Paul Warburg, *Defects and Needs of Our Banking System*, N.Y. TIMES, Jan. 6, 1907, at AFR14.

111. *See* PAUL WARBURG, THE FEDERAL RESERVE SYSTEM: ITS ORIGIN AND GROWTH 56–57 (1930); ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE 108–120 (2015). This narrative places Warburg at the center of the political discussion, but the intellectual streams active in the years ahead of the Fed's passage were varied. *See* Nadav Orian Peer, *Negotiating the Lender-of-Last-Resort: The 1913 Fed Act as a Debate Over Credit Distribution*, 15 N.Y.U. J.L. & BUS. 367 (2019); 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE 5–23 (2003).

112. *See* Carola Frydman, Eric Hilt & Lily Y. Zhou, *Economic Effects of Runs on Early "Shadow Banks": Trust Companies and the Impact of the Panic of 1907*, 123 J. POL. ECON. 902, 907–12 (2015) (describing the follow-on effects for businesses banking in the trust system).

113. *See* ROBERT F. BRUNER & SEAN D. CARR, THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM 3 (2007).

114. *Id.*

115. *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. REG. 257, 276–77 (2015).

116. Even though Morgan's participation in staunching the panic has been oversold, the shadow of panic still loomed over discussions regarding the Federal Reserve Act. *See generally* HERBERT SATTERLEE, J. PIERPONT MORGAN: AN INTIMATE PORTRAIT 1837–1913 (1939); FRANK VANDERLIP, FROM FARM BOY TO FINANCIER 174–75 (1935). Newspapers widely reported Morgan's involvement at the time. *See, e.g.*, *How and Why J. Pierpont Morgan Stopped the Panic of 1907*, WASH. POST, Nov. 10, 1907, at X5.

desirable in the monetary system of the United States or in the laws relating to banking and currency."[117] The Act created what one commentator called a "curious compound of conflicting views, compromise, haste, and politics,"[118] but still forced the hard conversations that Congress seemed unlikely to resolve on its own. But the Act had a limit: it would expire in fourteen years. Under Commission chair Nelson Aldrich, a major power broker in the Senate, the Commission issued over thirty volumes of original research on central banking from every major global jurisdiction and several different epochs of U.S. history, generating enormous new policy content.[119]

During the 1908 election season, Aldrich and other commissioners embarked on a global tour. Through fifty-eight meetings with central bankers, financiers, and other notables, they concluded that the common denominator across regimes was the idea of a *system*. Aldrich and his colleagues settled on the idea of a "system" that focused power in the hands of New York bankers with minimal participation from politicians. Given the political sensitivity that this outcome would engender, much of this strategizing was pursued in secret.[120]

The proposal that emerged from this secrecy was termed the Aldrich Plan. Its centerpiece was the "National Reserve Association," a national confederation with local branches that allowed individual banks to pool reserves under common control of a purely private governance structure. Although, unlike the archetypical central bank, it did not place total control in the hands of a single central bank governor, it would have government support and the U.S. President would appoint the entity's governor (albeit only from a list of forty directors). It was, as Warburg put it, "strictly a banker's bank."[121]

2. *The Politics of 1912*

Just as Aldrich prepared to release his plan, congressional hearings on the so-called "money trust" chaired by the obscure Democratic representative Arsene Pujo catapulted into the headlines. The Pujo Hearings featured testimony from J.P. Morgan, who answered the charge that the

117. Aldrich–Vreeland Act, Pub. L. No. 60-169, § 18, 35 Stat. 546 (1908).

118. J. Laurence Laughlin, *The Aldrich-Vreeland Act*, 16 J. POL. ECON. 489, 490 (1908).

119. The volumes of the National Monetary Commission have been collected by the Federal Reserve Bank of St. Louis, available at https://fraser.stlouisfed.org/series/publications-national-monetary-commission-series-1493 [https://perma.cc/N9BC-8QJL].

120. *See* WARBURG, *supra* note 111, at 57, 60. As a window into the enduring political salience of central banking, consider that, at the time, the Democratic Party was still frequently referred to as "The Democracy," in homage to the central bank-killing Jackson's political coalition generations ago in the 1830s.

121. WARBURG, *supra* note 111, at 59.

nation's money and credit were subject to monopolistic control.[122] Morgan's testimony did not impress the public, with popular sentiment turning against his perceived haughtiness in the midst of the 1912 election.[123] This shift in sentiment and the results of the highly contingent election made a profound difference in the final shape of the Fed's structure.

Meanwhile, as public sentiment shifted, the political landscape exploded, as the 1912 presidential campaign—which pitted two former presidents, Theodore Roosevelt and William Howard Taft, against Woodrow Wilson—got underway. The question of central banking played only a minor role in that election. "We oppose the so-called Aldrich Plan bill or the establishment of a central bank," the Democratic platform declared.[124] Likewise, Roosevelt's Progressive Party also opposed the Aldrich Plan, because it "would place our currency and credit system in private hands, not subject to effective public control."[125] By contrast, the Republican Platform was more opaque regarding its position; it declared simply that the "party has always stood for a sound currency and for safe banking methods."[126] There was virtually no further debate or engagement on this question: the political focus was almost exclusively elsewhere.

3. *The President in 1913*

Wilson won the election with a knife-edge result. His party then adopted the currency question—on the back of hostility from Pujo. The focus on a new plan meant the need for new ideas. Democrats turned, ironically, to the Aldrich Plan, but only for the expertise that Aldrich had acquired in developing its functions.[127]

The structure of what would become the Federal Reserve System was, however, the result of 1912, not 1907—of Woodrow Wilson, not Nelson Aldrich. The enthusiasm for the finer points of money had waned substantially. Woodrow Wilson summed up the mood this way: "Let bankers explain the technical features of the new system," he said. "Suffice it here to say that it provides a currency" that is based in sound economic

122. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

123. RON CHERNOW, THE HOUSE OF MORGAN 154 (1990).

124. THE AM. PRESIDENCY PROJECT, DEMOCRATIC PARTY PLATFORM OF 1912 (June 25, 1912), http://www.presidency.ucsb.edu/ws/?pid=29590 [https://perma.cc/K7FR-2J3Q].

125. THE AM. PRESIDENCY PROJECT, PROGRESSIVE PARTY PLATFORM OF 1912 (Nov. 5, 1912), https://www.presidency.ucsb.edu/documents/progressive-party-platform-1912 [https://perma.cc/6LYM-5HVS].

126. THE AM. PRESIDENCY PROJECT, REPUBLICAN PARTY PLATFORM OF 1912 (June 18, 1912), http://www.presidency.ucsb.edu/ws/?pid=29633 [https://perma.cc/ZF69-876P].

127. *See* WARBURG, *supra* note 111 (making the former claim); HENRY PARKER WILLIS, THE FEDERAL RESERVE SYSTEM (1923) (making the latter claim); CARTER GLASS, AN ADVENTURE IN CONSTRUCTIVE FINANCE (1927) (same).

principles.[128] The Fed could not issue money out of nothing, Wilson averred. But most people need not concern themselves with the technicalities.

Some Democrats in Congress resented their party leadership's change: their platform had, after all, rejected the Aldrich Plan, and now it seemed the Democratic Congress was poised to enact it. But through masterful use of his popularity, Wilson—with the assistance of the conservative House Banking Chair Carter Glass (D-VA)—brought the Democrats into line. Those who viewed the Federal Reserve Act as a dressed-up version of the Aldrich Plan were convinced or compelled to keep silent.[129] Further, even though the bill passed largely on party lines, it engendered support from an ideologically diverse coalition of liberals to moderate conservatives, particularly in the House.[130]

The structure of the central bank—specifically, whether it would be private or public, and whether it would be centralized or diffused—was highly contested.[131] Warburg feared public influence over the provision of liquidity throughout the system in case of panics, which he, as a private banker in the European tradition, viewed as an inherently private function. Glass did not disagree about the nefarious influence of government, but he preferred to create a sea of private central banks spread throughout the

128. DONALD KETTL, LEADERSHIP AT THE FED 22 (1986).

129. *See Wilson Plan is Adopted*, N.Y. TIMES, July 29, 1913, at 2. Although the bill passed the House and Senate mostly on party lines, an unusual number of abstentions were recorded, particularly among House Democrats. *See House Vote #33 in 1913 (63rd Congress) to Pass the Currency Bill H.R. 7837*, GOVTRACK (Sep. 18, 1913), https://www.govtrack.us/congress/votes/63-1/h33 [https://perma.cc/3Z8G-XKML] (recording 247 Democrats and 33 Republicans voting yea, 3 Democrats and 85 Republican nays, and 39 Democrats and 19 Republicans abstaining in the House); *Senate Vote #184 in 1913 (63rd Congress) to pass H.R. 7837*, GOVTRACK (Dec. 19, 1913), https://www.govtrack.us/congress/votes/63-2/s184 [https://perma.cc/T7D3-SW6L] (recording 47 Democratic and 7 Republican yeas, zero Democratic and 34 Republican nays, and 3 Democratic and 4 Republican abstentions in the Senate).

130. Using the DW-NOMINATE method of arraying legislators' ideological preferences on a one-to-one, liberal-to-conservative scale based on their roll-call votes, a House member with an ideal point of 0.308 would be at the "cutpoint," i.e., the location on this scale at which a legislator would be indifferent between voting for or against establishing the Federal Reserve. Keith Poole & Howard Rosenthal, *Realtime Nominate and Related Data*, VOTEVIEW, https://voteview.com/data [https://perma.cc/3335-37QT]; *63rd Congress, House Vote 33*, VOTEVIEW, https://voteview.com/rollcall/RH0630033 [https://perma.cc/W3M4-6LQM]. In comparison, the median House Democrat in the 63rd Congress was located at -0.304 and the median House Republican at 0.401. *Id.* Likewise, a senator located at 0.230 is estimated to be indifferent between voting for or against the legislation. *63rd Congress, Senate Vote 184*, VOTEVIEW, https://voteview.com/rollcall/RS0630184 [https://perma.cc/BL5S-HJY9]. The median Democratic senator's score was -0.278 and the median Republican's was 0.418. *Id.* For figures showing the ideal points of bill supporters, see *63rd Congress, House Vote 33*, *supra* note 130, and *63rd Congress, Senate Vote 184*, *supra*.

131. *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 17-27 (2016).

country—not to give the keys of the financial kingdom to the New York bankers.[132]

Wilson played a pivotal role in these debates. He wanted the private Reserve Banks—a real difference from the National Reserve Association in the Aldrich Plan—to thread the needle between autonomy and government supervision. He proposed a novel structure: a Washington-based, government-controlled supervisory board placed on top of the essentially private, decentralized central banks flung by Carter Glass throughout the country.[133]

Wilson's sui generis position carried the day. The result was the leanly staffed Federal Reserve Board based in Washington. The Board would include the Treasury Secretary as the ex officio Chair of the System, with the Comptroller of the Currency also serving on the Board. In addition to these two political appointees, the Board consisted of five presidential appointees, serving ten-year terms each. The rest of the System consisted of "eight to twelve" Reserve Banks, each of which would have a "governor" and a nine-person board of directors. They would be the essentially private features of the System.[134]

4. *Applying the Coalition-and-Contingencies Framework*

Recall the four principles of our framework: unpredictable events, policy entrepreneurs with only partially formed ideas, fragile coalitions, and novel legislative outcomes. The events behind the passage of the Federal Reserve Act were three, principally: the Panic of 1907, the Pujo Hearings of 1912, and the extraordinary election of 1912. The Panic was the least impactful of these, despite conventional narratives placing it front-and-center. But it did refocus the perennial issues of the financial legislation away from mentalism and toward banking. The Pujo Hearings and the election of 1912 pushed the politics toward experimental inclusion of political control that had not previously been a part of the discussion in the U.S. or elsewhere (Wilson's certainty to the contrary notwithstanding).

Policy entrepreneurs' fingerprints are also easily visible on the Federal Reserve Act. Warburg was an early, vocal voice in this debate, drawing on deep intellectual streams. Later, Aldrich and his Commission concluded that a systematic approach was needed, and pushed for one with his Aldrich Plan; that plan's proposed National Reserve Association functionally resembled the eventual Federal Reserve System. And Wilson, a scholar of institutional design, proposed a novel structure, layering a federally

132. *See id.*
133. *See id.*
134. *See* GLASS, *supra* note 127.

controlled supervisory board on top of a group of essentially private, geographically dispersed central banks. But neither Warburg, nor Aldrich, nor Wilson got what they wanted. Warburg was closest, but even he admits how much had changed between his proposals and legislative enactment.

Further, a punctuated coalition—not a single party or interest group *per se*—guided the Act through Congress. The Democratic Party did not create the Federal Reserve Act, despite the insistence of Carter Glass decades later. Indeed, some Democrats chafed at the prospect of supporting a bill that drew so heavily on Republican ideas.[135] Instead, the bill's content was largely generated by the Act's ultimate opponents, Republicans around Nelson Aldrich.

The Federal Reserve System's novelty is its most defining feature. "A slight acquaintance with American constitutional theory and practice demonstrates that, constitutionally, the Federal Reserve is a pretty queer duck," said Wright Patman, a perennial Fed critic and Democratic congressman.[136] Indeed, if antinovelty doctrine were around in 1913, the Fed likely would not have survived. Its central banking predecessors looked nothing like the public-private hybrid system. For some, the participation of essentially private bankers in major policy roles raises constitutional questions.[137]

Thus, even though the Federal Reserve Act is sometimes described as the quintessential act of policy entrepreneurs responding to financial crisis, it in fact bears all the hallmarks of contingency-driven legislation. By contrast, the crisis-legislation and bank-bargain theories hold more limited explanatory power. Bank-bargain theory's emphasis on strong, durable interests negotiating among each other is hard to reconcile with the fleeting and brittle coalition that midwifed the Federal Reserve. Randomness played a key role in its creation; a bargaining process among interest groups with known and durable positions did not. More to the point, there was nothing politically feasible about the Federal Reserve Act; it was a contingent outcome that might never have occurred.

Neither can the crisis-legislation hypothesis explain the statute's path to passage. Despite the intellectual proximity of the Federal Reserve Act of 1913 to the Panic of 1907, the Act was far from a cobbled-together overreaction to a financial crisis. Instead, the central ideas in the Act were

135. Ultimately, almost fourteen percent of House Democrats abstained from voting on the floor passage of the Act. *See House Vote #33 in 1913 (63rd Congress) to Pass the Currency Bill H.R. 7837*, *supra* note 129.

136. 112 CONG. REC. 15,031 (1966); WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 49–50 (1989).

137. Conti-Brown, *supra* note 115, at 300–07.

long incubating. In addition, Congress's approach was cautious; the original version of the Act even included a sunset clause.[138]

Further, if crisis-legislation adherents were to point to the Panic of 1907 as the motivating financial crisis, then the clearest legislative "reaction"—i.e., the true crisis legislation—would be the Aldrich-Vreeland Act establishing the National Monetary Commission in 1908. That law had nowhere near the ambition of the Federal Reserve Act, and is largely (and appropriately) forgotten to history. The six years that separated the Panic of 1907 and the Federal Reserve Act show that no predictable path toward legislative enactment was at stake. It was not a foregone conclusion in 1907 that the U.S. would experiment again with central banking in 1913. Very little was certain until the months prior to Woodrow Wilson's signing the bill into law on December 23, 1913.

What we see instead are tenuous, short-term coalitions poised to solve problems with solutions that largely developed during the process itself, creating something that had never been seen before. Rather than being subject to some great strategic design, the Federal Reserve Act of 1913 was the result of the collision of somewhat unstructured intellectual energies and unpredictable events.

B. Banking Act of 1933, § 8

The Great Depression, the election of 1932, and the New Deal ushered in substantial changes to nearly every element of banking and capital markets policy. The Banking Act of 1933 was particularly consequential.[139] The Act captured the popular imagination in a way that few pieces of financial legislation have done, before or since.

