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The Eagle or the Ostrich: A United States Perspective on the Future of Transnational Banking

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The Eagle or the Ostrich: A United States Perspective on the Future of Transnational Banking

*Marilyn B. Cane**

ABSTRACT

In this Article, Professor Cane discusses the problems of United States banking regulations in the new global financial system. These problems include antiquated legislation, the deposit insurance system, the dual federal-state banking system, and restrictive branching laws. Part II discusses the current deposit insurance system and options for reform. Part III poses the question of whether the United States should have "national" treatment or "reciprocal national" treatment for financial institutions. Part IV discusses the limitations the United States has put on its financial institutions and the disadvantage these limitations have caused globally. Finally, in Part V, Professor Cane discusses a proposal that requires foreign banks to capitalize separately their branches located in the United States.

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"America cannot be an ostrich with its head in the sand."
Woodrow Wilson (Speech at Des Moines, Iowa, February 1, 1916).

I. INTRODUCTION

This Article will explore certain issues we must confront in order for United States financial institutions to regain global competitiveness in the coming years. The recurring theme will be the conflict between the United States domestic agenda and transnational agendas. The restrictions placed on our financial institutions by the political demands of the United States domestic sphere and the requirements for economic success in the global realm are in conflict. What is politically palatable on the homefront will not work in the international markets, and vice versa. While the international community is playing soccer, we continue to play United States football. It is time to take off our helmets and shoulder pads; they will only slow us down. If political realities dictate, we could play football at home and soccer abroad. At the very least, the United States must recognize that the rules for each game are different, and allow our financial institutions to adjust accordingly.

In addition to the obstacles created by such antiquated legislation as the Glass-Steagall Act, which purports to separate commercial and investment banking, and the McFadden Act, (which results in prohibitions on interstate branching), the current system of deposit insurance distorts policy choices concerning the products and services that United States banks may offer here and abroad. As long as the deposit insurance system is subject to virtually unlimited risk because of essentially unlimited coverage, United States politicians will seek to limit hazard by shackling our banks with regulations that place our banks at a severe competitive disadvantage in world markets.

Prognosticating the future of transnational banking is a daunting task.[1] Twenty-five years ago, no one would have predicted the collapse of the Soviet Union, the unification of Germany, the emergence of the European Community (EC), or the financial ascension of Japan. No one would have foreseen the continuing United States thrift debacle. A quarter century ago the United States was an unparalleled economic behemoth. The dollar was the unchallenged benchmark. Even the locution of international banking was "Eurodollars." The phrase "Made in Japan" denoted shoddy goods. In 1966, six of the ten largest banks in the world were in the United States.[2] At that time, no Japanese bank ranked in the top ten, although French, English, and Canadian banks were included in the list.[3]

As the United States imported vast quantities of oil from the Middle East, the 1970s saw the appearance of petrodollars. By 1972, 107 United States banks were doing business abroad, operating 588 foreign branches, and holding about 80 billion dollars in combined assets.[4] Many petrodollars were ultimately recycled in seemingly lucrative Third World debt transactions. As the decade wore on, the pre-eminence of United States banking began to dwindle. By 1977, only three of the top ten banks were headquartered in the United States.[5]

By contrast, the number of foreign banks in the United States grew from 66 in 1972 to 144 by 1979.[6] As of 1988, the ten largest banks were all Japanese, and the largest United States bank, Citibank, N.A., ranked twenty-seventh.[7] By 1983, the Eurocurrency market consisted of 2,056 billion dollars in deposits.[8] Of that, 1,641 billion dollars (approximately

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1. "Prognostics do not always prove prophecies—at least the wisest prophets make sure of the events first." Horace Walpole (Feb. 19, 1785).

2. Marilyn B. Cane & David A. Barclay, *Competitive Inequality: American Banking in the International Arena*, 13 B.C. INT'L & COMP. L. REV. 273, 273 (1990) (the largest bank was the Bank of America with $16.4 billion in deposits).

3. *Id.*

4. M.A. Nunes, *Foreign Banks Come Sailing in as United States Banks Tack Slowly Upwind*, 13 HOUS. J. INT'L L. 39, 40 (1990).

5. *Id.* at 41 (citing letter from Muriel Siebert to Congressman Henry S. Ruess (Feb. 26, 1979)).

6. *Id.* (citing Key, *Implementation of the International Banking Act*, 65 Fed. Res. Bull. 785 (Oct. 1979)). Prior to the passage of The International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified as amended in scattered sections of 12 U.S.C.), foreign banks were permitted interstate branching, which aided their expansion. Nunes, *supra* note 4, at 41.

7. Nunes, *supra* note 4, at 41. The largest bank was the Dai-ichi Kangyo Bank with $312.5 billion, while Citibank had $105 billion.

8. *See* Shann E. Flatt, Comment, Citibank, N.A. v. Wells Fargo Asia Ltd.: *A Threat to the U.S. International Banking?*, 1991 DUKE J. COMP. & INT'L L. 241, 243.

80 percent) were Eurodollars, while the remainder was comprised of other Eurocurrencies.[9] By 1989, 281 foreign banks from 56 nations were operating 697 branches in the United States.[10] These foreign banks had 695.6 billion dollars in assets in the United States, representing 22.6 percent of the nation's total bank assets.[11]

The developing nations debt to creditors in wealthy states escalated to over one trillion dollars by 1989, of which sixty to seventy percent was owed to commercial banks.[12] By the end of the 1980s, Latin American debtors alone owed 422.4 billion dollars, of which over sixty percent was owed to commercial banks.[13] Today, the nine largest United States banks hold over two-thirds of all United States exposure to developing countries.[14]

Some of the trends discussed above relating to the decline of transnational banking in the United States are not as gloomy or inexplicable as they first appear. Although national self-esteem may be hurt by losing "top ten" status, the United States does have approximately 14,000 banks. Most foreign competitors have fewer, but larger banks. One reason for numerous banks in the United States is because of its dual federal-state banking system. This means that over fifty non-federal bank regulators may charter banks, rather than one centralized regulator. At times, the state and federal government seemed to be in competition to see which could charter more banks. The tension between state and national bank powers and regulation harkens back to the Federalists and anti-Federalists at the dawn of the Republic. Populist fears of concentration of wealth explains, in part, why our fragmented banking system has evolved.