Although the legislation accomplished a variety of objectives, the most consequential were the creation of the Federal Deposit Insurance Corporation and the division between commercial banks that accepted deposits and investment banks that underwrote securities, advised firms and individuals on investments, and performed other kinds of merchant banking activities. This section focuses on the deposit-insurance provision contained in section 8 of the Act.[140]

1. Halting Origins

The idea of government-provided deposit insurance has a long history—with varying degrees of success—beginning with New York's experiments

138. Federal Reserve Act of 1913, Pub. L. 63-43, ch 6. 38 Stat. 251, December 23, 1913, § 4.
139. Pub. L. No. 73-66, 48 Stat. 162.
140. *Id.*

with the concept in 1829.[141] After the Panic of 1907, Democrats called for deposit insurance in their party platform.[142]

There was little enthusiasm for the project outside the Democratic Party bosses who wrote the platform, and 1908 was not the Democrats' year. Laurence Laughlin, one of the key monetary theorists behind what would become the Aldrich Plan, dismissed the Democrats' ideas as an effort to "make men good by law. It is purely populistic and socialistic."[143] Despite continued, but somewhat uneven, experimentation at the state level,[144] the idea of federal deposit insurance on the eve of the Depression was widely dismissed.[145]

Bankers did not lose their enthusiasm for fighting deposit insurance throughout the debates. In the words of one contemporary observer, "[i]nfluential bankers and banker organizations fought deposit guaranty to the last ditch."[146] Their dispute was not that nothing should be done, but that deposit insurance had been a failure where it had been practiced ahead of the crises. "There can be no question about the need of protection for American bank depositors," one banker wrote in 1932. "The debatable point is the form which that protection should take."[147]

The bankers had the better of the argument from a practical perspective. Nearly every state insurance fund was insolvent by the time that Glass-Steagall was passed in 1933.[148] Carter Glass himself, speaking at the Democratic National Convention in 1932, argued that the "guarantee of bank deposits has been tried in a number of [s]tates and resulted invariably in confusion and disaster." Any effort to adopt deposit insurance at the federal level would "drive the strongest member banks from the Federal Reserve System. Th[o]se strong banks should not be assessed to pay a premium for mismanagement."[149]

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141. *See* Charles W. Calomiris & Eugene N. White, *The Origins of Federal Deposit Insurance*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 145, 148 (Claudia Goldin & Gary D. Libecap eds., 1994).

142. THE AM. PRESIDENCY PROJECT, 1908 DEMOCRATIC PARTY PLATFORM (1908), https://www.presidency.ucsb.edu/documents/1908-democratic-party-platform [https://perma.cc/K2N5-3YM2] (advocating "legislation under which the national banks shall be required to establish a guarantee fund for the prompt payment of the depositors of any insolvent national bank, under an equitable system which shall be available to all State banking institutions wishing to use it").

143. RICHARD T. MCCULLEY, BANKS AND POLITICS DURING THE PROGRESSIVE ERA 160 (1992).

144. *See, e.g.*, Arthur Evans, *South Dakota's Pet Peeve Is State Banking*, CHI. DAILY TRIB., Aug. 5, 1926, at 14 (blaming state-administered deposit insurance for bank failures).

145. *See, e.g.*, *Deposit Insurance, Again*, BANKERS' MAG., Jan. 1928, at 116 (asserting that the idea "is so fully discredited as to warrant the permanent scrapping of the scheme").

146. Howard H. Preston, *The Banking Act of 1933*, 23 AM. ECON. REV. 585, 599 (1933).

147. P.T. Hitchens, *The Guaranty of Bank Deposits*, BARRON'S, May 30, 1932.

148. *Id.*

149. Turner Catledge, *Platform Adopted with One Loud 'Aye'*, N.Y. TIMES, July 1, 1932, at 15.

2. Mainstream Adoption

The change came slowly, then in a rapid burst. Banks were almost unanimously opposed. Some southern politicians, however, viewed deposit insurance as an alternative to the dread of branch banking, or the practice of allowing banks to open new branches under the same umbrella organization. House Banking & Currency Committee Chair Henry Steagall (D-AL) was among those defenders of unit banking—the legal prohibition on branch banking. Deposit insurance was its alternative, and every piece of banking legislation from 1930 onward that originated from the House (always by way of Steagall's committee) included it.

Carter Glass and Franklin Roosevelt—also an opponent of deposit insurance—eventually relented. Glass viewed deposit insurance as a means of punishing New York investment banks by pushing them out of the commercial banking space. The public did not attach the same importance to that pet issue, although the prominence of New York's perceived errors had risen in the sensational Pecora hearings that had brought the activities of investment banks to the front pages.[150]

But although Glass's enthusiasm for the separation of commercial and investment banking made deposit insurance more palatable, the real enthusiasm was for what Congress had already done as the first piece of New Deal legislation: the de facto provision of 100% deposit insurance through the banking holiday of 1933.[151] Shortly after his inauguration on March 4, 1933, Roosevelt declared a national banking holiday after Michigan and other states had done the same. The original executive order required a four-day holiday; the holiday was in fact extended for three additional business days. In total, banks were closed from March 5 until March 13, 1933.

The Bank Holiday created what economic historian William Silber called "de facto 100 percent deposit insurance," as the Federal Reserve Banks provided essentially unlimited liquidity to banks, which were not subject to particularly stringent recapitalization plans.[152] The supervisory attention during that blistering period was intended to reassure the public, not cut out the rot of insolvency.[153] And the public responded. Within two weeks, "the public had returned to the banks two-thirds of the currency hoarded since the onset of the panic."[154]

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150. *See* MICHAEL PERINO, THE HELLHOUND OF WALL STREET (2010).

151. *See* Peter Conti-Brown & Sean H. Vanatta, *The Logic and Legitimacy of Bank Supervision: The Case of the Bank Holiday of 1933*, 95 BUS. HIST. REV. 1, 1–34 (2021).

152. William L. Silber, *Why Did FDR's Bank Holiday Succeed*, 15 ECON. POL'Y REV. 19, 20 (2009).

153. *See* Conti-Brown & Vanatta, *supra* note 151.

154. *Id.*

With the success of the Bank Holiday—and with Roosevelt, Glass, and Steagall all finally on board—passage of deposit insurance as part of the Banking Act of 1933 was essentially assured. By midcentury, there was near unanimity that the FDIC had been a crown jewel of the New Deal.[155] In a few decades, federal deposit insurance had gone from widely discredited to being viewed as an integral part of federal law and an enduring success of the New Deal. The bedrock status that deposit insurance currently holds in the financial regulatory structure makes its historically contingent origins even more remarkable.

3. Applying the Coalitions-and-Contingencies Framework

All four principles of our framework are present concerning the FDIC's establishment. First, key policy entrepreneurs—namely, Roosevelt, Glass, and Steagall—played an outcome-determinative role in guiding the bill to passage, even though the entrepreneurs themselves did not agree on that outcome. Had any of the three acted on their misgivings with the idea, it likely would have been scuttled.

Second, the coalition was remarkably brittle. Deposit insurance was not high on Roosevelt's list of priorities; Glass actively opposed it until the very end. While he had almost untrammeled legislative autonomy in the first weeks of the New Deal, he yielded to a public outcry that favored this kind of formal assurance. Steagall supported it largely to avoid branch banking. Thus, while the members of this troika were all high-ranking Democrats, their alliance was less firmly grounded than this shared affiliation may suggest, as each member supported the policy for widely differing reasons.

Third, the Bank Holiday and the panics that occurred after the 1932 election and before FDR's inauguration changed the course of deposit insurance. Bank examination and guarantees were substitutes for deposit insurance. Had Hoover succeeded in stemming the panics under way in 1932 without resort to a bank holiday, it is very likely that federal deposit insurance would not have been the preferred policy outcome.

Finally, the structure was novel. Federal deposit insurance had never been tried before. It was self-funded through premiums paid by the banks, and thus not an appropriated agency. Indeed, it was barely an agency at all: it was funded through the Federal Reserve System and technically a part of that system until 1951.

155. *See Federal Deposit Insurance Act of 1950: Hearings on Amendments to S. 2822 Before the H. Comm. on Banking and Currency*, 105th Cong. 21 (1950) (liberal legislators expressing "gratitude" and enthusiasm for the FDIC); MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960 at 434 (1963) (support from libertarian economists).

Other theories do not adequately explain the advent of federal deposit insurance. For one, banks generally were opposed to a federal deposit insurance program—a far cry from the government-banker partnerships that bank-bargain theory envisions.

Nor does the crisis-legislation account fully explain deposit insurance's genesis. To be sure, several factors counsel in favor of the crisis-legislation hypothesis. Deposit insurance was an off-the-shelf idea with almost no empirical evidence in its favor, passed in an emergency with little debate.[156] Nonetheless, the crisis-legislation explanation is incomplete. For one, it cannot explain why the federal deposit insurance program proposed in the wake of an *earlier* crisis—the Panic of 1907, the banking panics of 1930 or 1932—failed to gain traction, despite its wide discussion during both of those periods.

The confluence of events and the particular, personality-driven bargain that these strange bedfellows struck—combined with the enthusiasms of a mostly uninformed Congress to do something muscular—pushed through an idea that has endured, with bipartisan enthusiasm, for eighty years thereafter.[157]

C. Bank Holding Company Act of 1956

1. Before Legislation

Since at least the 1830s, clever bankers have formed loose corporate affiliations to evade state prohibitions on interstate banking and on nonbank businesses owning banks. Congress had attempted to rationalize this convoluted system, unsuccessfully, for decades.

By the mid-twentieth century, these affiliated entities became known as bank holding companies, i.e., entities that control multiple banks across states lines that are organized as separate legal entities in each state. The bank holding company *par excellence* at the time was Transamerica, a vast entity that grew over these decades to become one of the nation's largest financial firms. It aspired, in its founder A.P. Giannini's terms, to become a

156. For instance, the Emergency Banking Relief Act of 1933, enacted to legitimize FDR's Bank Holiday, was passed in a single day, only five days after Roosevelt's inauguration. When lawmakers, who were called into special session via Roosevelt's Bank Holiday proclamation, arrived in Congress, they did not receive printed copies of the bill and had only thirty-eight minutes of "debate" before their vote. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 at 134–35 (1999).

157. Indeed, the experience of deposit insurance has prompted some commentators to extend the idea to many more classes of assets. *See, e.g.*, MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION (2016); GARY B. GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007 (2010).

financial services "department store" to provide its customers and clients with every conceivable financial product or service. The company controlled banks in six states, including the largest bank in California. The firm also controlled insurance companies, mortgage originators, and before Glass-Steagall's abolition of that business model, investment brokerages. "This company," James Bonbright and Gardiner Means wrote in their 1932 treatise on bank holding companies, "has an intercorporate structure so ramified as almost to pass beyond the bounds of comprehension." After the war, Transamerica continued its dramatic expansion.[158]

From the Fed's perspective, Transamerica presented a fundamental threat to the nation's financial structure. By 1942, it had grown so large that it threatened to monopolize, as Fed Chair Marriner Eccles recalled, "a good part of the banking business of the Western seaboard." In February, in a moment of comity among the federal bank supervisors, the Fed, the Comptroller, and the FDIC ordered Transamerica to cease acquiring new banks. Giannini ignored them.

The Fed, at Eccles's insistence, sued under the Banking Act of 1935. That Act authorized the Fed to enforce the Clayton Act's antitrust provisions where they applied to banks. The Fed argued that Transamerica's position in five states constituted a monopoly in violation of those laws. Courts, however, disagreed.[159] The Fed's attempt to use antitrust law to control Transamerica had failed.

At the same time as the Fed's lawyers were attempting to use antitrust law to bring Transamerica to heel, Fed insiders pushed Congress for clarity on the legal status of holding companies. A coalition of banking trade associations and liberal members of Congress—including Senator Paul Douglas (D-IL), the Senate's resident banking and monetary expert—responded by introducing what would become the Bank Holding Company Act of 1956 (BHCA).[160] The legislation would compel bank holding

158. *Branch, Chain, and Group Banking: Hearings Before the H. Comm. on Banking and Currency* (1930) (statement of A.P. Giannini). *See also Transamerica—The Bank Holding Company Problem*, 1 STAN. L. REV. 658, 661–65 (1949); *Bank Holdings Bill: Hearings Before a Subcomm. of the S. Comm. on Banking and Currency*, 81st Cong. 193–94 (1950) (Statement of W. L. Andrews, Vice President and Treasurer, Transamerica Corp.); JAMES C. BONBRIGHT & GARDINER C. MEANS, THE HOLDING COMPANY 333–35 (1932); *Timeplan System Field to Expand: Wider Sales Financing Program Announced*, WALL ST. J., Apr. 23, 1941; *Bank of America Extends Plan*, WALL ST. J., April 24, 1941, at 10; *E.A. Mattison, Former Bank Executive, Dies*, L.A. TIMES, Dec. 4, 1958. Our thanks to Sean Vanatta for his help understanding these arguments and finding these sources.

159. Transamerica Corp. v. Bd. of Governors of Fed. Rsrv. Sys., 206 F.2d 163, 169 (3d Cir. 1953) (affirming dismissal of the Fed's suit and stating that the Fed's "conclusion of a tendency to monopoly in the five-state area . . . flies in the face of its own finding that the local community is the true competitive banking area").

160. Pub. L. No. 84-511, 70 Stat. 133.

companies to conform to the same regulations that governed the individual banks they owned.[161]

2. *The Path of Legislation*

In response to the Fed's failure in court—and backed by the temporary coalition of liberals, bankers, and Fed officials like Eccles—Douglas pushed for a bill that would, like the McFadden Act, limit bank holding companies to business within individual states, and thus maintain local democratic control over financial markets. Douglas's BHCA had twin aims: to prevent the growth of banks controlled by holding companies and to limit the extent that non-banking businesses were affiliated with insured banks—both of which were features of Giannini's empire.[162]

For liberals like Douglas, reining in Transamerica was emblematic of a lifelong quest to curtail the market power of large businesses and financial institutions.[163] On the conservative side, banking-sector trade groups argued that holding companies' excessive market power, which gave them competitive advantages over their independent counterparts, was as threatening to the free enterprise system as excessive government intervention.[164]

As Congress debated the Bank Holding Company Act, however, many members were willing to consider regulatory moderation. Against Douglas's wishes, the Senate Banking Committee reported a bill that allowed bank holding companies to cross state lines subject to Federal Reserve approval. They did so under the theory that authority over the national banking system should rest with national authorities.

Douglas took his fight to the Senate floor. There he introduced an amendment originally proposed by the American Bankers Association, stating that no out-of-state bank holding company could acquire a bank within a state "unless the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that

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161. *Id.* at § 6.

162. *See generally* Saule Omarova & Margaret Tahyar, *That Which We Call a Bank*, 31 REV. BANKING & FIN. L. 113, 114 (2011) (describing the complex statutory definition of a "bank holding company").

163. *See* 102 CONG. REC. S6,857 (daily ed. April 24, 1956) (statement of Sen. Douglas) ("Big banks commonly find it much easier and more to their liking to do business with big business rather than with little business."). Douglas championed an idealized antimonopoly liberalism, where the free-enterprise system preserved small competitors against the aggressive competition of larger rivals. *See id.*

164. *See Control and Regulation of Bank Holding Companies: Hearing on H.R. 2674 Before the H. Comm. on Banking and Currency*, 84th Cong. 163 (1955) (Statement of W.J. Bryan, President, Independent Bankers Association) (arguing that bank holding company legislation "is necessary if we are to preserve our free enterprise banking system, the economic counterpart of our political system").

effect and not merely by implication."[165] That compromise language was meant to give the states a greater say in permitting the growth of bank holding companies in their jurisdictions.

Both the amendment and the final bill passed—with an unusual coalition of supporters. In the Senate, Democrats voted 40-5 in favor and Republicans 24-15 (with a significant number of abstentions). The divide between yeas and nays was essentially uncorrelated with the legislators' ideological positions.[166]

The Act engendered a substantial expansion of the Fed's role at the national level. Its twin aims were to prevent growth of banks controlled by holding companies and to limit the extent that nonbanking businesses were affiliated with insured banks—both of which were features of Giannini's empire.[167] The Act came at the end of a very long road toward reining in holding companies, placing them more squarely within the banking regulatory and supervisory system. As J.L. Robertson, then a member of the Federal Reserve Board, noted at the time of its passage, the Act produced "a sigh of relief—and exhaustion—almost without precedent in the annals of American banking."[168] Hyperbole aside, holding company legislation had been before the Congress for roughly twenty years—more, if one adds the problems of branch banking to the mix.

But the final legislation was not in fact what the Fed, or Senator Douglas, or the bankers, or even the President wanted. Dwight Eisenhower, on signing the legislation into law, issued a brief statement that comes as close to a veto as these signing statements came in the 1950s. "Although the legislation has as its objectives (1) requiring bank holding companies to divest themselves of nonbanking assets and (2) preventing any lessening of competition in banking through the holding company device," the Administration wrote approvingly, "as a result of various exemptions and other special provisions, the legislation falls short of achieving these objectives."[169] But because the legislation represented "a forward step" in curing the evils of concentration that holding companies represented, the

165. Bank Holding Company Act, Pub. L. No. 84-511, 70 Stat. 133 § 3(d) (1956).

166. *84th Congress, Senate Vote 139*, VOTEVIEW https://voteview.com/rollcall/RS0840139 [https:perma.cc/7D8A-N6SD] (showing that senators' DW-NOMINATE scores—i.e., their ideological ideal points, based on their roll call voting records—provides little predictive power for this vote).

167. *See generally* Omarova & Tahyar, *supra* note 162 (describing the complex statutory definition of a "bank holding company").

168. J.L. Robertson, Member of the Bd. of Governors, Fed. Rsrv. Sys., Remarks Before the Independent Bankers Association (Oct. 22, 1956).

169. John Woolley & Gerhard Peters, *Statement by the President Upon Signing the Bank Holding Company Act of 1956*, AMERICAN PRESIDENCY PROJECT (May 9, 1956), https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-bank-holding-company-act-1956 [https://perma.cc/TR9W-4FBN].

president signed it into law. "The exemptions and other special provisions will require the further attention of the Congress," he concluded.[170]

The Fed largely opposed the final legislation, despite the facts that it expanded the Fed's supervisory authority and that Fed Chair Eccles was a key early support of the BHCA. Six months after passage, Robertson strongly criticized the legislation: "The express requirement . . . that [the Fed] consider the effect of a proposed transaction on the preservation of competition presents problems that call for the wisdom of a Solomon—and there are not many of them around."[171] By giving the Fed such substantial supervisory discretion in passing on holding company applications, Congress had substantially increased the Fed's supervisory burden—without providing sufficient guidance.[172]

Today, financial historians consider the BHCA to be one of the signal contributions of twentieth century financial legislation.[173] Holding company legislation also put the Fed in a better position to combat the financial crisis of 2008.[174] And it has become the dominant post-crisis model of resolving failed banks.[175]

3. *Applying the Coalitions-and-Contingencies Framework*

Historical contingencies played an important role in BHCA's passage. Several extragovernmental events motivated its development, including Giannini's aggressive expansion of his Transamerica empire and his noncompliance with federal regulators' orders. Had he adopted a different posture, the story may have been very different. This episode also illustrates the importance of policy entrepreneurs—here, Senator Douglas, most prominently—in advancing major financial legislation.

Perhaps the most striking feature of this vignette is the incredible brittleness of BHCA's legislative coalition. The bankers and liberals who had squabbled over so much during the New Deal joined together in recognition of perceived dangers that holding companies' aggregation of financial power presented. Yet their cross-ideological coalition did not even

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170. *Id.*

171. Robertson, *supra* note 168.

172. *See* Robertson, *supra* note 168; Omarova & Tahyar, *supra* note 162.

173. *See* Dafna Avraham, Patricia Selvaggi & James Vickery, *A Structural View of U.S. Bank Holding Companies*, 18 FRBNY ECON. POL'Y REV. 65, 66 chart 1 (2012) (showing an extraordinary increase in the number of holdcos). The BHCA's importance endured even after restrictions on interstate banking were lifted in 1994.

174. *See* Dealbook, *As Goldman and Morgan Shift, a Wall St. Era Ends*, N.Y. TIMES (Sept. 21, 2008), https://dealbook.nytimes.com/2008/09/21/goldman-morgan-to-become-bank-holding-companies [https://perma.cc/AAD4-XW8V].

175. *See, e.g.*, Mark J. Roe & Stephen D. Adams, *Restructuring Failed Financial Firms in Bankruptcy: Selling Lehman's Derivatives Portfolio*, 32 YALE J. REG. 363 (2015).

survive the legislation itself. The liberal reformers, bankers, and the Federal Reserve officials that initiated the legislative process that culminated in the passage of the BHCA did not all support it by the time of the legislation's enactment.

Although the novelty of BHCA's new regulatory structure was apparent to the law's supporters, that novelty also grew in importance decades later: its sponsors did not predict that holding companies would be the dominant form of banking institution by the 1990s.

Other theories of financial legislation offer limited explanatory power. The enacting coalition was not part of a bank bargain in any grand scheme. Neither was the legislation spurred on by any financial crisis; the 1950s were an unusually peaceful time in banking. Instead, a series of historically contingent events—including Transamerica's expansion, Eccles's pushback, Giannini's refusal to abide by regulators' orders, and the courts siding with Giannini—motivated the Act's introduction.

D. Financial Institutions Reform, Recovery, and Enforcement Act of 1989

Prior to the 1980s, the term "savings & loan" may have brought to mind the small-town, morally upright Bailey Building & Loan in *It's a Wonderful Life*.[176] From its beginnings in the nineteenth century,[177] the industry focused on home mortgages, often for working-class borrowers.[178] By the end of the 1980s, however, the sector was arguably better known for reckless lending practices, junk bond financing, self-dealing executives, and political scandal.[179] In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to resolve the hundreds of insolvent S&Ls across the nation.[180]

176. For simplicity, we use the terms "savings and loan" (S&L) and "thrift" interchangeably, even though the latter term also encompasses some mutual savings banks. Although S&Ls and savings banks were subject to different regulatory regimes and performed somewhat different functions during this period, the lines often blurred. *See* Lawrence J. White, *The S&L Debacle*, 59 FORDHAM L. REV. 57, 62–63 (1991).

177. For early histories of the S&L industry, see Kathryn C. Lavelle, *Constructing the Governance of American Finance: Timing and Creation of the SEC, OTS, and CFPB*, 29 J. POL'Y HIST. 321, 331 (2017); Calomiris & White, *supra* note 141, at 13.

178. WILLIAM GREIDER, WHO WILL TELL THE PEOPLE? 65 (1992).

179. *See generally* Julie Laumann & Paul Teske, *Principals, Agents, and the Impact of Regulatory Federalism on the Savings-and-Loan Crisis of the 1980s*, 3 STATE POL. & POL'Y Q. 139 (2003) (discussing in retrospect the failings of the S&L industry).

180. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C.).

1. Spendthrifts

Thrifts' problems began in the late 1970s, when rising interest rates and the advent of new, relatively unregulated, and competing financial products like certificates of deposit and money-market mutual funds together raised the costs of attracting depositors for S&L.[181] The situation worsened as regional real-estate bubbles burst and the country entered a recession in the early 1980s.[182] The thrift industry reported losses of $8.1 billion in 1980 through 1982,[183] with approximately 85% of federally-insured thrifts posting losses in 1981 alone.[184]

Rather than liquidate insolvent thrifts, the federal government pursued forbearance.[185] The Federal Home Loan Bank Board tried to make the numbers work by revising the applicable accounting principles to permit spreading losses over up to forty years, and the reporting of high book values for the nebulous concept of "goodwill."[186] The Bank Board also relaxed S&Ls' capital requirements.

Further, Congress adopted the position that fewer constraints on risk-taking could nurse insolvent thrifts back to health.[187] The Depository Institutions Deregulation and Monetary Control Act (DIDMCA) of 1980 permitted S&Ls to expand their investments beyond mortgages—including higher-risk investments like leveraged buyouts—and more than doubled the federally insured amount on thrift accounts.[188] The Garn–St. Germain Act of 1982 expanded the categories of financial products that S&Ls could sell to include, inter alia, credit cards and consumer loans.[189]

By allowing thrifts—including so-called "zombie thrifts," which were, at best, nearly insolvent—greater latitude to act, policymakers generated moral hazard.[190] For zombie thrifts, high-risk activities presented the only possible path back to profitability (however unlikely). Should this Hail

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181. Elijah Brewer III, *Full-Blown Crisis, Half-Measure Cure*, 13 ECON. PERSP. 2, 2–3 (1989).
182. Lavelle, *supra* note 177, at 332–33.
183. Calomiris & White, *supra* note 141, at 67–71.
184. Thomas Romer & Barry R. Weingast, *Political Foundations of the Thrift Debacle*, *in* POLITICS AND ECONOMICS IN THE EIGHTIES 175, 176 (Alberto Alesina & Geoffrey Carliner eds., 1991).
185. *See id.* at 175–78 (referring to this response as "gambling for resurrection").
186. R. Dan Brumbaugh, Jr., Andrew S. Carron & Robert E. Litan, *Cleaning Up the Depository Institutions Mess*, 12 BROOKINGS PAPERS ECON. ACTIVITY 243, 245–46 (1989).
187. *See* Laumann & Teske, *supra* note 179, at 146. Many states' regulatory rollbacks for state-chartered thrifts went further than Congress's. Because deposits in these state thrifts were federally insured, state-level deregulation also increased moral hazard. *Id.*
188. *Id.*
189. *Id.*
190. Romer & Weingast, *supra* note 184, at 177.

Mary strategy fail, federally administered deposit insurance would bear the losses.[191]

These perverse incentives encouraged thrifts to take excessive risks, which, predictably, deepened the crisis.[192] By 1986, almost 600 thrifts had failed. Of the approximately 4,000 survivors, 983 were insolvent or weakly capitalized.

Each year that the government allowed insolvent thrifts to remain open increased the cost of the eventual reckoning.[193] For instance, the insolvent thrifts could have been resolved in 1985—when it had already been clear for several years that thrifts were in crisis[194]—with around $15 billion.[195] Under the program Congress authorized when it passed FIRREA in 1989, however, taxpayers' portion of the price exceeded $160 billion.[196]

2. Policy Apparatchiks

Given the slow burn of the S&L crisis and the legislative initiatives in finance that preceded it, why did Congress not act sooner?[197] Reasons range from lawmakers' failure to comprehend a complex and esoteric situation to their self-interested desire to avoid a politically unpopular bailout.[198] But the overriding consideration was that politically powerful thrifts did not want Congress to provide funds to shut more of them down.[199] Their trade association was, at the time, looked upon with an admixture of admiration and fear.[200] Further, S&Ls were located in every congressional district, and their executives—often local notables in their communities—contributed

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191. *See* Steven Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 568 (2000).

192. *See* Romer & Weingast, *supra* note 184, at 186 (recounting that the Council of Economic Advisors warned President Reagan of these likely consequences in 1984).

193. Brumbaugh et al., *supra* note 186, at 244.

194. Ramirez, *supra* note 191, at 568.

195. Brumbaugh et al., *supra* note 186, at 244.

196. GEN. ACCT. OFF., FINANCIAL AUDIT: RESOLUTION TRUST CORPORATION'S 1995 AND 1994 FINANCIAL STATEMENTS 13 (1996).

197. Congress did pass the Competitive Equality Banking Act (CEBA) of 1987, which injected $10.8 billion into the S&L insurance program. But this measure was merely a stopgap; in that year $50 billion was needed to resolve insolvent thrifts. *See* Romer & Weingast, *supra* note 184, at 177.

198. Calomiris & White, *supra* note 141, at 137–38, 180; White, *supra* note 176, at 137–38. This lack of congressional understanding may have extended to FIRREA. *See* LAWRENCE J. WHITE, THE S&L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 180 (1991) ("Congress could not distinguish between the operators of the solvents and insolvents. . . . [I]t therefore expected 'the thrifts' to . . . endure the appropriate punishment. The fact that the remaining healthy thrifts would be the ones to bear the costs . . . was little noticed or understood.").

199. Calomiris & White, *supra* note 141.

200. Nathaniel C. Nash, *Power Fades for Savings Lobbying Group*, N.Y. TIMES, July 4, 1989, at A41. *See also* Edwin J. Gray, *Warnings Ignored: The Politics of the Crisis*, 2 STAN. L. & POL'Y REV. 138, 143 (1990).

heavily to both parties.[201] They were not shy about calling in favors in return.[202] In contrast, because losses ultimately would fall broadly on taxpayers, no organized constituency lobbied against forbearance.[203]

When Congress suffers from parochialism and collective action problems, the President may step in.[204] That did not occur here. The Reagan administration mostly avoided the issue, deferring to Congress's policy of forbearance and hoping to run out the clock on its second term before the problem worsened.[205]

Neither did the presidential candidates vying to succeed Reagan in 1988 make an issue out of the worsening S&L crisis. George H.W. Bush, who as Vice President chaired a White House task force on deregulation, did not want to call attention to the role that deregulatory measures like DIDMCA and Garn–St. Germain played in exacerbating the problem. Michael Dukakis mentioned the issue once during his campaign, then reportedly dropped it at the urging of House Speaker Jim Wright (D-TX), who was under an ethical cloud regarding his relationships with S&L executives.[206] Indeed, politicians from both parties relied on S&L donations, making the growing crisis an uncomfortable issue for both candidates.[207]

Ultimately, Congress's tepid response was simply the normal course of politics. Whereas resolving insolvent thrifts would have benefited a diffuse public—which might not even recognize the rationale for doing so[208]—forbearance served the interests of well-resourced and politically active S&L operators. Further, without the presence of a skilled policy

201. *See* L. WILLIAM SEIDMAN, FULL FAITH AND CREDIT 191 (2000); Joseph A. Grundfest, *Lobbying into Limbo: The Political Ecology of the Savings and Loan Crisis*, 2 STAN. L. & POL'Y REV. 25, 28 (1990).

202. *See, e.g.*, SEIDMAN, *supra* note 201, at 234 (describing the Keating Five); White, *supra* note 176, at 138 (describing then-Majority Leader James Wright's (D-TX) successfully killing a bill to increase funds to shut down insolvent thrifts at the urging of S&L executives in his home state, which was the epicenter of the S&L crisis). *See also* Romer & Weingast, *supra* note 184, at 195–200 (reporting regression results showing that thrifts' power in congressional districts is correlated with legislators' votes on S&L legislation).

203. Romer & Weingast, *supra* note 184, at 202.

204. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1218 (2006) (describing, and critiquing, the view that the President represents a national constituency and may be retrospectively held responsible for national conditions).

205. *See* Romer & Weingast, *supra* note 184, at 186–88; GREIDER, *supra* note 178, at 73 (quoting an administration official: "If [a candidate for an S&L regulatory position] really wants this job, he's going to have to . . . assure [the administration] . . . that we can hold things together until this president gets out of town."). *But see* SEIDMAN, *supra* note 201, at 193 (noting that President Reagan supported the stopgap CEBA).

206. SEIDMAN, *supra* note 201, at 189–90.

207. Lavelle, *supra* note 177, at 334. As one banking lobbyist memorably put it: "Everyone knew [what] the game was: Democrats don't bring this up, Republicans don't bring this up. Because a firefight on this issue will have more bodies on both sides than anyone wants to lose." GREIDER *supra* note 178, at 73.

208. *Cf.* Ross Douthat, *The Great Bailout Backlash*, N.Y. TIMES, Oct. 25, 2010, at A27 (describing public opposition to the Troubled Asset Relief Program).

entrepreneur willing to absorb the costs of assembling a coalition, the hurdles associated with collective action proved insurmountable. Thus, far from being traceable to some rare breakdown in the political system, the S&L crisis had its roots in the system's ordinary functioning.[209]

3. *The Cavalry Arrives*

After the 1988 election, despite ignoring the issue during the campaign, President-elect Bush concluded that the metastasizing crisis could no longer go untreated. Two weeks after his inauguration—and nearly a decade after the crisis began[210]—he proposed closing 350 insolvent S&Ls and substantially reorganizing the federal thrift-regulatory architecture, most notably by transferring the deposit-insurance program from the Bank Board and Federal Savings & Loan Insurance Corporation (FSLIC) to the FDIC.[211] Bush sent Congress a detailed draft bill, later titled FIRREA, a few weeks later.[212] Congress passed it on a bipartisan basis that summer, with support cutting across party lines and other common political-economic cleavages.[213] For a bill of its magnitude, Congress made remarkably few changes to Bush's proposal and passed it relatively expeditiously.[214] This was a White House initiative, top-to-bottom.

FIRREA accomplished five main objectives. First, the law eliminated the S&L deposit-insurance program's deficit. Second, it resolved the currently insolvent S&Ls. Third, it imposed new regulatory requirements on S&Ls, which included increasing S&Ls' capital requirements, prohibiting them from investing in junk bonds, and standardizing regulators' treatment of S&Ls and commercial banks. Fourth, it substantially expanded financial supervisory agencies' enforcement powers. Fifth, it restructured the regulatory architecture, replacing the FSLIC and Bank Board with, respectively, the Resolution Trust Corporation (RTC) to resolve existing

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209. *See id.*

210. *See* CONGRESSIONAL QUARTERLY, *Caught in Turf Battle, Bank Powers Bill Dies*, CQ ALMANAC (1988).

211. Muriel Watkins, *Crossing Party Lines to Resolve the S&L Crisis of the 1980s*, 111 FIN. HIST. 33, 34 (2014).

212. Calomiris & White, *supra* note 141, at 175–76.

213. Christopher B. Colburn & Sylvia C. Hudgins, *The Influence on Congress by the Thrift Industry*, 20 J. BANKING & FIN. 473, 488–89 (1996).

214. *See* William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 STAN. L. & POL'Y REV. 102 (1990); *see also* 135 CONG. REC. S6,682 (daily ed. Apr. 17, 1989) (remarks of Sen. Donald Riegle) ("The President . . . asked us to move faster than we have ever done before on a legislative package . . . .").

insolvent thrifts and the Office of Thrift Supervision (OTS) to supervise the sector.[215]

By 1995, RTC had resolved 747 thrifts with almost $400 billion in assets.[216] OTS, with a structure modeled on the deep-rooted Office of the Comptroller of the Currency,[217] performed its functions seemingly without favor, engaging in a high-profile battle with President Bush's son Neil over his culpability as a director of a failed S&L.[218]

Nonetheless, FIRREA was plagued by controversy from the start, mostly concerning its inadequate funding for resolving failed thrifts and the labyrinthine organizational structure that it established.[219] The sheer complexity of the organizational structure—a delicate balance between

215. Pub. L. No. 101-73, 103 Stat. 183 (1989); *see also* Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 52 (2009) (summarizing FIRREA); Douglas H. Jones, *Developments on the U.S. Banking Scene: The S&L Crisis and FIRREA*, *in* 2 CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS 119 (Robert C. Effros ed., 1994) (same). Although most of the money to resolve insolvent S&Ls was earmarked to RTC and the Resolution Funding Corporation, FIRREA also set aside $24 billion for a new, FDIC-administered Savings Association Insurance Fund to address any thrift bankruptcies after mid-1992. CONGRESSIONAL QUARTERLY, *supra* note 210.

216. Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 FDIC BANKING REV. 26, 26 (2000).

217. Both agencies were headed by Senate-confirmed appointees, were funded by their regulated institutions, and were placed within the Treasury Department. Although the OCC was not without its critics, it had performed its bank-regulatory functions with this basic structure since the 1860s. *See* National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C.).

218. *See* SEIDMAN, *supra* note 201, at 240. The controversy generated negative headlines for the First Family and angered Barbara Bush, *see id.*, but ultimately led to de minimis sanctions for Neil Bush. *See* Leslie Wayne, *Neil Bush Ends His Appeal of Ruling in Silverado Case*, N.Y. TIMES, June 19, 1991, at D1.

219. *See* White, *supra* note 176, at 189 (illustrating the organizational complexity for thrift supervision and resolution under FIRREA). In brief, OTS—and independent agency nested within the Treasury Department—supervises thrifts and the Treasury Department's Office of Supervision regularly examines its books. When OTS determines that a thrift is insolvent, it assigns the thrift to RTC for resolution. A new oversight board—chaired by the Treasury secretary and including the HUD secretary, two additional presidential appointees, and one individual appointed by the Federal Reserve chair—sets RTC policy and conducts audits. The FDIC shares the same board of directors as RTC and manages RTC's day-to-day operations. The new Resolution Funding Corporation funds RTC via assessments on S&Ls and the issuance of government-backed bonds. Jones, *supra* note 215; SEIDMAN, *supra* note 201, at 202–03. Controversy also quickly found the OTS. Most of the agency's thrift examiners—along with its first director—were brought over from the often-criticized Bank Board. Lavelle, *supra* note 177, at 335. Calls to abolish the agency or transfer much of its authority to either the OCC or Federal Reserve echoed through the Capitol. S&Ls also chafed under OTS's regulations and high fees; many switched to state charters to avoid the agency. By the twenty-first century, the number of nationally chartered thrifts was in steep decline. Among the most prominent remaining thrifts (or those that switched their charter to be subject to OTS) were Washington Mutual, IndyMac, and Countrywide Financial, all of which collapsed during the financial crisis of 2007–2008. *Id.* at 335–36. OTS received a significant share of the blame for that crisis—perhaps unjustifiably—and was eliminated in the Dodd-Frank Act. *See* Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1778, 1780 (2011).

competing bureaucratic power centers that the FDIC chair deemed "almost irrational"[220]—meant that lines of authority blurred.[221]

4. Applying the Coalitions-and-Contingencies Framework

Although FIRREA's history contains some variations on the themes present in the other case studies, in broad strokes a framework based in fragile coalitions and historical contingencies still explains the development of legislation better than alternatives.

First, the event that led to FIRREA was the election of George H.W. Bush and his seemingly inscrutable decision to make S&L resolution his first domestic policy priority. The cascading failures of banks and S&Ls in the eight preceding years were not enough. The scandals of the S&Ls, which implicated several high-profile politicians, were not enough. It took an inexplicable twist of domestic policy prioritization after Bush won a relatively strong mandate.

Second, the ideas of policy entrepreneurs became active only through the internal debates inside the Bush transition team. In some of the other vignettes, policy entrepreneurs' ideas are longstanding and relatively stable, such as Henry Steagall's enthusiasm for federal deposit insurance or Paul Warburg's interest in a central bank. Not here: policy entrepreneurs in the Bush White House simply wrote what they hoped would be a final resolution to a slow-burning crisis that had dogged the financial system for almost the entire Reagan Administration in which many of them worked.

Third, the coalitions were brittle. The Democratic House and Senate approved the bill by wide margins—the Senate approved the bill on voice vote with only eight senators voting against it. In the House, the bill passed 320-97. For such a massive overhaul of the entire financial structure of thrifts, this political coalition almost defies explanation. Collectively, a set of standard political-economic variables correctly predicts only fifty-eight percent of House members' votes on the two key FIRREA roll calls.[222] In other words, FIRREA's enacting coalition did not align well with preexisting groups. Predictably, the coalition did not endure. Enveloped in controversy since the start, RTC and OTS found few defenders in Congress.[223] This legislative coalition was not built to last.

220. SEIDMAN, *supra* note 201, at 203.

221. For instance, was a given RTC function a "general policy" (and thus under the Oversight Board's purview) or an operational matter (and therefore under the FDIC's control)? *See* Lee Davison, *The Resolution Trust Corporation and Congress*, 1989–1993, Part I: 1989–1991, 18 FDIC BANKING REV. 38, 42–43 (2006).

222. Colburn & Hudgins, *supra* note 213, at 488–89. These variables include party label, campaign contributions from thrifts, electoral margin of victory, and committee assignments. *Id.*

223. *See* Lavelle, *supra* note 177, at 335–37.

And finally, the byzantine system that FIRREA created was so novel in its structure, so creative in its institutional reorganization, that it did more to reorganize the financial system than perhaps any single piece of legislation that preceded it.[224]

E. Financial Services Modernization Act of 1999

1. The Path to Gramm-Leach-Bliley

By the 1990s, the nation's financial regulatory infrastructure looked increasingly out of step with the times. A movement to deregulate many industries began during the Carter administration and accelerated under President Reagan.[225] Financial services was no exception.

Alongside this general deregulatory trend, several finance-specific developments led financial-services firms to chafe under Glass-Steagall and the Bank Holding Company Act's separations of firms engaged in banking, securities, and insurance functions.[226] New financial products—chief among them money market mutual funds and asset-backed commercial paper—emerged as substitutes to traditional deposit accounts.[227] Like traditional deposit accounts at banks, these and other "shadow bank" products provide maturity transformation, but without authority to access central bank liquidity or government-backed credit guarantees.[228] With the Fed's Regulation Q limiting the interest rates that banks could offer to holders of traditional deposit accounts,[229] savers migrated from banks to these lightly regulated products.[230] Banks were left at a distinct disadvantage.[231]

In addition to these shadow-bank products, Wall Street clamored for a growing array of sophisticated financial products, including junk bonds and mortgage-backed securities. On Main Street, demand for mutual funds, discount brokerage services, and credit cards was growing.[232] Financial

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224. *See id.*
225. *See* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION, 33, 53 (1985).
226. *See* Arthur E. Wilmarth, Jr., *How Should We Respond to the Growing Risks of Financial Conglomerates?*, *in* FINANCIAL MODERNIZATION AFTER GRAMM-LEACH-BLILEY 110-13 (Patricia A. McCoy ed., 2002).
227. Jill M. Hendrickson, *The Long and Bumpy Road to Glass-Steagall Reform: A Historical and Evolutionary Analysis of Banking Legislation*, 60 AM. J. ECON. & SOCIO. 849, 860 (2001).
228. ZOLTAN POZSAR, TOBIAS ADRIAN, ADAM ASHCRAFT & HAYLEY BOESKY, FEDERAL RESERVE BANK OF NEW YORK STAFF REPORTS: SHADOW BANKING 8–9 (2010).
229. Jonathan R. Macey, *Reducing Systemic Risk: The Role of Money Market Mutual Funds as Substitutes for Federally Insured Bank Deposits* 11 (Yale L. & Econ., Rsch. Paper No. 422, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735008.
230. Hendrickson, *supra* note 227, at 861.
231. *See id.*
232. *See* Wilmarth, *supra* note 226.

firms explored opportunities to cross-sell these and other products to their clients—but were stymied, to some extent, by financial regulations.[233]

At the same time, banks faced increased competition in their core business of lending. Advances in communications and data processing lowered barriers to entry for both foreign banks and U.S. nonbank lenders.[234] Relatedly, American banks saw their international position erode as Japanese and British competitors—which were relatively unencumbered by regulation—grew larger.[235]

Yet efforts to deregulate consistently came up short. By one estimate, Congress had seriously considered repealing or significantly revamping Glass-Steagall and the BHCA once every two years on average from 1979, when lawmakers marshalled the first serious attempt to change these laws, through 1998.[236] These measures floundered in the face of turf wars among congressional committees and objections from a rotating set of banks, securities firms, and insurers that claimed reform would advantage one of these sectors at the expense of the others.[237]

After two decades of failed attempts, financial reform seemed moribund.[238] On March 30, 1998, *Business Week* magazine published a commentary entitled "Why Congress Can't Afford to Shatter Glass-

233. *See id.*

234. *See id.*

235. *See* YOUSSEF CASSIS, CRISES AND OPPORTUNITIES: THE SHAPING OF MODERN FINANCE 143–44 (2011); AMEY STONE & MIKE BREWSTER, KING OF CAPITAL: SANDY WEILL AND THE MAKING OF CITIGROUP 232 (2002).

236. Howard Gleckman & Dean Foust, *Why Congress Can't Afford to Shatter Glass-Steagall*, BUS. WK., Mar. 30, 1998, at 38. *See also* Richard W. Stevenson, *Financial Services Heavyweights Try Do-It-Yourself Deregulation*, N.Y. TIMES, Apr. 7, 1998, at A1. These were not "messaging" votes. Several of these bills passed the Senate overwhelmingly, only to see the House decline to schedule a vote. For instance, the Financial Services Competitive Equity Act of 1984, which would have authorized bank holding companies to underwrite and sell certain bonds, commercial paper, and mortgage-backed securities, passed the Senate 89-4; the measure died in the House, after leadership declined to schedule a floor vote. Charles C.Y. Wang & Yi David Wang, Explaining the Glass-Steagall Act's Long Life, and Rapid Eventual Demise (Dec. 8, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722373. Others failed narrowly on the floor of one chamber or the other. For instance, the Barnard amendment to the Comprehensive Deposit Insurance Reform & Taxpayer Protection Act of 1991, which would have permitted commercial banks to enter into insurance and investment-banking, failed 200-216 on the House floor. Thomas Stratmann, *Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation*, 45 J.L. & ECON. 345 (2002).

237. *See* CONGRESSIONAL QUARTERLY, *Caught in Turf Battle, Bank Powers Bill Dies*, *in* CQ ALMANAC (1988); Hendrickson, *supra* note 227, at 863–64; Kane, *supra* note 97, at 185; Sandra Suárez & Robin Kolodny, *Paving the Road to "Too Big to Fail": Business Interests and the Politics of Financial Deregulation in the United States*, 39 POL. & SOC'Y 74, 93 (2011). For instance, the Proxmire Financial Modernization Act of 1988, which proposed allowing commercial banks and securities firms to affiliate, sailed through the Senate, 94-2, but floundered in a turf war in the House. CONGRESSIONAL QUARTERLY, *supra*. *See also* Kane, *supra* note 97, at 185 (describing how the failed Financial Services Competitiveness Act of 1995 pitted insurance companies and large banks against each other); Suarez & Kolodny, *supra*, at 93 (describing how the Clinton Treasury and commercial banks' opposition ultimately killed the Financial Services Act of 1998).

238. STONE & BREWSTER, *supra* note 235, at 234.

Steagall."[239] The authors predicted that "[w]hen the dust settles this fall . . . Glass-Steagall . . . will still be on the books."[240] By their count, repeal had been attempted ten times in the past two decades. Could this year be different? "Fat chance," they answered.[241]

One week later, however, their confident prediction was overtaken by events. On April 6, Travelers Group CEO Sandy Weill and Citicorp CEO John Reed announced plans for their firms to merge.[242] The proposed deal would be history-making; the new "Citigroup" would have a market capitalization of approximately $135 billion, making it the most valuable financial-services company in the world.[243] Although the two CEOs shared credit during the April 6 announcement, Weill was in fact the mastermind.[244]

Weill's proposal was audacious, financially and legally. While regulators had eroded the lines between securities, insurance, and banking over the years,[245] Glass-Steagall and BHCA's general limits on entities engaging in these combined activities were still the law of the land. But engaging in these combined activities was the whole purpose of the merger; Weill envisioned creating a one-stop shop for financial services, making

239. Gleckman & Foust, *supra* note 236.

240. *Id.*

241. *Id.*

242. Mitchell Martin, *Citicorp and Travelers Plan to Merge in Record $70 Billion Deal: A New No. 1: Financial Giants Unite*, N.Y. TIMES (Apr. 7, 1998), https://www.nytimes.com/1998/04/07/news/citicorp-and-travelers-plan-to-merge-in-record-70-billion-deal-a-new-no.html [https://perma.cc/U9DX-K2GR]. Technically, Travelers acquired Citibank. Nonetheless, for simplicity we adopt the participants' terminology and refer to it as a merger.

243. *Id.*

244. Weill began his career on Wall Street as a stock runner in the 1950s; co-founded his own brokerage in 1960; grew it into the nation's second-largest brokerage by 1979; and sold it to American Express in 1981. JEFF MADRICK, AGE OF GREED 289–99 (2011); Vartanig G. Varian, *Move Would Form Wall St.'s No. 2 Firm*, N.Y. TIMES (May 15, 1979), https://www.nytimes.com/1979/05/15/archives/shearson-and-loeb-to-merge-move-would-form-wall-sts-no-2-firm.html [https://perma.cc/9CXG-NERY]. His second act—which would send him into finance's stratosphere—began with the 1986 purchase of a Baltimore-based consumer lender specializing in high-interest loans to lower-income borrowers. MADRICK, *supra*, at 302. Over the next decade, Weill and his lieutenant Jamie Dimon used that company as a vehicle to acquire four blue-chip brokerage firms and insurance companies, including Travelers. *Id.* at 302–08.

245. *See* Arthur E. Wilmarth, Jr., *Was Glass-Steagall's Demise Both Inevitable and Unimportant?*, CLS BLUE SKY BLOG (Sept. 18, 2018), http://clsbluesky.law.columbia.edu/2018/09/18/was-glass-steagalls-demise-both-inevitable-and-unimportant [https://perma.cc/Q4L2-VJXA] (discussing the actions of the SEC and Fed regarding money market mutual funds as one way that Glass-Steagall was undermined by federal regulators). For instance, in 1986 OCC authorized nationally chartered banks to sell insurance. Hendrickson, *supra* note 227, at 874. One year later, the Fed declared that subsidiaries of bank holding companies could derive up to 5 percent of their revenue from securities underwriting, sales, and trading. (Later, the Fed increased that ceiling to 10 percent in 1989 and to 25 percent in 1996.) *Id.* at 874. In a pair of mid-1990s cases, the Supreme Court upheld the OCC's determination that national banks could sell annuities and determined that federal law allowing banks to sell insurance in small towns preempted state law to the contrary. *See* Barnett Bank v. Nelson, 517 U.S. 25 (1996) (insurance sales); Nationsbank v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (annuity sales). OCC upped the ante in 1996, authorizing national banks' subsidiaries to engage in a broad array of nonbank activities. Hendrickson, *supra* note 227, at 874.

brokerage, insurance, and retail banking services available to a broad customer base in 100 countries.[246]

When Weill approached Citicorp to propose this megamerger, he knew Glass-Steagall's separation of commercial banking, investment banking, and insurance stood in the way.[247] Indeed, when his company's own general counsel was first briefed on the proposed merger, he responded: "I don't see how this can be done. It's not legal."[248] Weill's lawyers, however, soon suggested a work-around: federal law provided a two-year period—extendable to five years upon application to the Federal Reserve—during which a newly combined financial firm must divest itself of assets to come into compliance.[249] If Weill could persuade Congress to change the law within that two to five year period, the merger could go through.[250]

Weill went to work.[251] His team informed Federal Reserve Board Chair Alan Greenspan and Treasury Secretary Robert Rubin of Travelers' intentions, and he and Citicorp's Reed took the unusual step of calling President Clinton the night before the deal announcement to promote its benefits.[252]

The next day, financial-services lobbyists met with Hill staffers to revive Leach's bill (or at least some version of it).[253] Senate Banking Committee Chair Al D'Amato (R-NY) conveyed that he was open to expediting consideration of the bill.[254] Time was of the essence. As a Travelers lobbyist explained:

> We have to strike while the iron is hot. This deal is a real live manifestation of how the markets are changing, and that puts the legislation against a different political backdrop than a week ago. . . . All of these planets are in alignment now in ways they may not be a year from now.[255]

The stakes for Citicorp and Travelers were immense, and time was of the essence.[256] If Congress did not act, the combined company likely would have to sell its insurance underwriting, casualty insurance sales, and

246. Martin, *supra* note 242.

247. *See* MONICA LANGLEY, TEARING DOWN THE WALLS: HOW SANDY WEILL FOUGHT HIS WAY TO THE TOP OF THE FINANCIAL WORLD . . . AND THEN NEARLY LOST IT ALL 276 (2004).