Another reason creating numerous, small banks in the United States was the enactment of restrictive state branching laws. These laws meant that to do banking in another part of the same state, a new bank had to be chartered. Simply opening a new branch of an existing bank was prohibited or restricted. The McFaddden Act, by requiring national

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"Eurocurrencies are deposits denominated in foreign currency located in a bank outside the country where the currency is issued as legal tender." *Id.* at 242.

9. *Id.* at 243.

10. Nunes, *supra* note 4, at 41 (citing to Krause, *Foreign Banks Still Seizing Greater U.S. Market Share*, Am. Banker, Feb. 27, 1990, at 1, 18).

11. *Id.*

12. Eve Burton, *Debt for Development: A New Opportunity for Nonprofits, Commercial Banks, and Developing States*, 31 HARV. INT'L L.J. 233, 235 (1990).

13. Alberto G. Santos, Note, *Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors*, 66 N.Y.U. L. REV. 66, 67-68 (1991).

14. *Id.* at 81.

banks to follow the branching laws of the state in which they were located, also caused a proliferation in the number of national banks.

Not only do we have interstate and intrastate branching restrictions, but also restrictions on interstate banking. The 1980s saw the innovation of regional reciprocal interstate banking. This change was caused by fears of banks outside money centers. New England banks trembled at the thought of New York money-center banks streaming over the walls. To mix regional metaphors, they circled the wagons. Thus, a number of super-regional giants emerged. Many small, local banks still exist.

The situation with regard to Third World debt, albeit intimidating, actually may be improving. Since the early 1980s, commercial banks have reduced their developing country debt exposure.

> In 1982, the nine leading United States commercial banks' exposure to developing counties amounted to over 250% of capital; between 1983 and September, 1990, their primary aggregate capital increased from $32 billion to $54.7 billion, while debt exposure fell . . . from $61 billion to $40.1 billion. Thus, the nine banks' loans to [Latin America] now amount to well below 100% of capital. . . . Finally, the nine banks' loan loss reserves for these loans to developing countries increased from an average of 5% of book value in 1982 to an average of about 50% in mid-1990.[15]

This Article will not focus on the Third World debt problem. Nor will it address whether we should have fewer, larger banks. Rather, it will highlight certain changes that need to be addressed by Congress regarding deposit insurance reform, product and geographical expansion, and the necessity to view financial institutions in a global context.

In 1991, Congress considered, but did not enact, some of the reforms advocated in this Article. Once again, Congress failed to pass essential, comprehensive banking reform legislation. Whether this was the result of special interest logjams, fear that any fundamental changes would terrify a public already in shock because of the thrift crisis, legislative turf battles, political gamesmanship, or inertia, the banking legislation passed in 1991 was a bailout of the FDIC, and little more. On December 20, 1991, President Bush reluctantly signed the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA),[16] providing seventy billion dollars in funding for the Federal Deposit Insurance Corporation's Bank Insurance Fund.[17] The FDICIA creates a new supervisory system for banks requiring regulators to take increasingly harsh action

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15. *Id.* at 82-83 (footnotes omitted).

16. Pub. L. No. 102-242, 105 Stat. 2236 (1991).

17. *Bush Signs FDIC Funding Bill, Protests Short-Term Approach of Congress in S 543*, 58 Banking Rep. (BNA) No. 1, at 5 (Jan. 6, 1992).

as a bank's capital declines, requires the FDIC to use the least-costly approach when resolving a failed bank, provides for greater supervision of foreign banks that operate in the United States, and places limits on brokered deposits. The reason for the President's reluctance was that FDICIA did not deal with key reforms regarding services and geographical expansion recommended by the Bush Administration. These reforms, which Congress failed to enact as part of FDICIA, include interstate branching, Glass-Steagall Act repeal, and the related issue of firewalls, and commercial ownership of banks. The modest FDICIA reforms are positive, but they are far from what indisputably is needed to transform United States banking into a robust global competitor as we look towards the twenty-first century.

"*History is past politics, and politics present history.*" Sir Jon Robert Seeley (*Growth of British Politics*)

II. OF SACRED COWS AND MORAL HAZARDS: DEPOSIT INSURANCE

A. *The Domestic Situation*

Deposit insurance is a splendid concept and has served the public well. The FDIC was created by Congress to suppress the bank panics of the Great Depression and was intended to restore the public's confidence in the banking system—a fundamental element of its safety, soundness, and effectiveness. During the 1920s, banks were failing at a rate of six hundred per year. From 1930 to 1933, more than five thousand banks failed, resulting in losses to depositors of almost 800 million dollars (6 billion dollars in 1990 dollars).[18] The main ideas in creating deposit insurance were to protect "small depositors" and to prevent bank runs. Unfortunately, like many of the best ideas of the New Deal, the safety net was overexpanded and abused in the decades that followed.

According to the preliminary results of one study, over eighty-seven percent of United States households have less than 50,000 dollars in total deposits and less than six percent have over 100,000 dollars in deposits.[19] Since 1934, the percentage of FDIC-insured deposits has risen from about forty percent to over seventy percent.[20] Adjusted for inflation, the amount covered per account has increased fourfold, from the initial 2500

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18. DEPARTMENT OF THE TREASURY, MODERNIZING THE FINANCIAL SYSTEM: RECOMMENDATIONS FOR SAFER, MORE COMPETITIVE BANKS 1 (Feb. 1991) [hereinafter Brady Report].

19. *Id.* at 21.

20. *Id.* at 9.

dollars to 100,000 dollars (adjusted for inflation).[21]

Under the present regime, a husband, wife, and child, by opening various accounts, can obtain 1.2 million dollars deposit insurance coverage from one bank.[22] The financial industry did not take long to further exploit loopholes in the deposit insurance system. To this end, industry professionals would simply break up accounts into 100,000 dollar-insurable chunks and then "broker deposits" to insured institutions. The fundamental safety and soundness of the bank or thrift was not an issue for the brokers or their customers because the government's guarantee was there. All that depositors sought was the highest return in an insured institution. Not surprisingly, some of the least sound institutions offered the highest returns.

This is one of the clearest examples of the "moral hazard" of first dollar deposit insurance for multiple accounts. The current system provides no market discipline on an institution from either its depositors or their agents. In fact, the market creates incentives to place insurable deposits in institutions that have higher than market rates. Of course, as we have sadly discovered, by paying higher than average rates, these banks and thrifts had to take higher than average risks. Although brokered deposits have been used by both strong and weak insured banks and thrifts, they have been used more by weak institutions. For example, the ratio of brokered deposits to total deposits at banks with equity to capital ratios under 3 percent averaged 4.1 percent from 1986 to 1989, but only 1.9 percent for banks with equity to capital ratios over 3 percent. Under the Federal Deposit Insurance Corporation Improvement Act of 1991, "[o]nly well-capitalized institutions (or adequately capitalized ones that get a waiver from the FDIC) are permitted to accept brokered deposits, and those that do may pay no more than the average rate for their locale. New Section 29A of the Federal Deposit Insurance Act requires FDIC to regulate deposit brokers."[23]

The FDICIA also places limits on pass through coverage, limiting insurance coverage for bank insurance contracts (BICs), and requiring a study of the cost and feasibility of tracking the insured and uninsured deposits of any individual with respect to all insured depository institu-

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21. *Id.* at 17.

22. *Id.* at 19. These are three individual accounts ($300,000), three joint accounts ($300,000), two retirement accounts ($200,000), and four revocable trusts (husband for wife, wife for husband, husband for child, and wife for child, for $400,000).

23. *Id.* at IV-3. *Summary of Major Provisions of Banking Bill (S 543) From House Banking Committee*, 57 Banking Rep. (BNA) No. 23, at 956 (Dec. 9, 1991) [hereinafter *Summary of Major Provisions*].

tions. The FDICIA also requires feasibility studies regarding the offering of insured and uninsured accounts, private deposit insurance, and reinsurance alternatives.

Another problem that has arisen in the context of deposit insurance is that depositors expect to be bailed out when their bank fails, notwithstanding the 100,000 dollar limit per account. These expectations are based on prior government actions as over ninety-nine percent of uninsured deposits have been protected in bank failures from 1985 through 1990.[24] Under the FDICIA, beginning in 1995, the FDIC will be explicitly prohibited from protecting uninsured creditors unless to do so would be the least-cost method, that is, the method is least costly to the government.

The Bush administration has urged needed limits on deposit insurance, which are set forth in the Treasury Department's February 1991 proposal.[25] The administration proposal would limit deposit insurance to one hundred thousand dollars per individual per institution, plus one hundred thousand dollars per individual per institution for retirement accounts, after a two year transition. The ultimate goal of the proposal would be a 100,000 dollar limit, per capacity systemwide, rather than per institution.[26] It would eliminate pass-through insurance, except for self-directed plans and BICs, and would eliminate deposit insurance for brokered deposits after a two year phase in period.[27] Non-deposit creditors would receive no coverage, while uninsured deposits would receive limited coverage.

The Bush Administration's proposals seek rational goals that are consistent with the original purpose of the federal deposit insurance system. The primary intent of deposit insurance was to provide a safety net for small depositors. The vast majority of households in the United States do

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24. *Id.* at 8.

25. *Id.* at III-1.

26. The House Rules Committee "cleared a controversial amendment by Rep. Chalmers Wylie (R-Ohio) that would limit deposit insurance coverage to $100,000 per individual per bank or thrift for regular accounts, plus an additional $100,000 in coverage per institution for individual retirement accounts, by Jan. 1, 1995." *See House Sticks With Compromise on Banking Bill, Republicans Threaten to Kill Bill*, 57 Banking Rep. (BNA) No. 18, at 715 (Nov. 4, 1991) [hereinafter *House Sticks With Compromise*]. Earlier in the year the House Banking Committee rejected several amendments to place limits on the amount of deposit insurance coverage individuals can get from the FDIC. *See House Banking Passes Banking Reform Bill With Some Deposit Insurance Reform*, 57 Banking Rep. (BNA) No. 23, at 40 (July 8, 1991).

27. See *supra* note 23 and accompanying text. *Summary of Major Provisions of Banking Bill (S 543) From House Banking Committee*, 57 Banking Rep. (BNA) No. 23, at 956 (Dec. 9, 1991) [hereinafter *Summary of Major Provisions*].

not need more than 100,000 dollars of insurance. Indeed, almost ninety percent of households would be protected by half the current amount of insurance. A systemwide limit of 100,000 dollars per individual and 100,000 dollars per retirement account is a generous safety net. Individuals with deposits exceeding those amounts should be able to find alternatives. The marketplace surely would evolve mechanisms and products to fill their needs.