248. *Id.*

249. 12 U.S.C. § 1843(a)(2) (2018).

250. LANGLEY, *supra* note 247, at 309.

251. *See* STONE & BREWSTER, *supra* note 235, at 231 ("The day after the merger was announced Weill was already working on his legislative and public relations strategy for bringing down Glass-Steagall.").

252. Barbara Rehm, *Mega Merger Plan Hinges on Congress*, AM. BANKER, Apr. 7, 1998, at 1.

253. STONE & BREWSTER, *supra* note 235, at 234.

254. *Id.*

255. *Id.*

256. *See* Stevenson, *supra* note 236.

property insurance sales divisions, which together comprised roughly half of Travelers' revenue.[257] So, whereas Citicorp had opposed several previous reform attempts, it now played an important role in these efforts.[258] Further, Citicorp's advocacy also suggested to Congress that other commercial banks—which in the past had helped kill similar bills—would be more willing to consider the legislation.[259]

That two major firms would agree to a legally dubious merger sent another signal to Congress: as Federal Reserve Chair Alan Greenspan explained to a Senate committee, "the market will continue to force change whether or not Congress acts."[260] This development produced a sense of urgency among lawmakers.[261]

Even in this climate, reformers could not reach the finish line. Leach's H.R. 10 bill passed the House by one vote in May 1998. In the upper chamber, Senator Phil Gramm, who would soon become Banking Committee chair, vehemently opposed the bill's requirement that new multiline financial firms like Citigroup be subject to certain community-lending requirements.[262] Based largely on Gramm's opposition, the Senate never scheduled Leach's bill for a floor vote.[263]

In 1999, Leach once again introduced a version of his H.R. 10 and sought to build consensus.[264] President Clinton, who was previously cool to Leach's perennial efforts, came out in favor of his bill, which passed the House with a large, bipartisan majority.

The Senate took a different tack. Rather than markup the Leach bill, which he considered "a waste of time," Senator Gramm, the new Banking Committee chair, introduced his own bill, which built on Leach's bill and also slashed banks' obligations under the CRA to borrowers in lower-income neighborhoods. Gramm's bill passed the Senate with only one Democratic vote.[265]

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257. CONGRESSIONAL QUARTERLY, *Financial Services Overhaul Dies in Senate, a Victim of Friendly Fire*, *in* CQ ALMANAC (1998), https://library.cqpress.com/cqalmanac/document.php?id=cqal98-0000191038.

258. *See* Annys Shin, *Citi's Relentless Quest for Growth; History of Innovation Has Led Bank to Milestones, Missteps*, WASH. POST, Nov. 25, 2008, at D1.

259. Suarez & Kolodny, *supra* note 237, at 93.

260. *Id.*

261. Hendrickson, *supra* note 227, at 872.

262. *See id.* at 869.

263. GIBSON, DUNN & CRUTCHER LLP, THE GRAMM-LEACH-BLILEY ACT, P.L. 106-102: FINANCIAL SERVICES MODERNIZATION, WORKING SUMMARY NO. 4, 3 (1999), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=210468.

264. *See* CONGRESSIONAL QUARTERLY, *Major Overhaul Enacted of Rules Governing the Financial Services Industry*, *in* CQ ALMANAC (1999), https://library.cqpress.com/cqalmanac/document.php?id=cqal99-0000201143 [hereinafter CONGRESSIONAL QUARTERLY, *Major Overhaul*].

265. *Id.*

With the clock ticking on Citigroup's divestiture period, the company stepped up its lobbying efforts and made large soft-money contributions that coincided with important congressional actions.[266] Trade associations representing large banks, insurance companies, and securities firms put aside their differences to support reform[267]—with Citigroup leading the charge.[268] These groups also opened their checkbooks, giving more in soft-money contributions than any other industry by a factor of two.[269]

Conference committee negotiations to reconcile the House and Senate bills were tense, with Leach's consensus-seeking approach butting up against Gramm's maximalist one. It seemed that Congress once again would fall short. In late September, insurance, banking, and securities leaders met with Senate Majority Leader Trent Lott (R-LA), presenting a united front to convey that they wanted a bill enacted this year, even if that meant including some provisions that they opposed.[270]

Government officials stayed in close contact with Citigroup during these negotiations. During one contentious session, Gramm instructed Citigroup's head lobbyist to "get Sandy Weill on the phone right now [and] [t]ell him to call the White House and get moving or I'm going to shut this conference down."[271] Weill called Clinton that night. Hours later, Gramm and the Democratic conferees agreed on several compromise measures regarding the CRA.[272]

On October 18, with conference committee negotiations ongoing, Treasury Secretary Rubin announced that he would become the co-chair of Citigroup. Rubin previously had expressed concerns that the legislation would empower the Fed at Treasury's expense, and thus had been a tepid supporter of Congress's efforts on behalf of Citigroup and other financial-services firms.[273] Now, according to Weill, Rubin's decision to join Citigroup was a "public endorsement" of the company.[274]

266. *Id.*

267. *Id.*; Hendrickson, *supra* note 227, at 871.

268. *See* Wilmarth, *supra* note 226. Community banks were lukewarm. CONGRESSIONAL QUARTERLY, *Major Overhaul*, *supra* note 264. Independent insurance agents were on board, but did not appear to be major players. *See* Jerry W. Markham & Lissa L. Broome, *Banking and Insurance: Before and After the Gramm-Leach-Bliley Act*, 25 J. CORP. L. 723, 756 (2000).

269. Gleckman & Foust, *supra* note 236, at 38.

270. *See* CONGRESSIONAL QUARTERLY, *Major Overhaul*, *supra* note 264.

271. STONE & BREWSTER, *supra* note 235, at 256.

272. *Id.* at 256–57.

273. *See* Nelson Schwartz & Eric Dash, *Where Was the Wise Man?*, N.Y. TIMES, Apr. 27, 2008, at BU1.

274. SANDY WEILL & JUDAH S. KRAUSHAAR, THE REAL DEAL: MY LIFE IN BUSINESS AND PHILANTHROPY 361 (2006). As Weill acknowledges, his "political triumph nearly coincided with Bob Rubin's arrival . . . ." *Id.* at 368. Observers debate the extent to which those events were causally connected.

Soon thereafter, the conferees came to an agreement, with both chambers approving the conference bill with overwhelming bipartisan majorities on November 4.[275] Seventy-four mostly liberal Democrats who had voted nay on the original Leach bill switched to support the committee bill; in explaining their switch, they tended to cite the Clinton administration's support for the latter bill. President Clinton signed the Financial Services Modernization Act—also known as the Gramm-Leach-Bliley Act—into law eight days later.[276]

Weill's gamble had paid off, and he rightly credited Citigroup with pushing Congress to pass the measure after decades of failed attempts.[277] Senator Gramm agreed. "Congress made a mistake," he told Weill several years later. "It should have called the new law the '*Weill*-Gramm-Leach-Bliley Act'!"[278]

2. Applying the Coalitions-and-Contingencies Framework

The Financial Services Modernization Act's long road to passage provides a prime example of the importance of unpredictable events to major legislative change. Various iterations of the bill had languished for decades. Although some scholars saw the demise of the *ancien régime* as inevitable in light of developments in financial products, information technology, and the international competitive landscape,[279] Congress nonetheless failed to act for twenty years.

What explains this stasis? The simple answer is, in each failed attempt, loss aversion motivated enough financial-services firms to block any disruption of the status quo. Glass-Steagall and the BHCA established a complex system in which various categories of firms were assigned property rights over certain lines of business and excluded from others. Under these circumstances, Pareto-improving changes are elusive; opening a certain line of business to a new set of firms necessarily weakens incumbent firms. The perceiving losers under any given reform scheme then mobilize against it, and lawmakers develop second thoughts about measures that would unavoidably alienate one powerful interest or another.[280] As Speaker Newt

275. *See* 145 CONG. REC. H11,551 (daily ed. Nov. 4, 1999) (recording a 362-57 vote in the House); 145 CONG. REC. S13,917 (daily ed. Nov. 4, 1999) (90-8 vote in the Senate).

276. CONGRESSIONAL QUARTERLY, *Major Overhaul*, *supra* note 264.

277. *See* WEILL & KRAUSHAAR, *supra* note 274, at 368.

278. *Id.* at 366.

279. *See, e.g.*, Paul G. Mahoney, *Deregulation and the Subprime Crisis*, 104 VA. L. REV. 235, 240 (2018).

280. *See* CONGRESSIONAL QUARTERLY, *Major Overhaul*, *supra* note 264 ("Overhaul efforts had foundered repeatedly in previous Congresses as various industry sectors fought among themselves over the details.").

Gingrich (R-GA) observed, "[t]his is a very complex, very difficult area with very powerful interests who all jealously guard their own turf."[281]

It took a business event of such magnitude as the Citigroup merger to shock the system into action. According to Professor Arthur Wilmarth, "the Citigroup deal put a gun to the head of Congress."[282] Without mincing words, lawmakers directly credit the Travelers-Citicorp merger announcement—a tectonic shift in finance, creating the nation's largest financial services firm and the first one-stop "financial supermarket"[283]—with spurring Congress to act.[284]

The Citigroup merger was exogenous in the sense that it was outside of lawmakers' control, but its success (after decades of failure) was, in a word, random.[285] The executives took great pains to keep it confidential, and the 21% and 26% gains in Travelers and Citicorp's respective share prices on the day of the merger announcement suggests that they held the information close to their vests.[286] For lawmakers, the merger was unknown and essentially unpredictable ex ante.

Weill's role as a policy entrepreneur—albeit an unconventional one—was essential. He devised a lobbying and public-relations strategy for repeal,[287] poured campaign contributions and lobbyists into Washington (as did other firms),[288] and served as a go-between for Clinton and Gramm in the final days of negotiations.[289]

Arguably, Weill filled this role because no government officials—the usual policy entrepreneurs, as we have seen thus far—were willing or able

281. *See* CONGRESSIONAL QUARTERLY, *supra* note 257.

282. Wilmarth, *supra* note 245.

283. Steven Lipin & Stephen E. Frank, *One-Stop Shopping Is the Reason for the Deal*, WALL ST. J., Apr. 7, 1998, at C14.

284. *See, e.g.*, Rehm, *supra* note 252 (quoting House Republican Conference Chair John Boehner: "Congress needs to pass financial modernization legislation this year so providers, both big and small, can have the same opportunities . . . as this new financial giant."); Dean Anason, *Advocates, Skeptics Face Off on Megadeals*, AM. BANKER, Apr. 30, 1998 (quoting Rep. Maurice Hinchey (D-NY): "Citigroup is essentially playing an expensive game of chicken"); Stevenson, *supra* note 236 (quoting Senate Banking Committee Chair Al D'Amato (R-NY): "This merger demonstrates that we really should move forward despite the intransigence or opposition of some in the financial services industry to creating a level playing field") (quoting House Banking Committee Chair Jim Leach (R-IA): "This merger underscores the need for prompt Congressional action on financial services modernization legislation").

285. It is important to note, however, that Weill and Reed controlled the timing of the deal, and may have sensed that the regulatory status quo was sufficiently brittle such that the merger could topple it. *See* MADRICK, *supra* note 244, at 312.

286. Greg Ip, *Citicorp Merger: Weill, Reed, Prince Alwaleed and Buffett Are Huge Winners*, WALL ST. J., Apr. 7, 1998, at C14.

287. STONE & BREWSTER, *supra* note 235, at 231.

288. *See* Chris Suellentrop, *Sandy Weill: How Citigroup's CEO Rewrote the Rules So He Could Live Richly*, SLATE (Nov. 20, 2002) ("Travelers and Citi lobbied Congress strenuously to pass new legislation that would bless their marriage, and Congress complied."), https://slate.com/news-and-politics/2002/11/citigroup-s-sandy-weill.html [https://perma.cc/U4KL-3H7Z].

289. *See* STONE & BREWSTER, *supra* note 235, at 256–57.

to do so. Leach had quarterbacked previous bills[290]—and had a long record of failures to show for it.[291] His preference for open deliberation and multiple public votes during markups had previously afforded bill opponents time to bury past bills.[292] Gramm's maximalist, scorched-earth style was ill-suited for coalition building. And turf battles between Rubin's Treasury and Greenspan's Fed made neither official appropriate for the role.[293]

Weill entered the void. "In the end, Citigroup basically drafted the new law," political journalist Chris Suellentrop concluded.[294]

The coalition that supported passage was also mostly a brittle and fleeting one. While the Clinton administration, Republican Congress, the Fed, and industry would later join together to pass the Commodity Futures Modernization Act of 2000, after the 2000 election this coalition would not unite again.

Finally, the structures that emerged—the creation of a new entity, the Financial Holding Company and the imposition of new and compliance-intensive privacy requirements—were entirely novel. The bill that emerged was remarkably different from previous efforts. Although it did not create new government entities as in other examples, it created new banking structures that had never existed before.

F. Dodd-Frank Act of 2010

The subprime mortgage crisis beginning in 2007 and the consequent failures of financial institutions the next year which sparked a worldwide Great Recession generated no shortage of bold reform proposals.[295] Several of the most ambitious ideas made it into the sprawling Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[296] In this section we focus on three: establishing a new consumer-protection agency, creating a regulatory council charged with macroprudential supervision and systemic risk regulation, and authorizing the FDIC to orderly liquidate a broad set of financial institutions.

290. *See* Hendrickson, *supra* note 227, at 865–66.
291. Kane, *supra* note 97, at 185–86.
292. *Id.*
293. CONGRESSIONAL QUARTERLY, *Major Overhaul*, *supra* note 264.
294. Suellentrop, *supra* note 288.
295. *See* Cunningham & Zaring, *supra* note 215, at 39–41 (citing various proposals).
296. Pub. L. No. 111-203, 124 Stat. 137. Another bold idea, consolidating bank supervision into one regulator, failed to garner sufficient support for inclusion in the bill.

1. Consumer Protection

In his statement accompanying the signing of the Dodd-Frank Act into law, President Barack Obama declared that the law would create "the strongest consumer financial protections in history."[297] Yet the creation of this powerful new agency was far from inevitable. Then-Professor Elizabeth Warren proposed the agency—with a different prospective name, structure, and set of functions—in a timely article in the liberal magazine *Democracy*. In that article, she compared the purchase of destructive credit instruments to the highly regulated market for home appliances. "It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house," she wrote. "But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street."[298]

Warren proposed a supervisory and regulatory solution to this problem, modeled on the way the government tackles toaster safety. She would create a "Financial Product Safety Commission," similar to the Consumer Product Safety Commission, an independent agency that regulated institutions and products aimed at busy consumers who may lack the time or sophistication to independently verify the safety of those financial products they purchased.

Warren wrote as what was then called the Subprime Mortgage Crisis was engulfing the nation; it was not yet the global financial crisis, and the idea more or less remained limited to academics and activists.[299] After the crisis reached full bloom in September 2008, Warren received another opportunity to put her mark on the debates around banking and supervision. As part of TARP, Congress included a Congressional Oversight Panel as a layer of accountability. Congress endeavored to ensure that this unprecedented deployment of the public fisc carried with it appropriate transparency and accountability. The Panel's authority was limited: no subpoena powers, no access to unofficial information or data.[300] The only formal requirement for the Panel was to hold hearings (if they could get voluntary witnesses) and release reports, which they were expected to do monthly.

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297. President Barack Obama, Remarks on Signing the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act [https://perma.cc/S7HS-MKCH].

298. Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, at 5, https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/K877-PHEM].

299. Warren rewrote the proposal with a co-author as a law review article shortly thereafter. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

300. ELIZABETH WARREN, A FIGHTING CHANCE 1493 (2012).

Despite these limitations, her assignment to the Congressional Oversight Panel was enough to put Warren in the spotlight and give her the platform to promote her idea. Warren had an advantage in this fight; the financial industry was on the ropes because of the still smoldering crisis. The first major legislative battle in the post-crisis period (excluding TARP) was a credit card reform package that the industry opposed: it sailed through both chambers with overwhelming bipartisan support.[301] But the creation of a new federal regulatory agency—the first new consumer-focused agency since the 1970s[302]—devoted to policing the highly profitable businesses of consumer finance was another matter altogether.

Warren had the benefit of a key supporter: President Obama.[303] As with the efforts to take a more aggressive posture toward the big banks, however, it seemed that even this support was not enough, at least initially. Eventually, Treasury Secretary Timothy Geithner—who was initially cool to the idea that financial reform should be focused on anything other than systemic risk—was convinced.

Getting through the congressional process was a separate matter. Both House Financial Services Committee Chair Barney Frank (D-MA), who would shepherd the bill through that chamber, and Senate Banking Committee Chair Chris Dodd (D-CT), his counterpart in the Senate, were broadly supportive of the inclusion of a new consumer agency. Republicans were nearly uniformly opposed. The consumer-protection agency thus became the central fight in the passage of Dodd-Frank.[304]

One major problem for the Republicans was the very existence of a new regulator. Sometimes these concerns became *very* specific. Senator Olympia Snowe (R-ME) expressed concern about the agency because, as summarized by the Wall Street Journal, the new agency "could harm Maine's lobstermen and innkeepers" who depended on "customized financing for the seasonal businesses, which take the form of home-equity lines of credit that allow for low payments in the off-season."[305] If the CFPA

301. *See* ELISE BEAN, FINANCIAL EXPOSURE 354 (2018).