Depositors over the limits would take into account the fundamental soundness of the bank, creating market discipline. Even today, companies are providing analyses of the relative safety of depository institutions. Commercial vendors, such as Veribank, have come up with simple systems for evaluating bank safety based on call reports and other analyses. Banks and thrifts are rated like stop signals. The safest deposit institutions are green, less safe institutions are yellow, and the least safe are rated red. With this data available, depositors could make informed decisions. If they wanted a relatively higher return, they could risk placing uninsured deposits in a red bank, but if safety was the primary concern, they could choose the relatively lower rates at a green bank. Competition for deposits based on safety and soundness, as well as on return, would evolve. This competition, coupled with increased capital requirements, would go far in providing incentives for safer depository institutions.

The idea of placing curbs on deposit insurance makes sense. Unfortunately, Congress seems unwilling to take this step. No Representative or Senator wants to be perceived as taking away what the United States public has come to view as a fundamental right. This right seemingly evolved from a safety net for a limited amount of deposits to an expansive lattice-work under which every dollar deposited is covered. Moreover, the public seems unwilling to discern that it must pay for this added protection, either directly through increased premiums, or indirectly through lower returns or higher fees. Only a short time ago, a proposal surfaced to make depositors pay directly for premiums for deposits over a certain amount. That trial balloon quickly was shot down.

The public is furious at bankers. It does not see why it should pay for the corruption and fraud of some bankers and thrift operators. The public's belief is understandable, but naive. The truth is that the public will pay no matter which course is chosen. The cost of the thrift and bank bailout will be hundreds of millions of dollars. This cost will translate into higher deficits and higher taxes. Tax dollars that could be used for social services, rebuilding our infrastructure, or technological research will have to be diverted to pay for the bailout. Society refuses to believe that there "ain't no such thing as a free lunch." The United States societal credo has become the free lunch. Until basic reform of deposit insurance is accomplished, a grotesquely distorted market will exist. Congress must finally grapple with the champion that has emerged as a monster. Unfortunately, this is not likely. No member of Congress wants to be the Grinch who stole Christmas. Unlimited deposit insurance, for that is what it has become in practice, is a sacred cow in the United States.

Despite its inaction or its refusal to play the Grinch, the need for deposit insurance reform has become clear even to Congress. Under the FDICIA, no later than January 1, 1994, the FDIC must establish a risk-based assessment system for insured depository institutions.[28] The FDIC must take into account the risks attributable to different categories and concentrations of assets and liabilities (both insured and uninsured, contingent and noncontingent).

B. *The Global Situation*

Only Norway, the German Savings Bank Security Fund and Credit Cooperative Security Scheme Funds,[29] and Yugoslavia (or what was Yugoslavia) provide unlimited deposit insurance.[30] Many deposit insurance programs are voluntary, such as those in Argentina, Belgium, Chile, Germany, Italy, Spain, Switzerland, and Uruguay.[31] Deposit insurance is compulsory in Austria, Canada, Colombia, Denmark, Finland, France, India, Ireland, Japan, Kenya, the Netherlands, Nigeria, Norway, the Philippines, Trinidad and Tobago, Turkey, the United Kingdom, and Venezuela.[32] The United States requires deposit insurance for national banks and state banks that are members of the Federal Reserve System. Nevertheless, virtually all banks have opted to have FDIC insurance.

Some deposit insurance programs are government sponsored and administered (such as those in Argentina, Belgium, Canada, Chile, Ireland, Kenya, Nigeria, Paraguay, Spain, Switzerland, the United Kingdom, the United States, and Venezuela).[33] Others are industry sponsored and administered (such as those in Austria, Denmark, Finland, France, Ger-

28. *See id.*

29. Germany has deposit insurance funds. One, the Deposit Security Fund (DSF), provides only 30% coverage of the "liable capital of [the] bank concerned per depositor", while the Savings Bank Security Fund (SBSF) and Credit Cooperatives Security Scheme (CCSS) provide 100% coverage. The DSF is voluntary and industry sponsored. *See* Brady Report, *supra* note 18, at XXI-2-5.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

many, India, Italy, Sweden, and Trinidad and Tobago).[34] Yet others are jointly administered by the government and the industry (such as those in Brazil, Colombia, Japan, the Netherlands, Norway, the Philippines, and Turkey).[35] Thus, a patchwork of choices is available: (i) government-sponsored, voluntary programs (such as in Argentina and Belgium); (ii) government-sponsored, compulsory programs (such as in Ireland and the United Kingdom); (iii) industry-sponsored, compulsory programs (such as in Denmark and France); (iv) industry-sponsored, voluntary programs (such as in Germany and Italy); and (v) jointly administered, compulsory programs (such as in Columbia and Japan).[36] The United States program is sponsored by the government and, although nominally voluntary, is de facto compulsory.

Globally, the amount of deposit insurance varies widely. The limit for Belgium is 14,706 dollars, for Canada 51,582 dollars, for Denmark 39,708 dollars, for France 72,033 dollars, for India 1,722 dollars, for Ireland 16,206 dollars, for Japan 66,212 dollars, for the Netherlands 18,800 dollars, for the Philippines 662 dollars, for Spain 14,789 dollars, for Switzerland 21,406 dollars, and for Venezuela 5,296 dollars.[37] Only Finland and Italy, with coverage up to 128,966 dollars and 659,385 dollars, respectively, exceed the United States limit of 100,000 dollars.[38] The Italian system, however, is both voluntary and industry-sponsored, while the Finish system is also industry sponsored, but compulsory. Government-sponsored deposit insurance systems outside the United States are all well below 100,000 dollars. The United States system is by far the most extensive government-sponsored system in the world.

C. *Insurance for Foreign Deposits*

The United States system nominally does not insure deposits in foreign branches of United States banks. Home country deposit insurance coverage of deposits in foreign branches of domestic banks is available only for the German DSF system,[39] Italy,[40] Japan,[41] and Norway.[42]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (based on United States dollar equivalents as of July 6, 1990).
38. *Id.*
39. *Id.* (voluntary and industry-sponsored program with an insurance coverage limit of 30% of the liable capital of bank concerned per depositor).
40. *Id.* (voluntary and industry-sponsored program).
41. *Id.* (compulsory program with joint administration by the government and industry).
42. *Id.* (compulsory and jointly sponsored program).

The majority of deposit systems worldwide do not purport to cover these deposits.

Some deposit insurance systems, including those of Chile, France, the German SBSF and CCSS systems, the Netherlands, Nigeria, Norway, Swèden, the United Kingdom, and the United States, cover deposits of domestic branches of foreign banks. Others, however, such as those of Austria, Belgium, India, Turkey, and notably, Japan, do not cover these deposits. This means a branch of a United States bank in Japan does not have Japanese coverage of deposits, but a Japanese branch in the United States has United States coverage. Put another way, a deposit in a Japanese branch in the United States has both Japanese and United States coverage, but a deposit in a United States branch in Japan has neither United States nor Japanese coverage—hardly a competitive edge for United States bank branches in Japan.

D. *United States Deposit Insurance for Foreign Deposits*

By 1989, foreign deposits totaled two hundred sixty billion dollars, or ten percent of all deposits in United States banks.[43] These deposits, however, are concentrated in the ten largest United States banks, which hold sixty-seven percent, while eighty-five percent are held by the twenty-five largest United States banks.[44] In these large banks, the ratio of foreign to domestic deposits ranges from twenty-six percent to eighty-one percent.[45] By law, foreign deposits[46] are not insured by the FDIC, nor are they assessed insurance premiums. The rationale for the exclusion is, in part, that forcing United States banks to pay assessments on foreign deposits would decrease United States competitiveness abroad.

The issue of assessing these deposits for premiums has been raised periodically from 1935 to 1991. Thus far, Congress has refused to assess premiums on these deposits.[47] Imposing such premiums on foreign de-

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43. *Id.* at VI-1.

44. *Id.*

45. *Id.*

46. Foreign deposits are "[d]efined as deposits in foreign offices of United States banks, which include foreign branches of United States banks, Edge Act and Agreement corporations, and International Banking Facilities. . . ." *Id.*

47. The House Banking Committee rejected "an amendment by Rep. Jim Slattery (D-Kan) to provide federal deposit insurance coverage for United States deposits in foreign branches of United States banks, and to include those deposits in the FDIC premium assessment base (by a vote of 12-35)." *See House Banking Passes Banking Bill With Some Deposit Insurance Reform*, 57 Banking Rep. (BNA) No. 2, at 40 (July 8, 1991). Section 312 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (S 543) prohibits insurance coverage for foreign deposits, except that the conditions

posits would increase the FDIC fund by five hundred fifty million dollars in 1991 and approximately three billion dollars between 1991 and 1995.[48] Opponents of premium assessments, however, argue that they would either force banks to absorb the costs, making them unprofitable, or drive down rates, causing them to be less competitive. If premiums were imposed, it is argued that foreign deposits would decline over fifty percent, causing the FDIC fund to lose approximately 1.5 billion dollars.[49] One wonders if this projected decline in foreign deposits takes into account the potentially large amount of these deposits that United States banks could attract with the lure of United States deposit insurance, particularly given the relatively stingy amount of deposit insurance available under foreign states' domestic insurance programs.

In practice, the United States has covered deposits in United States branches abroad. This is because most of the banks having large foreign deposits are, and will continue to be, too big to fail. Given this de facto insurance, which large banks receive without paying premiums, supporting these assessments clearly is not in their interest. This too-big-to-fail mentality has led to inequitable results. Depositors in too-big-to-fail banks will be covered over and above the deposit limits while depositors in the Third National Bank of Podunk will be covered only to the limit per account. Covering foreign deposits, on which no premiums are paid, seems more unsporting. One appealing argument against expressly including foreign deposits, and assessing them, is that the United States government should be reducing, not increasing, the safety net. On the other hand, if deposit insurance could be reduced overall to 200,000 dollars systemwide per depositor, this could apply to foreign deposits as well. Moreover, as long as the concept of too-big-to-fail applies, most foreign deposits will be covered notwithstanding the legal limits.

E. *Co-Insurance: Sound Policy, Bad Politics*

In a co-insurance system, the insurance fund insures only a percentage of covered deposits. This type of system works in several ways. One way is that the insurer insures only a percentage of deposits from the first dollar, up to a maximum amount. If the insured institution fails, the depositor is at risk from dollar one. Another technique is that insurance

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and limitations imposed under section 10B of the Federal Reserve Act (as amended by other provisions of the Federal Deposit Insurance Corporation Improvement Act of 1991) apply (allowing a limited "viability" exception). *See Summary of Major Provisions, supra* note 27, at 956.

48. *Brady Report, supra* note 18, at VI-2-3.

49. *Id.*

is provided on a sliding scale. The lower the amount deposited, the higher the percentage of insurance; each dollar, however, is at risk for some percentage. Still another variation is that one hundred percent insurance is provided up to a certain amount and then a lower percentage applies up to some maximum amount covered. The United States does not have a co-insurance system. Instead, it has one hundred percent, first-dollar insurance up to one hundred thousand dollars per account.