302. Jim Puzzanghera, *Obama's Consumer Protection Legacy Defined by Aggressive Agency*, L.A. TIMES (May 29, 2016, 3:00 AM), https://www.latimes.com/business/la-fi-obama-consumer-protection-20160529-snap-story.html.

303. In a talk show appearance early in his presidency, Obama essentially quoted the toaster analogy with which Warren began her Democracy article two years earlier. *Transcript: President Barack Obama on 'The Tonight Show with Jay Leno'*, N.Y. TIMES (Mar. 19, 2009), https://www.nytimes.com/2009/03/20/us/politics/20obama.text.html [https://perma.cc/5AB6-VF2D].

304. *See* Arthur E. Wilmarth, Jr., *The Financial Service Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 887 (2012).

305. Deborah Solomon, *Wooing GOP, Geithner Gets an Earful: Senators Bring Up Lobstermen and NASA in Talks on Financial Bill, Not Just Fears of More Bailouts*, WALL ST. J. (Apr. 24, 2010, 12:01 AM), https://www.wsj.com/articles/ SB10001424052748704388304575202332951328628 [https://perma.cc/J6N6-Q68B].

(as it was then known) was given the authority to supervise every entity that provided consumer finance, then these seasonal businesses could be hurt.

Another concern was more structural. The House version of the bill called for a consumer agency modeled on other independent commissions. It would be a bipartisan, multimember commission, similar to the SEC, with five members appointed by the President and confirmed by the Senate, only three of whom could be from the same party.[306]

The prospective creation of a central agency devoted to the financial contracts of all kinds of companies sparked widespread criticism. Senator Bob Corker (R-TN) and other Republicans proposed a compromise: the entity would be a bureau nested within the Federal Reserve, be led by a single director rather than a political commission, and be granted autonomy within the Fed. Other Republicans initially seemed open to the idea, and Democrats did not have strong preferences.

Although Republicans almost universally abandoned the final version of the Dodd-Frank bill, their version of the Consumer Financial Protection Bureau survived.[307] The Republican origins of this structure were all but forgotten in their subsequent rejection of the Bureau; Corker later observed that the title creating the CFPB was "the most contentious issue" and "the elephant in the room" that dissuaded Republicans from voting for Dodd-Frank.[308]

2. *Macroprudential Regulation*

In the midst of debates over Dodd-Frank, FDIC Chair Sheila Bair proposed an "independent council of regulators, chaired by a presidentially appointed head" to take on the task of macroprudential supervision and systemic risk regulation.[309] (Macroprudential supervision is a mezzo level of supervision, between the supervision of individual institutions and the broader, system-wide efforts to regulate and legislate problems throughout the system.)[310]

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306. H.R. 4173, 111th Cong. § 4103(c) (2009). For a full account of the day-to-day debates around the CFPB and its creation, see ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2013).

307. Pub. L. No. 111-203, 124 Stat. 1964 (codified at 12 U.S.C. § 5491(b)).

308. James Rowley & Lisa Lerer, *Consumer Agency Still 'Elephant' in Room for Finance Debate*, BLOOMBERG (May 3, 2010, 12:42 PM), http://www.bloomberg.com/news/2010-05-03/consumer-protection-still-elephant-in-room-forfinancal-overhaul-debate.html [https://perma.cc/ACM8-FAK7].

309. SHEILA BAIR, BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF 186 (2013).

310. *See* Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Lessons of the Financial Crisis for Banking Supervision, Speech at the Federal Reserve Bank of Chicago Conference on Bank Structure and Competition, Chicago, Illinois (May 7, 2009).

Bair's proposed council would have the authority not only to identify the next AIG, but also bring other financial supervisors and regulators into line when they were growing too lax in the face of systemic risk. In Bair's vision of the council, for example, it could have "been able to step in and write mortgage-lending standards when the Fed failed to act" in the early 2000s.[311]

Geithner thought the idea terrible. "Sheila Bair was especially aggressive in trying to clip the Fed's wings and expand the FDIC's authority," he wrote a few years later.[312] He thought her lobbying "relentless and effective," especially on the "crusade" to get her council.[313] "This view got a lot of traction on the Hill," Geithner wrote later, "but I saw the council as a way to avoid any centralized accountability."[314] His assessment of the proposed council was blunter in congressional testimony, in which he characterized it as "convening a committee to put out a fire."[315] He was blunter still during a meeting with banking executives, declaring, "There isn't going to be any fucking council."[316]

Whatever the surface-level harmony that these officials displayed at times, Geithner's hostility to Bair and others who would not get in line spilled into view. In August 2009, Geithner summoned financial regulators to his office to berate them for their lack of unity with the Administration's priorities. He took particular aim at the idea that a council, as supported by Bair and the SEC's new chair, Mary Schapiro, should shoulder more macroprudential supervisory burden.[317]

Yet, by then, Geithner had a weaker hand to play. With the Obama Administration focusing on health care as its first priority, the White House's passion behind financial reform—a passion that had led to one of the largest reforms of credit card laws in decades, for example—had started to slow. Industry could organize in opposition to the Administration's white papers, and financial supervisors, wary of encroachments on their turf, were engaged in backdoor lobbying at Congress. And not just Bair—the Fed, CFTC, SEC, and many others were similarly engaged.[318]

311. BAIR, *supra* note 309, at 186.

312. TIMOTHY GEITHNER, STRESS TESTS: REFLECTIONS ON FINANCIAL CRISES 402 (2014).

313. *Id.* at 403.

314. *Id.*

315. David Stout, *Senators Skeptical of Financial Regulation Plan*, N.Y. TIMES (June 18, 2009), https://www.nytimes.com/2009/06/19/business/19treasury.html [https://perma.cc/GQQ7-S6TY].

316. NOAM SCHEIBER, THE ESCAPE ARTISTS: HOW OBAMA'S TEAM FUMBLED THE RECOVERY 178 (2012).

317. Bair had already testified before the Senate Banking Committee that she had reservations about this approach, in July 2009. "You are talking about tremendous regulatory power being invested in whatever this entity is going to be," she stated. "And I think, in terms of checks and balances, it's also helpful to have multiple views being expressed and coming to a consensus." Damian Paletta & Deborah Solomon, *Geithner Vents at Regulators as Overhaul Stumbles*, WALL ST. J. (Aug. 4, 2009, 11:59 PM), https://www.wsj.com/articles/SB124934399007303077 [https://perma.cc/HU4L-85GR].

318. SCHEIBER, *supra* note 316, at 178.

By this point, though, Bair and her allies had won the existential debate over the FSOC. Not only had Frank included the FSOC into the House legislation, but the Administration's own proposal also had embraced the idea of a council of regulators engaged in macroprudential supervision.[319]

3. Orderly Liquidation

Bair was not only interested in the council of supervisors. She also desired to expand the FDIC's role in supervising large institutions before they threatened the entire system. Bair endeavored to make the FDIC's key supervisory tool—the threat of resolution—the default expectation for large banks as well as small ones. Geithner and others opposed this effort, too, seeing its inclusion in Dodd-Frank as a threat to the potential success of the overall legislative package. Bair wasn't appeased: "The FDIC is scrappy, we always have to fight to be heard," she told the *Wall Street Journal*.[320]

In April 2009, Bair took this fight to the Economic Club of New York, where she spoke in favor of reforming the law to have an orderly liquidation for the largest banks. It was the first time an FDIC chair had ever been invited to speak in that august forum. In the speech, she noted its two "credos" that guided the FDIC throughout its history: First, "[n]o depositor should ever lose a penny of insured deposits (and none ever has)." And second, "failed banks should be closed expeditiously" with a "minimum of disruption, their financial assets quickly sold back into private hands, and the losses first absorbed by their shareholders and creditors to maintain market discipline."[321]

The problem was not that this method of resolving financial risk was faulty; it was that "vast changes in how credit is provided and in the types of firms which provide financial intermediation" had made it so that the model of focusing financial risk on depository institutions no longer made sense.[322] In place of the commercial banks that formed the backbone of lending in America in the postwar era, so-called "shadow banks" took their place.

The FDIC was ill-equipped for this change, as it was designed to protect the government's commitment to commercial deposits. No deposits, no

319. DEP'T OF THE TREASURY, REGULATORY REFORM: A NEW FOUNDATION (2009), https://www.treasury.gov/initiatives/wsr/Documents/FinalReport_web.pdf [https://perma.cc/HDG4-BYM8]. Bair's victory was not unconditional, however. Whereas Bair wanted the FSOC to be headed by a presidentially appointed director with a fixed term, the council actually is chaired by the Treasury Secretary. BAIR, *supra* note 309, at 338.

320. Damian Paletta, *Agencies in a Brawl for Control Over Banks*, WALL ST. J. (Dec. 22, 2009, 12:01 AM), https://www.wsj.com/articles/SB126091986848592805 [https://perma.cc/Y5A4-ALEB].

321. Sheila Bair, Remarks by FDIC Chair Sheila Bair to The Economic Club of New York (Apr. 27, 2009).

322. *Id.*

FDIC, and that meant that resolution was subject to whatever the government could scramble to put together in the moment of crisis. In other words, bailouts.

This failure to provide a process for FDIC-style resolution was a key weakness in the pre-crisis supervisory framework, Bair argued. The stakes were high; "lack of an effective resolution mechanism for large financial organizations . . . contribute[s] to unprecedented government intervention . . . It has fed the 'too big to fail' presumption, which has eroded market discipline for those who invest and lend to very large institutions."[323] Further, not only market participants suffered as a result. These bailouts gave "rise to public cynicism about the system and anger directed at the government and financial market participants."[324]

Resolution for large banks as well as small was the key, Bair thought. The idea was not original with Bair. After Bear Stearns's collapse, then-Treasury Secretary Hank Paulson and Bernanke had approached Barney Frank about the idea of some kind of formal resolution authority in March 2008. It went nowhere.

The idea came up again in the Citigroup debates. The idea that Citigroup would pass its stress test—an idea already disputed, as we have seen—was not taken for granted. In the event that the bank was insolvent and needed massively greater capital infusions from TARP, the question was how to manage the government's risk. There were two options: what National Economic Council Director Larry Summers had called the "hawk option" and the "dove option." The hawk option—the one he favored, with the full support of the FDIC—would involve a "rapid resolution exit" that would have pushed Citi through an FDIC resolution. It was seen as the option most likely to appeal to the Administration's populist supporters. The "dove option" was a conservatorship, similar to the status of Freddie Mac and Fannie Mae.[325]

Geithner hated the terminology and insisted that his option was no more "dovish" than the other. "You can't say we're dove and [Summers] is hawk" in a presentation of these options to President Obama, Geithner yelled through his phone on a transatlantic call. "There's no dove. You've got to make it Hawk One and Hawk Two!"[326]

The final outcome concerning resolution authority resembled the "compromise" on the Financial Stability Oversight Council: Bair's view emerged essentially intact. Dodd-Frank created a new authority, the Orderly

323. *Id.*
324. *Id.*
325. GEITHNER, *supra* note 312, at 320.
326. *Id.*

Liquidation Authority, with overwhelming bipartisan support.[327] Whereas formerly only commercial banks and other institutions backed by deposit insurance could qualify for FDIC resolution, under the new authority, the FDIC could resolve any bank holding company and any firm designated "systemically important" by the oversight council.[328]

There were many winners and losers in the passage of Dodd-Frank. The Office of Thrift Supervision was abolished entirely. The Fed also lost some of its key authorities over consumer financial protection, despite its expansion in other important ways. The only clear supervisory winner was the FDIC. For the first time in its eighty-year history, it had a new mission: prevent the failure of the entire financial system, and not just the idiosyncratic failures of community banks.

4. Applying a Coalitions-and-Contingencies Framework

Dodd-Frank was passed during a legislative session coinciding with the financial crisis, making it quintessential crisis legislation.[329] Of the legislation surveyed in this Article, only the Banking Act of 1933 comes as close to a crisis. That temporal link is consistent both with our framework and, naturally, with the crisis-legislation hypothesis.

The fact that Congress reacts to an exogenous event, however, says nothing about the content of that reaction. To explain many of Dodd-Frank's key provisions, we turn to our framework's other components: the central role of idiosyncratic policy entrepreneurs, the assembly of temporary legislation coalitions, and the novelty of the structure.

Bair's essential roles in the FSOC and orderly liquidation authority case studies illustrate the significance of policy entrepreneurs. It is difficult to imagine either structures without Bair's interventions. Consider, for instance, Paulson and Bernanke's failed efforts to establish some sort of orderly liquidation authority in the wake of Bear Stearns' implosion. That inability to grab Congress's attention suggests that, without a skilled policy entrepreneur like Bair, a crisis is not sufficient to spark legislative action.[330]

The CFPB vignette also shows the importance of a singular policy entrepreneur. From penning an article in an obscure journal, Warren caught the attention of Washington officials, including President Obama. Given a

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327. 111th Congress, Senate Vote 131, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00131 [https://perma.cc/A9TF-2327] (recording a 93-5 vote on this amendment).

328. 12 U.S.C. §§ 5381–5394.

329. *See* Conti-Brown & Ohlrogge, *supra* note 20 (defining "first-order crisis legislation").

330. This claim rests on the assumption that Bear Stearns' failure qualifies as a crisis. *Cf.* Romano, *Quack Corporate Governance*, *supra* note 3, at 1523–28 (describing the Enron and Worldcom failures and associated scandals as crises).

stage, Warren seized it, and assembled an enduring coalition of liberal activists to her cause.[331]

In different ways, both the macroprudential regulation and consumer protection case studies show the temporary nature of the coalitions assembled in support of these provisions. Concerning macroprudential regulation, the inter-executive branch battles over FSOC exemplify the "strange bedfellows" nature of short-term political coalitions. The debate pitted leaders of several independent regulatory agencies—Bair's FDIC, as well as the SEC, CFTC, and Fed—against Geithner. To some extent, these agencies' shared interest really boiled down to self-interest; they were concerned with protecting their turf.[332] This coalition represented a temporary convergence of interests, not a durable alliance.

Regarding the CFPB, while there is nothing temporary about the liberal wing of Warren's coalition, other components of the coalition behind the CFPB were more ephemeral. Recall that Republican Senator Bob Corker proposed the agency's unique structure and other Republicans seemed amenable to the idea—before, ironically, Republicans pulled out of negotiations over Dodd-Frank because of the CFPB's inclusion in the bill.[333] Demonstrating the utter fragility of legislative coalitions, Republican contributors to Dodd-Frank's CFPB title jettisoned their idea prior to the final vote.[334]

Chief Justice Roberts's majority opinion in *Seila Law* bulldozes these intricate political discussions and the constitutionally supported—even mandated—efforts that politicians reached in crafting this novel structure. There is no dispute about the CFPB's novelty; the question is whether that novelty arose through constitutionally exotic mechanisms. The answer, in that instance, is no: the novelty of the CFPB was the product of vital and ubiquitous legislative processes dominated by randomness and a specific political moment.

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331. For other Dodd-Frank provisions—namely, (1) the creation of the Financial Stability Oversight Council (FSOC), a council of regulators charged with macroprudential supervision and systemic risk regulation, and (2) FDIC's "orderly liquidation authority" to resolve any bank holding company or firm that FSOC designates "systemically important"—FDIC Chair Sheila Bair played a starring role as the key policy entrepreneur. *See* GEITHNER, *supra* note 312, at 402–03 (Bair's role promoting FSOC); Paletta & Solomon, *supra* note 317 (same); Paletta, *supra* note 320 (Bair's role promoting orderly liquidation authority); Bair, *supra* note 321 (same).

332. SCHEIBER, *supra* note 316, at 178.

333. *See* Stacy Kaper, *Dodd Recounts War Stories Over Reg Reform*, AM. BANKER (Aug. 24, 2010, 4:35 PM), https://www.americanbanker.com/news/dodd-recounts-war-stories-over-reg-reform [https://perma.cc/HZ7N-W86Z].

334. Corker—along with 36 of his 40 Republican colleagues, voted against Dodd-Frank. Keith Poole & Howard Rosenthal, *111th Congress, Senate Vote 559*, VOTEVIEW (May 20, 2010), https://voteview.com/rollcall/RS1110559 [https://perma.cc/RD2Y-AT5M].