Congress should study co-insurance systems in the United Kingdom, Ireland, and Italy. For example, the British system covers seventy-five percent of the deposit balance up to the first twenty thousand pounds. This means that the depositor is "at risk" for twenty-five percent from the first pound deposited. In this system, all depositors should be keenly interested in the soundness of the bank at the outset, and this in turn should translate to a competitive advantage for safe and sound institutions. After all, if depositors knew that twenty-five percent of their deposits were at risk, they would be motivated to find out which institutions were the safest, rather than focusing solely on the return. This creates market discipline from the depositors. Under the present system in the United States, only the equity holders in the bank, depositors who have more than one hundred thousand dollars per account, and the government are motivated to assess an institution's safety and soundness. As the United States has learned to its collective sorrow, this may not provide sufficient monitoring to be adequate.

The system used in Ireland provides for a percentage at risk, adjusted on a sliding scale. The Irish system calls for eighty percent deposit insurance for the first five thousand Irish Republic Pounds (IRP), seventy percent of the next five thousand IRP, and fifty percent of the next five thousand IRP. This means that a depositor is at risk for only twenty percent of the first increment, thus providing the best coverage for the smallest deposits. Like the British co-insurance scheme, the Irish system injects market discipline, placing the higher risks on larger deposits.

The Italian system provides one hundred percent insurance for the first two hundred million lira, then seventy-five percent of the next eight hundred million lira. This system covers small deposits completely, while larger deposits are covered only partially, and amounts over eight hundred million lira are not covered at all. This system provides complete coverage for the small depositor, but provides an incentive for market discipline for larger deposits.

Each of the co-insurance systems described have their advantages and disadvantages. The British system is simple, and therefore easily administered, but it puts smaller and larger amounts at the same risk. This may not be perceived as fair to unsophisticated people with small amounts of deposits. The Irish system protects the smaller deposits, and perhaps the less wealthy depositors more fully, but it is more complex. The Italian system covers small deposits completely, and, to the extent that these deposits are from less wealthy or less financially sophisticated people, this is appealing. The risk is reserved for those who can afford more deposits, although a certain amount is fully protected.

Each co-insurance system, however, requires that some depositors are at risk at some level. The British system of deposit insurance was created in 1979. Prior to that, no deposit insurance system existed there. Unlike their counterparts in the United States who have been accustomed to one hundred percent, first-dollar insurance since 1934, the British system makes depositors responsible for their deposit decisions.

The reality is that Congress would not require people to be responsible for a percentage of first dollar insurance, no matter how small. Would it not make sense for Congress to consider even a small at risk percentage? What if deposit insurance covered ninety-five percent of the first 106,000 dollars? The maximum amount of coverage would be 100,700 dollars. Being at risk, however, would provide an incentive for depositors to place their deposits in institutions that could advertise their safety. Safety and soundness would be rewarded, as the safest banks could attract deposits, and presumably have to pay less for them. Obviously, penalties for false advertising would have to exist. The marketplace would doubtless create more rating systems. Admittedly, even a five percent risk borne by depositors could create runs on deposits of troubled institutions, but the benefits should outweigh this risk.

The bigger problem is political. Since United States investors have become used to one hundred percent, first-dollar insurance, limiting coverage to anything less would be considered political suicide. Without the deposit safety net being constrained in some manner, all are truly at risk. Taxpayers are at risk since they will have to make good on Congress' promises. Even if Congress recognizes the problems inherent in the current system, it will not take the needed steps. Like Dr. Frankenstein's monster, deposit insurance is a good idea gone awry.

F. *The EC Proposal*

The Second Banking Directive of the European Community[50] divides bank regulation between the "home" regulator—the regulator in the

50. *Second Council Directive of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC*, 32 O.J. EUR. COMM.(No. L 386) 1 (1989) [hereinafter *Second Banking Directive*].

state where the bank is chartered—and the "host" regulator—the regulator in the foreign state where the bank is doing business.

> Licensing authorization to take deposits is the responsibility primarily of the home regulator. Most prudential supervision (for example, capital adequacy rules) also goes to the home State, while liquidity and monetary policy lie with the host State, in cooperation with the home State, and market risk is the subject of collaboration between them both.[51]

A suggestion, confirmed by Sir Leon Brittan, proposed that the Recommendation on Deposit Protection, which is to become a Directive, be revised so that the nation responsible for exercising prudential regulation (that is, the home state) is also responsible for making payments under the revised deposit protection schemes. These payments would be made to all depositors located in any EC state who suffer losses from the failure of an institution supervised by a regulator.[52] As one commentator stated:

> If this measure is adopted, it would provide a powerful incentive for Member States to improve the quality of their banking supervision. Even more importantly, it would provide a strong incentive for States to refuse to authorize institutions unless the State in question is sure that it has the capacity to exercise an appropriate degree of supervision. Another consequence—perhaps less desirable—would likely to be that if an institution is near to failure, the supervisor will be more reluctant to precipitate or to allow collapse at an early stage. The regulator would be more likely to attempt to 'bail out' failing institutions, and the 'too big to fail' problem which has often arisen in the past would be emphasized.[53]

Congress should take note of developments in the deposit insurance system in the EC. The United States, as a home state, apparently will have to provide for deposit insurance for United States foreign bank branches, as the host EC states presumably will not be doing. As discussed above, the United States will be doing so as a practical matter in any event. Given this, Congress should consider making foreign deposits in United States branches *de jure* insured and assess premiums. This change, however, must be in the context of fundamental deposit insurance reform. The safety net would be wider, although perhaps no wider than it already is in reality, yet more shallow. The too-big-to-fail phenomenon must be addressed directly. Congress must consider the global

51. *Who is the Responsible Regulator Under the Banking Directives?*, FIN. TIMES, Sept. 17, 1991.

52. *Id.*

53. *Id.*

context of its actions.

III. Competing in the World: Reciprocal National Treatment or National Treatment?

One issue that needs to be resolved is whether the United States should adopt a policy of national treatment or reciprocal national treatment for financial institutions. National treatment is defined as parity of treatment between foreign and domestic banks under similar circumstances. The International Banking Act of 1978 adopted the policy of national treatment. The Fair Trade and Financial Services Act (FTFSA) proposal embodies a fundamental shift in United States policy regarding foreign financial institutions from one of national treatment to one of reciprocal national treatment. If a nation is found not to provide national treatment to United States firms, a series of escalating measures can be taken against that nation, beginning with negotiations and ending with denial of firms' applications from that nation. As proposed, the FTFSA also would require firms from most nations to apply for regulatory approvals, even in situations in which no approval is required for domestic firms.

Reciprocity is a major concern for the United States in the area of financial services. The United States wants equal access to the EC market as enjoyed by EC companies. The EC has tried to limit United States companies to the same degree of access afforded EC companies in the United States market. United States and EC companies, however, both operate in the United States under certain restrictions not imposed in the EC. This could result in inequalities for United States companies in the EC.

Democratic Representative Charles Schumer of New York has said he would introduce a strengthened version of the Senate's proposed FTFSA bill.[54] The Senate legislation would create a new standard of reciprocal national treatment for banking and securities services. The United States would give the same competitive opportunities to foreign banks and securities firms as are available to domestic firms, but only to those firms whose home states grant such national treatment to United States firms. "The purpose is to give countries that presently discriminate against our firms a clear list of conditions which the United States believes are an essential element of fair trade in financial services,"[55] Schumer said. He

54. *Schumer to Introduce Tougher Bill on Fair Trade in Financial Services*, 8 Int'l Trade Rep. (BNA) No. 31, at 1149 (July 31, 1991).
55. *Id.*

noted that the conditions are taken from the Treasury's study on national treatment.

The issue may be seen through domestic eyes. Requiring reciprocal treatment is good politics. As with so many international competitiveness issues, Congress seems only too willing to blame others (United States business, foreign governments, and foreign business) for problems that are inherent in the current regulatory structure. As economist Murray Weidenbaum noted, "[u]nfortunately, it seems easier for legislators to continue berating United States business for a lack of international competitiveness while taking legislative actions on the tax and regulatory fronts that erode their productivity."[56] The intrinsic problem with reciprocal treatment is that the United States has governmental product and geographical restraints that are alien to most foreign banks. Senate conferees abandoned legislation that would have given federal regulators of United States financial institutions the power to deny foreign banks and securities firms the right to expand their United States operations if their home states discriminated against United States financial services firms.

IV. UNITED STATES ANOMALIES: LIMITATIONS ON PRODUCT AND GEOGRAPHICAL EXPANSION

A. *The Glass-Steagall Act*

Astonishingly, the Glass-Steagall Act, which presumably separates commercial banking from investment banking, continues to endure repeated attempts to finally put it out of its misery. The rationale for the passage of the Glass-Steagall Act in 1933 was that "speculative activities, partially attributable to the connection between commercial banking and investment banking had contributed to the rash of bank failures."[57] The Glass-Steagall wall has been breached in so many respects, however, that to call it a "wall" is absurd. For example, regulators have permitted banks or their subsidiaries to serve as advisers to open-end mutual funds, to provide advice to customers about a fund's merits, and to obtain a sales "load" from the mutual fund.[58] Banks and bank holding companies

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56. Murray Weindenbaum, *EC Moves Toward Global Financial Marketplace*, L.A. TIMES, Mar. 10, 1991, at D2.

57. Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 61 (1981).

58. Banks, however, may fulfill some, but not all, of the responsibilities necessary to sponsor and distribute mutual funds. The remaining Glass-Steagall barriers preclude a bank from sponsoring and distributing mutual funds. John K. Forst, Note, *Legislative Reform of Glass-Steagall: Bank Sponsorship and Distribution of Mutual Funds is Long Overdue*, 19 CAP. U. L. REV. 521, 531-33 (1990).

may engage in discount and "full service" brokerage activities through subsidiaries and may distribute asset-backed mortgage securities.[59] Moreover, the Federal Reserve Board has approved applications by several large bank holding companies to underwrite and deal in corporate debt and equity securities through certain types of subsidiaries, provided proper firewalls are in place.[60] Ironically, although the regulators and the courts have been steadily chipping away at the wall, Congress has been fortifying it. As one author noted, "over the past decade, Congress actually tightened, rather than loosened, restrictions on bank diversification, first, by restricting bank insurance activities, and second, by preventing commercial and industrial companies from setting up limited purpose deposit-taking institutions."[61]

The legislation that allows United States banks to operate foreign branches includes the Glass-Steagall Act's investment banking prohibition and states that a "foreign branch [may not] engage or participate, directly or indirectly, in the business of underwriting, selling or distributing securities."[62] The Glass-Steagall Act places United States banks and their branches at a severe competitive disadvantage globally.[63] The prohibitions of the Glass-Steagall Act are an aberration in the global context. In Great Britain and Germany, banks are able to engage in full-scale merchant or universal banking. No artificial line is drawn between commercial and investment banking. German banks are given latitude to participate in the economic life of Germany to an extent unimaginable in the United States. For example, the Deutsche Bank AG owns a controlling interest in Daimler Benz, the German industrial giant.[64] This kind of link is presently unthinkable, as well as unlawful, in the United States.[65]

59. Edward J. Markey, *Why Congress Must Amend Glass-Steagall: Recent Trends in Breaching the Wall Separating Commercial and Investment Banking*, 25 NEW ENG. L. REV. 457, 473 (1990).