G. CARES Act of 2020

The COVID-19 pandemic swept the globe in the early months of 2020, creating massive public health and macroeconomic disruptions. Congress responded quickly with two legislative responses. On March 4, 2020, Congress passed the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, to provide $8 billion in additional appropriations for federal agencies and to waive telehealth restrictions.[335] On March 18, 2020, as the crisis developed further, Congress passed the Families First Coronavirus Response Act, which sought to guarantee coronavirus testing and increase funds for unemployment insurance, food security, and Medicaid funding.[336]

On March 27, 2020, Congress passed a substantially more comprehensive legislative response, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a $2.2 trillion piece of legislation that sought to stabilize the system much more.[337] In this subpart, we describe the (very fast) legislative process that resulted in the passage of the CARES Act, with a focus on § 4003, a provision that created a novel legislative structure through which Congress appropriated $454 billion to the U.S. Treasury for the exclusive purpose of investing in facilities created and managed by the Federal Reserve. In other words, Congress appropriated a half trillion dollars for one arm of the government to invest in another. This structure is new under the legislative sun, the result of fast-paced compromise, Fed lawyers serving as policy entrepreneurs who successfully shaped policy outcomes based on the exigencies of the time, and a coalition of convenience that is unlikely to ever arise again.

1. The Context of COVID-19

That the Federal Reserve would receive Congress's blessing to lead the Treasury on arguably fiscal matters was hardly obvious leading into 2020. The macroeconomic and political context that preceded the passage of the CARES Act is vital to understanding what Congress hoped to accomplish with § 4003 and why it took the form it took. Following the 2008 crisis, the passage of Dodd-Frank in July 2010, and the midterm election of 2010 that ushered in a Republican majority in the House of Representatives, the

335. Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 16-123, 134 Stat. 146 §§ 102, 301–508 (2020) (waiving various restrictions on telehealth services and appropriating funds for federal agencies).

336. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 §§ 6001, 4102, 1101, 6008 (2020).

337. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, H.R. 748, 116th Cong. (2020).

Federal Reserve's authority and reputation suffered. Conservative commentators such as Glenn Beck and Sarah Palin,[338] politicians such as Rick Perry[339] and Rand Paul,[340] and academics like Allan Meltzer[341] and John Taylor[342] leveled accusations ranging from macroeconomic malpractice to treason. At the same time, the Fed's public standing slid substantially. As measured by Gallup's polling, the Fed slid from among the top three best-regarded federal agencies in 2006 to among the least well-regarded in 2016.[343]

The Fed also became a target of electoral concern in 2016 and beyond. At first, then-candidate Trump excoriated the Federal Reserve's Chair Janet Yellen for playing politics with monetary policy by keeping interest rates too low.[344] After his election, President Trump broke tradition and failed to re-nominate Yellen, replacing her instead with Republican Fed Governor Jay Powell. But eventually, Trump soured on Powell too, this time because he blamed Powell for leading the Fed on raising interest rates.[345] Although it is highly debatable whether President Trump's very public war against the Fed succeeded in changing the Fed's course, as some have claimed,[346] the attacks certainly injected the Fed into a much more highly partisan register, further eroding the public's confidence in the Fed as a nonpartisan, technocratic institution.

Even so, when the coronavirus first landed in the U.S., the Fed acted more swiftly than Congress or indeed any other organ of government.[347] Over the course of just a few short weeks, the Fed dropped interest rates 150

338. *See* ADAM TOOZE, CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD (2018); David Corn, *Sarah Palin, Wall Street Bailout Hypocrite*, MOTHER JONES (Nov. 18, 2010), https://www.motherjones.com/politics/2010/11/sarah-palin-wall-street-bailout-tarp/ [https://perma.cc/7T35-S5LQ].

339. Press Release on TARP, Rick Perry, Chairman, Republican Governors Association (Oct. 1, 2008).

340. Interview by Kiran Chetry with Rand Paul, U.S. Rep., on CNN "American Morning," (Oct. 17, 2008).

341. Allan H. Meltzer, *Inflation Nation*, N.Y. TIMES, May 3, 2009.

342. John B. Taylor, Opinion, *How to Avoid a 'Bailout Bill'*, WALL ST. J., (May 3, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703871904575216633061219378 [https://perma.cc/842R-QUWW].

343. *Government: In Depth: Topics A to Z*, GALLUP, https://news.gallup.com/poll/27286/government.aspx (last visited May 23, 2021).

344. Matthew Belvedere, *Trump: Janet Yellen Should be 'Ashamed' of What She's Doing to the Country*, CNBC (Sept. 12, 2016, 10:49 AM), https://www.cnbc.com/2016/09/12/trump-says-fed-chief-yellen-should-be-ashamed.html.

345. Christopher Condon, *Key Trump Quotes on Powell as Fed Remains in the Firing Line*, BLOOMBERG (Dec. 17, 2019, 9:35 AM), https://www.bloomberg.com/news/articles/2019-12-17/key-trump-quotes-on-powell-as-fed-remains-in-the-firing-line.

346. Gavyn Davies, *Can Donald Trump Force the Federal Reserve to Cut Rates?*, FIN. TIMES (Oct. 6, 2019), https://www.ft.com/content/5b98bf34-7bd4-11e9-81d2-f785092ab560.

347. For more on the Fed's response to the COVID-19 pandemic, see Lev Menand, *The Federal Reserve and the Crisis of 2020*, 24 STAN. J. L., BUS. & FIN. (forthcoming 2021).

basis points,[348] reassuring the world that interest rates would stay at the zero-lower bound for quite some time.[349] It began a sustained process of large-scale asset purchases, first at defined levels,[350] then without limit,[351] before pledging to taper these commitments.[352] And, very quickly, the Fed broke the glass on its emergency lending programs developed in the 2008 crisis.[353] Meanwhile, Congress was still thinking small, passing two pieces of legislation that together were orders of magnitude smaller than the Fed's programs.[354]

2. *The Legislative Debates and the Legislative Result*

By mid-March, state after state had declared a shutdown, the U.S. was in a recession, and unemployment had reached historical highs as businesses closed.[355] Congress faced significant pressure to do much more than it had accomplished in the first two rounds of legislation. While bipartisan consensus existed regarding the need for dramatic interventions, the days of negotiation were intense and bitter.[356] One particular point of contention: a $500 billion fund that Republicans designated for the U.S. Treasury to deploy to help vital U.S. industries. Democrats immediately seized on this initiative as a "slush fund."[357] Treasury control over these funds was a non-

348. Press Release, Bd. of Governors of the Fed. Rsrv. Sys. (Mar. 15, 2020) [hereinafter "Fed. Press Release"], https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a.htm [https://perma.cc/6XX8-2T8Z].

349. Press Release, Bd. of Governors of the Fed. Rsrv. Sys. (Apr. 29, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200429a.html [https://perma.cc/8V7U-Q47Z].

350. Fed. Press Release, *supra* note 348.

351. Press Release, Bd. of Governors of the Fed. Rsrv. Sys. (Mar. 23, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm [https://perma.cc/N8LB-NCS7].

352. Press Release, *supra* note 349.

353. Jeanna Smialek, Kate Kelly & Peter Eavis, *Fed Unveils Emergency Lending Programs as Companies Struggle to Raise Cash*, N.Y. TIMES (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/business/economy/federal-reserve-coronavirus.html?smid=url-share [https://perma.cc/ZL7C-QLWQ].

354. Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020) (made public law on 03/06/2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (made public law on 03/18/2020).

355. Nat'l Bureau Econ. Res., *Determination of the February 2020 Peak in US Economic Activity* (2020), https://www.nber.org/news/business-cycle-dating-committee-announcement-june-8-2020 [https://perma.cc/N4NX-D7S9].

356. *See* Andrew Duehren, Siobhan Hughes & Lindsay Wise, *McConnell Unveils GOP Stimulus Plan Amid Coronavirus Crisis*, WALL ST. J. (Mar. 19, 2020), https://www.wsj.com/articles/senate-republicans-prepare-third-coronavirus-measure-11584622892 [https://perma.cc/5JJT-WJJX].

357. John Bresnahan & Marianne Levine, *Dems Seize on 'Slush Fund' to Oppose Republican Rescue Package*, POLITICO (Mar. 23, 2020, 10:53 AM), https://www.politico.com/news/2020/03/23/democrats-slush-fund-republican-rescue-package-143565 [https://perma.cc/Y446-F4CU].

starter, even though it mapped onto the 2008 crisis rulebook pretty closely.[358]

Initially, the compromise point was for the Treasury to receive the appropriated funds to control how they would be deployed by the Fed: that is, the Treasury would lead the fiscal charge by directing how money would be lent through the Federal Reserve to specific industries. But Fed lawyers intervened: the Fed's independence was more important than Treasury's traditional role overseeing fiscal policy.

The next step was a fund of $425 billion that the Treasury would use "in support of programs or facilities established" by the Fed through its emergency lending programs.[359] Ostensibly, this would mean a fund similar to the Troubled Asset Relief Program created in September 2008 to give the U.S. Treasury $700 billion to respond to the 2008 financial crisis.[360] Some of those funds were used by the Treasury alone,[361] some were used in coordination with the Fed,[362] and some were invested directly into Fed facilities. Under this kind of structure, the Treasury would still maintain its autonomy.

But this structure did not survive the final process. Instead, Congress appropriated $454 billion "to make loans and loan guarantees to, and other investments in, programs or facilities established" by the Fed under its emergency lending provisions.[363] This was a novel structure. The Treasury lost its autonomy to manage fiscal affairs, and was arguably subordinate to the Fed—the latter would design, manage, and operate the facilities instead. This is an arguable characterization: because the Treasury retained sign-off authority over the Fed's emergency lending programs after Dodd-Frank, the reality was more of a partnership. But if the Fed could not proceed without the Treasury, neither could the Treasury proceed without the Fed.

The political logic of the § 4003 fund appears to be distrust of sole Treasury control over a half trillion dollars of appropriated funds to use with minimal oversight. The economic logic, on the other hand, was later justified after the fact to protect the Fed from losses in its emergency

358. Despite the Fed's dramatic interventions (and non-interventions).

359. CARES Act compromise bill, on file with author.

360. Emergency Economic Stabilization Act, Pub. L. No. 110-343, 122 Stat. 3765 § 115(a)(3) (2008).

361. *See Investment in AIG: Program Status*, U.S. DEP'T TREASURY, https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/aig/Pages/status.aspx [https://perma.cc/SNP6-VYHR] (last updated Dec. 11, 2013).

362. *See* Office Fin. Stability, U.S. Dep't Treasury, Citizens' Report on the Troubled Asset Relief Program (TARP) 4, 7 (2009), https://www.treasury.gov/initiatives/financial-stability/reports/Documents/09%20OFS_CitizensReport%20MAR2.pdf [https://perma.cc/GZ84-KDL8].

363. Coronavirus Aid, Relief, and Economic Security Act, § 4003(b)(4), Pub. L. No. 116-136, 134 Stat. 281 (2020).

lending.[364] The Fed was to lend to entities in distress, but could not take losses on these loans. The Treasury could. Congress appeared to endorse that view.

3. Applying a Coalitions-and-Contingencies Framework

The $454 billion in § 4003 represented just 20% of the total appropriated funds. But it also shows the power of theory. The financial turmoil that preceded the passage of the CARES Act was not a financial crisis in the conventional sense, although it certainly shared features with one.[365] Instead, the CARES Act was responsive to a true exogenous shock—a global pandemic whose impact on the macroeconomy was unprecedented in its scope. The shock did not activate pre-existing coalitions—the legislative coalition that enacted the legislation was essentially the entire Congress; the Senate passed the legislation 96-0, and the House accepted the Senate version of the bill on a voice vote.[366] The partisan rancor that has increased in the Congress in the last generation nearly guarantees that this coalition will not endure.[367] Policy entrepreneurs like Fed lawyers played a key role, despite having so few off-the-rack proposals to address Fed lending in a pandemic.

The final result was a structure so novel that one leading member of Congress regarded it as exceptional beyond precedent. "This should be considered a very freakish Black Swan event, not anything that would be revisited under ordinary circumstances," Senator Pat Toomey, one of the architects of § 4003, told reporters a month after the passage of the CARES Act.[368] "You have to be concerned about precedents."[369]

In other words, Congress created a novel structure because extraordinary times called for extraordinary—even unique—legislative structures. Unexpected partisan rancor against Treasury discretion over a large pool of

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364. David Beckworth, *Darrell Duffie on Treasury Markets and the Post-COVID Path to Financial Stability*, MERCATUS (June 15, 2020), https://www.mercatus.org/bridge/podcasts/06152020/darrell-duffie-treasury-markets-and-post-covid-path-financial-stability [https://perma.cc/9FPB-F6HD].

365. *See* Conti-Brown & Ohlrogge, *supra* note 20.

366. Claudia Grisales, Kelsey Snell, Susan Davis & Barbara Sprunt, *President Trump Signs $2 Trillion Coronavirus Rescue Package into Law*, NAT'L PUB. RADIO (Mar. 27, 2020, 5:00 AM), https://www.npr.org/2020/03/27/822062909/house-aims-to-send-2-trillion-rescue-package-to-president-to-stem-coronavirus-cr [https://perma.cc/3TKE-CWMU].

367. *See* Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10 PLOS ONE 1, 10 (2015).

368. Nick Timiraos & Jon Hilsenrath, *The Federal Reserve Is Changing What It Means to Be a Central Bank*, WALL ST. J. (Apr. 27, 2020, 11:06 AM), https://www.wsj.com/articles/fate-and-history-the-fed-tosses-the-rules-to-fight-coronavirus-downturn-11587999986 [https://perma.cc/Y6CY-KDCV].

369. *Id.*

appropriated money led Congress to create a novel structure. It may well be impossible to put this genie back in the bottle, as some have predicted.[370] But the ambition to novelty was undeniable.

IV. IMPLICATIONS

A framework for evaluating financial legislation based on fragile coalitions and historical contingency yields prescriptive guidance for judges, lawmakers, and scholars. For courts, the theory raises concerns regarding the use of historical-gloss and antinovelty doctrines. In light of the historically contingent nature of financial legislation and the randomness throughout its path to passage, a degree of novelty should be tolerated; there is no mold for financial legislation.

Further, by highlighting the particular conditions under which Congress enacts financial legislation, the framework also spotlights Congress's inattention to finance in most circumstances. That finding weighs in favor of an expansive nondelegation doctrine, enabling expert regulatory agencies to take on the task of making dynamic, incremental changes to policy under broad delegations of authority from Congress.

Finally, our framework should buoy would-be policy entrepreneurs. Although financial reform is not easy, neither is its enactment only possible following a financial crisis or on the terms set by a particular interest-group coalition.

A. Anti-antinovelty

1. Challenging Historical-Gloss and Antinovelty

Each element of our framework challenges the historical-gloss and antinovelty doctrines' foundational assumptions about the legislative process.[371] Given that the latter doctrine provided the intellectual footing to *Free Enterprise*, *Seila*, and *Collins*—and the Court's tacit acknowledgment in *Collins* that the door is open to future litigation concerning other

370. *Governments Must Beware the Lure of Free Money*, ECONOMIST (July 23, 2020), https://www.economist.com/leaders/2020/07/23/governments-must-beware-the-lure-of-free-money [https://perma.cc/GM9W-TU37].

371. Recall that historical-gloss doctrine considers a type of statute's durability, along with other officials' acquiescence concerning its legitimacy, as weighing in favor of its constitutionality, *see* Bradley & Siegel, *supra* note 18, at 18, whereas antinovelty considers a statute's novelty as weighing against its constitutionality. *See* Litman, *supra* note 15, at 1411.

agencies' structures[372]—this challenge goes to the heart of the Court's recent separation-of-powers jurisprudence.

First, whereas antinovelty is premised on the notion that Congress is able to use its powers expansively,[373] our framework recognizes the inherent difficulties in passing major legislation—and the consequent need for the stars to align to do so. We are not the first to observe that these doctrines assume away the many obstacles to lawmaking.[374] We build on this critique by noting that major financial legislation often requires yet another element—a major, often unpredictable event—to stand a chance at passage.

Second, whereas both judicial doctrines view Congress as a unified, coherent actor across time—constructing a determinate "historical practice" over generations or purposefully augmenting its power to a perceived constitutional limit—we show how specific policy entrepreneurs—some situated outside of Congress—drive major legislation. According to legal historian Alison LaCroix, judicial doctrine that aims to uncover a single, coherent historical practice presumes "an artificial degree of unity and coherence within institutions, and from one action to another."[375]

By focusing on the pivotal role of individual policy entrepreneurs, our framework highlights the flaws in doctrine that assumes an inter-temporally unified Congress engaging in a coherent practice. That so many of these policy entrepreneurs—e.g., Paul Warburg, Sandy Weill, and then-Professor Elizabeth Warren—are situated outside of government drives home this point even further.

Third, our theory's emphasis on temporary legislative coalitions contrasts with historical-gloss and antinovelty's assumption that constitutional considerations and concerns with augmenting Congress's power motivate lawmakers in part. Brittle, shifting coalitions pushed the

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372. Collins v. Yellen, 141 S. Ct. 1761, 1787 n.21 (2021) ("None of these [other] agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.").

373. Printz v. United States, 521 U.S. 898, 905 (1997) ("[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.").

374. *See, e.g.*, Litman, *supra* note 15, at 1428 ("[E]nacting federal laws is difficult, and the nature of the legislative process requires Congress to select from among many different priorities and make compromises."); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 448 (2012) ("The various veto-gates through which formal legislation must pass, as well as collective action problems and the likelihood that individual members think more in terms of party than institution, provide a host of reasons why Congress might not legislate in a particular circumstance . . . [which] have nothing to do with the ideas of institutional agreement or waiver undergirding theories of acquiescence.").

375. LaCroix, *supra* note 89, at 78. This fallacy goes beyond the familiar problem of treating a given Congress as a singular entity, *see* Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992), to instead see Congress as a unitary actor across time, consciously building a set of practices. *See* William Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 204–05 (2000).

Federal Reserve Act, the Banking Act of 1933, BHCA, and FIRREA to passage, and the CARES Act's unanimity likely will be a ticket good for one day only. Considering that these coalitions could not agree on essentially *anything* for very long, the notion that they were in accord on abstract principles is doubtful.

In light of these faulty premises, our framework counsels judges to be skeptical of arguments that new financial regulatory structures run afoul of constitutional principles because of their novel structures.[376]

2. Randomness Yields Novelty

Our framework's challenge to antinovelty extends beyond impeaching the doctrine's theoretical assumptions. The extremely historically contingent nature of major financial legislation suggests that novelty may be virtually inevitable. Phrased another way, given the prevalence of randomness throughout the process, one cannot expect Congress to use a mold to create new regulatory institutions.

In this section, we empirically demonstrate that novelty is the rule, not the exception. We focus our analysis on one type of financial legislation: the creation of new financial regulatory agencies. Statutes establishing new agencies are an important category of financial lawmaking, as our case studies concerning the legislative origins of the Federal Reserve, FDIC, CFPB, and FSOC illustrate. They also feature prominently in recent cases that deploy antinovelty rhetoric.[377]

We start with Kirti Datla & Richard Revesz's classification of eighty-one executive-branch entities based on the presence or absence of seven key indicia of agency independence, e.g., for-cause removal protection, a multi-member structure, independence from congressional budgeting, etc.[378] Using Datla & Revesz's lists, we identify each entity with a unique combination of these important attributes.

Remarkably, we find that, of the eight financial regulators in their study, six different design structures are present. The Federal Reserve, FDIC, National Credit Union Administration (NCUA), and Treasury all have

376. *See* Litman, *supra* note 15, at 1422–27.

377. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2019), *cert. granted*, No. 19-422 (2020).

378. Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (reporting these indicia as absence of "removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, and budgetary and congressional communication authority, and adjudication authority").

bespoke structures; the CFPB (as originally constituted) and FHFA share the same structure; and the SEC and CFTC do as well.[379]

By comparison, among the twenty-two agencies with removal protection—which some scholars view as the *sine qua non* of independence,[380] there are twelve different structures. Among all eighty-one included executive departments, independent agencies, and government corporations, thirty-five different structures are present.[381] Table 1 summarizes these findings.

Table 1: Institutional Designs across the Executive Branch

Category	*Number of Entities*	*Number of Unique Inst. Designs*[382] *(%)*
Financial Regulatory Agencies	8	6 (75%)
Agencies w/ Removal Protection	22	12 (55%)
All Executive-Branch Entities	81	35 (43%)

The table shows a remarkably wide-ranging set of institutional design choices across the executive branch. That eclecticism is even more remarkable when one considers that Datla and Revesz's exclusive focus on the presence or absence of these seven features *underestimates* the degree of institutional diversity, as these binary determinations obscure substantial variation within many of the categories.[383]

379. *See id.* at 786–809 (providing the information used to make this determination). The OCC is not included in Datla & Revesz's study because it is nested within the Treasury Department. 12 U.S.C. § 1(a).

380. *See, e.g.*, Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1208 (2014); John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 953–54 (2001) (classifying agencies as independent if their "heads do not serve at the pleasure of the president"); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 426 (1990) ("An agency is independent if Congress has provided that its members can be discharged by the President only for specific causes.").

381. *See* Datla & Revesz, *supra* note 378, at 786–809 (providing the information used to make this determination).

382. Unique Institutional Designs refers to the number of different combinations of Datla & Revesz's seven indicia of independence that are present in the category.

383. *See, e.g.*, 12 U.S.C. § 1752a (establishing a 3-member NCUA); 39 U.S.C. § 202 (establishing an 11-members Postal Service Board of Governors); *see also* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2242–43 (Kagan, J., dissenting in part) ("[T]he very category of multimember commissions breaks apart under inspection . . . Some of those commissions have chairs appointed by the President; others do not. Some of those chairs are quite powerful; others are not . . . [T]erm length, voting rules, and more—all vary widely, in ways that make a significant difference to the ease of presidential control.") (citation omitted).

The prevalence of novel structures is not a recent development. In the realm of finance, the First Congress established a bespoke structure for the First Bank of the United States: three presidentially appointed superintendents would direct the Bank's initial capitalization, and twenty-five directors would use a detailed voting system to appoint the Bank's president.[384] Indeed, the First Congress experimented with unique administrative structures in a wide variety of regulatory areas.[385]

Neither is this pattern exclusive to financial regulators. Aziz Huq and Jon Michaels state that in separation-of-powers cases, which include challenges to agency designs, "difficult cases of first impression"—a tell-tale sign of congressional experimentation—"are surprisingly common."[386] And, as Table 1 shows, unique agency structures feature throughout the executive branch.

Nonetheless, nowhere is this institutional diversity more pronounced than in financial regulators, with six different basic design structures represented among eight agencies. For financial regulatory agencies, novelty is the norm. Thus, when then-Judge Brett Kavanaugh observed that Dodd-Frank's legislative coalition "apparently stumbled into" a single-director structure for the CFPB,[387] he was describing a situation that is all too ordinary. Whereas this structure may be unusual, the manner in which Congress constructed it is not. As Lisa Schultz Bressman and Robert Thompson remarked, financial agencies "have their own unique statutory characteristics."[388] In light of the random walk that produced them, how could they not?

As we have shown, novel structures are both ubiquitous and, given the centrality of historical contingency, unsurprising. Accordingly, judicial doctrine that views novelty skeptically not only places many independent agencies—including the uniquely designed Federal Reserve, FDIC, NCUA, OCC, and (post-*Seila*) FHFA—on shaky ground, but also disrupts Congress's ability to address future challenges, as the products of Congress's institutional design processes will likely continue to be novel. In light of our framework's insights into the legislative process, antinovelty doctrine deserves reconsideration.

384. Act of Feb. 25, 1791, ch. 10, §§ 1, 7, 1 Stat. 191, 191–95 (1791).

385. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 35 (2012) ("How could Congress construct an administrative apparatus that was both efficacious and legitimate? Judged by congressional practice there was no single answer to that question. In a true spirit of democratic experimentalism, Congress struck out in multiple directions.").

386. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 417 (2016).

387. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 171 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *overruled in part by Seila Law*, 140 S. Ct. 2183.

388. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 607 (2010).

B. Delegation

Although focusing on the path of financial legislation as largely contingent challenges courts' use of historical-gloss and antinovelty, the theory bolsters another important judicial doctrine: the intelligible principle standard. Under that standard, a statutory delegation of authority to an executive-branch actor is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform."[389] That standard permits broad delegations of policymaking discretion to administrative agencies.[390] The doctrine's permissiveness thus provides the legal ballast for the modern administrative state, in which executive departments and independent agencies exercise expansive policymaking authority.

The future viability of the intelligible principle standard is currently in doubt, with four Supreme Court justices evincing support for a stronger nondelegation doctrine in the 2019 case *Gundy v. United States*.[391] Should Justice Kavanaugh (who did not participate in *Gundy*) or Justice Barrett (who was not a member of the Court in 2019) join their four colleagues to breathe new life into nondelegation in another case—that result would call into question the constitutionality of much of the administrative state.[392]

Our framework shows the importance of retaining the intelligible principle standard for two reasons. First, as our case studies illustrate, it often takes a significant event to spark legislative action.[393] Congress is less adept at incrementally revising statutes to address minor or gradual changes.[394] By contrast, in several respects agencies are able to more

389. Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

390. Only twice (both times in 1935) has the Court struck down delegations based on Congress's failure to provide an intelligible principle. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). *See also* Whitman v. Am. Trucking Assn's., Inc., 531 U.S. 457, 474–75 (2001) (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law") (internal quotation omitted).

391. 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (stating that the intelligible principle standard, as currently understood, "has no basis in the original meaning of the Constitution," and instead "rest[s] on misunderst[ood] historical foundations") (internal quotation omitted); *id.* at 2131 (Alito, J., concurring in the judgment).

392. *Id.* at 2130 (majority opinion) (arguing that, had the dissenters' position been adopted, "then most of Government [would be] unconstitutional").

393. *See supra* Part II.

394. *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954 (1999).

quickly respond to changing circumstances.[395] For instance, agencies may announce policy changes via nonbinding guidance documents, include waiver provisions in rules, or calibrate enforcement levels (including non-enforcement) with minimal procedural hurdles or judicial oversight.[396] Accordingly, the Supreme Court and many scholars consider agencies' greater flexibility in the face of changing conditions to be an important justification for delegation.[397]

To some, the claim that regulatory agencies are flexible may seem surprising. That claim is at odds with the critiques that their excessive emphasis on procedure promotes ossification and facilitates capture.[398] Concerning financial regulators specifically, Awrey and Judge see a "mismatch" between a dynamic, complex, and uncertainty-filled financial sector and "regulatory processes that assume a high degree of knowability, stability, and predictability in designing rules."[399] Assessing regulators' competencies requires a comparison group, however, and here, lawmakers are the most obvious one. Our framework shows just how limited the circumstances under which Congress will act are, thus drawing out the differences between these two institutions in terms of flexibility.

Second, our framework's emphasis on the role of particular key individuals—namely, policy entrepreneurs situated at the right place at the right time—illustrates the historically contingent nature of major financial legislation. In contrast, given the deep reservoirs of subject-matter experts at regulatory agencies, these agencies presumably are far less likely to rely on a small handful of indispensable individuals. Indeed, the leading rationale for delegation emphasizes agencies' superior expertise and institutional capacity vis-à-vis Congress.[400]

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395. Rulemaking, which can be plodding, is not one of those respects. *See* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997).

396. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 440 n.36 (1999).

397. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425 (1944) (stating that delegation to agencies permits "Congress the necessary resources of flexibility and practicality") (internal quotation omitted); Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1982 (2008); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 512–13 (2005); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2089 (1990).

398. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 364–65 (2019); Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

399. Awrey & Judge, *supra* note 103, at 22.

400. *See* Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (stating that judges, unlike agencies, are not "experts in the field"); Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA.

While many scholars justify expansive delegations by highlighting agencies' flexibility and expertise, our framework calls attention to the other side of the coin. By describing the role that significant events play in motivating financial legislation, the theory raises questions about Congress's ability to recalibrate legislation to respond to lesser changes in circumstance. And by emphasizing the role that policy entrepreneurs play in the process, the theory draws an implicit contrast with agencies, whose deep bench of policy experts may lessen their reliance on any one particular individual. Accordingly, our framework buttresses these well-established reasons for permitting congressional delegations to agencies.

C. Legislative Possibility

Finally, a theoretical focus on contingency as the defining basis of financial legislation offers encouragement to would-be policy entrepreneurs. The crisis-legislation hypothesis implies that reformers can only achieve meaningful legislative changes following a financial or economic crisis.[401] By implication, an ossified status quo otherwise prevails. Likewise, bank-bargain theory holds that stable interest-group coalitions control financial policy. These coalitions endure for decades, if not centuries.[402]

For proponents of reform, these two prevailing accounts are cause for fatalism.[403] The former leaves little room for successful policy entrepreneurship absent a crisis, whereas the latter hold that entrepreneurs outside of the durable coalition that has captured financial policy are essentially "powerless."[404]

Placing fragile coalitions and historical contingency at the center of financial legislation opens up the frontier. Policy entrepreneurs can utilize a variety of events—not just crises, but even much less salient events like bank expansions and megamergers—as a catalyst for legislative change. Some catalysts for policy change are not even exogenous to the political system; the Pujo Hearings and the extraordinary election of 1912

L. REV. 633, 642 (2018) (referring to this account as the "most common view"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 234 (1997) ("In many areas, the need for complex regulations seems better handled in a specialized agency than in Congress. Also, the sheer quantity of regulations exceeds the capacity of Congress."); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337 (1947); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938) (agencies possess "advantages of specialization").

401. *See* Romano, *Regulating in the Dark*, *supra* note 3, at 56.

402. CALOMIRIS & HABER, *supra* note 7, at 39.

403. *See* GERDING, *supra* note 3; Coffee, *supra* note 30, at 1023.

404. Calomiris & Haber, *Banking Systems*, *supra* note 6, at 99 ("The rules [of the political system] . . . determine which other groups have to be included in the government-banker partnership, or, alternatively, who can be left out because the rules . . . render them powerless.").

precipitated the Federal Reserve Act. President Bush's unexpected decision to make S&L reform his first domestic initiative paved the way for FIRREA. In both cases, politicians set in motion the catalyzing event. The large and varied set of events that can spark legislative change should encourage would-be reformers.

Once that policy window is open, the entrepreneur is tasked with assembling a winning coalition in Congress. Importantly, the coalition does not need to track party status or other deeply rooted cleavages; as we have seen, a variety of major financial bills passed based on support from temporary, strange-bedfellow coalitions.

For would-be policy entrepreneurs, that reforms can be enacted without the buy-in of the majority party's organization is cause for optimism. A received wisdom holds that political polarization has contributed to gridlock on important policy matters.[405] As an empirical matter, that claim is not accurate; concerning major legislation, cross-party coalitions are roughly as prevalent today as in past generations.[406] Our analysis reinforces that message. Although affecting major policy change is always a long-shot, the odds are not staked against a savvy policy entrepreneur to nearly the extent as the crisis-legislation hypothesis, bank-bargain theory, or popular understandings suggest.

Relatedly, when presenting proposed reforms, our framework counsels legal scholars to be mindful of a variation of what Eric Posner and Adrian Vermeule term "the inside/outside fallacy."[407] That term refers to a tendency in public law whereby scholars identify an incentive structure that afflicts policy actors, and then prescribe some corrective that similarly situated policy actors should adopt. "In a typical pattern," Posner and Vermeule write, "the diagnostic sections of a paper draw upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions."[408]

Likewise, the sheer unpredictability of the legislative process concerning major financial legislation implies that proposed good-government reforms that do not squarely address the realities of this lawmaking process may be Pollyannaish. Applying Terry Moe's aphorism

405. *See, e.g.*, Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 242 (2016) ("As Congress becomes more polarized, it becomes less able to resolve major questions affecting social, economic, and political issues.").

406. *See* JAMES CURRY & FRANCES LEE, THE LIMITS OF PARTY 15–16 (2020); E. SCOTT ADLER & JOHN WILKERSON, CONGRESS AND THE POLITICS OF PROBLEM-SOLVING 4–5 (2013).

407. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013).

408. *Id.* at 1745.

about the institutional design of bureaucracy to legislative processes generally, we observe that legislation, in an important sense, "is not designed to be effective," but arises "out of politics, and its design reflects the interest, strategies, and compromises of those who exercise political power."[409]

Accordingly, legislative reform proposals that criticize past legislative enactments should, at the very least, grapple with the legislative process that will effectuate those proposals. Specifically, reform proposals should make an effort to identify possible policy entrepreneurs who, by position and motivation, plausibly could take up the mantle and possible coalitions that could arise to navigate reform where earlier efforts have failed. In brief, when scholars and others advance proposed reforms, however, they should be cognizant of the messiness of the legislative process that they hope will effectuate their proposals.

CONCLUSION

This Article introduces a new framework for understanding financial legislation in the United States. We argue that many of the canonical pieces of financial legislation in the United States are historically contingent, the products of uncertainty, ambiguity, and even randomness throughout the legislative process. Events that are unpredictable ex ante spark policy proposals; well-placed individuals then assemble legislative coalitions, which are often brittle, to guide those ideas into law. Along the way, the proposals may change markedly from the policy entrepreneur's original idea into something else entirely, and winning legislative coalitions may dissolve around the time of enactment. The consequence of this multi-layered uncertainty is diverse legislative outcomes; novelty is the defining characteristic of financial legislation.

This change in approach to understanding financial legislation is an important correction to theories of financial legislation that are grounded in financial crises, easy electoral politics, or durable coalitions. Instead, an approach that emphasizes shifting coalitions and high-variance contingency produces a greater systems-level understanding of how and when ideas becoming laws. That knowledge is valuable not only for scholars, but also for would-be policy entrepreneurs deciding whether to launch legislative campaigns and for judges assessing the constitutionality of regulatory structures.

That said, this Article does not claim that financial legislation is dominated by nihilism. It is an invitation to use past legislative experience

409. Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 268 (John E. Chubb & Paul E. Peterson eds., 1989).

to understand the genesis and path to passage for major financial legislation. Our framework's four principles present falsifiable statements about the nature of legislation. We offer them for future scholars to further develop and test.