60. *Id.*

61. Helen A. Garten, *Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform*, 49 MD. L. REV. 314, 321 (1990).

62. 12 U.S.C. § 604a (1988).

63. Cane & Barclay, *supra* note 2, at 315-17; *see also*, Garten, *supra* note 61; Markey, *supra* note 59.

64. Cane & Barclay, *supra* note 2, at 315.

65. The House rejected an administration-backed amendment to allow commercial firms to buy failed or failing banks if no government assistance is provided and the FDIC determines the acquisition would be the least costly alternative to taxpayers. Supporters argued the amendment would save taxpayers billions of dollars by allowing commercial companies to pump much-needed capital into failing banks. Opponents, however, warned the amendment was a back-door attempt to mix banking and commerce. *See*

While the Japanese Securities and Exchange Act of 1948, which was modeled after United States laws, prohibits Japanese banks from underwriting most securities, Japanese banks are permitted to own stock in businesses to which they are a major creditor.[66] Spurred by competitiveness concerns raised by the EC's banking plans, the Bank of Japan stated, in a report published in the spring of 1991, that Japan should enhance its competitive edge in global markets by abandoning Glass-Steagall-type constraints.[67] A news story on that report said:

> Among other things, the [Bank of Japan] Report pointed to unified rules being drafted gradually in a less-regulated form on financial services in the region as they serve to prompt banks and brokerage houses to diversify their businesses and expand into new fields on a cross-border basis.
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> In particular, it cited expansion by banks doing business under the so-called universal banking system into insurance and investment advisory businesses, mergers and acquisitions among small and medium-size institutions in south European countries, and major British commercial banks' moves to scrap and reorganize their securities units.
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> Under the universal banking system that is widely seen in EC countries, banks can engage in banking as well as brokerage business.
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> These developments, the [Bank of Japan] Report said, should allow financial institutions in the EC to make better use of their competitive edge over their counterparts in Japan and the United States, where banking and brokerage businesses are separated by law.[68]

Japan appears likely to repeal its "Glass-Steagall Act," which was engrafted onto Japanese law when Japan's financial services laws were enacted after World War II. If this occurs, the United States will be alone among major industrial countries that bind its financial services institutions by Glass-Steagall-type constraints.

If the global trend is so clear, why has Congress failed to repeal Glass-Steagall? The answer, once again, is domestic politics. After the thrift debacle, Congress is like a deer, frozen in place, watching oncoming headlights of the Mack truck of angry public sentiment. Although Congress correctly perceived that something was dreadfully wrong, many chose to use deregulation as the scapegoat. Congress fails to realize that lax regulation and deregulation are different—a major cause of the thrift crisis unmistakably was a lack of effective enforcement.

House Sticks With Compromise, *supra* note 26, at 715.

66. Cane & Barclay, *supra* note 2, at 295.

67. *BOJ Sees EC Financial Reforms Having Impact on Japan*, Kyodo News Service, May 14, 1991, *available in* LEXIS, Nexis Library.

68. *Id.*

Some in Congress place the blame for the thrift crisis directly on deregulation. The argument seems to be as follows: When the thrifts were deregulated, all hell broke loose. Many millions of dollars were lost as the thrifts ventured into the unknown waters of commercial loans and real estate investments. They should not have been allowed to enter these new areas. Consequently, the answer must be that deregulation is inherently evil. The United States should not let its banks make the same mistake by allowing them to dive into unchartered waters.

This is painting with too broad a brush. The problem was not deregulation *per se*, but rather fractional deregulation in a setting of one hundred percent, first-dollar, unlimited deposit insurance. Without basic reform of deposit insurance, thrifts were tempted to engage in risky ventures with depositors', and ultimately taxpayers', funds. Another problem was the relatively thin capitalization requirements for thrifts. This meant that appropriate risk was not allocated properly to management and the shareholders, as compared with depositors and the insurance fund. The regulators have partially addressed this by requiring a more substantial capital cushion for depositary institutions.[69]

As Professor Helen Garten convincingly asserts, the "primary hazard created by deregulation may be the unpredictability of the consequences. . . ."[70] She states that the hazards fall into the categories of inefficient diversification, inefficient funding, and inefficient management.[71] As she correctly observes, these hazards are not likely to be deterred by preventative rules, but are rather inherent problems of organization, structure, and management when banks diversify into new businesses.[72] Her solution is to adopt a transitional policy permitting banks to diversify by making minority investments in nonbanking ventures. This would allow banks to share funding and operational risks, lower the cost of diversification and obtaining information, diminish incentives for cross-funding and similar abuses, and allow banks to gain experience in managing diversification risk.[73] Her proposals have significant merit. Reforming the deposit insurance system simultaneously with repeal of Glass-Steagall, however, is essential. Whatever the risks may be, they should be properly allocated to shareholders and depositors (and finally taxpayers). The

69. *See* Risk-Based Capital Guidelines, 54 Fed. Reg. 4186 (1989). By the end of 1992, banks must maintain a capital to risk-weighted asset ratio of at least 8%, of which 4% must consist of equity. *Id.* at 4187.

70. Garten, *supra* note 61, at 333.

71. *Id.* at 336-84.

72. *Id.* at 385.

73. *Id.* at 386.

increase in capital requirements is one step toward this goal, and another step is deposit insurance reform. If taxpayer exposure were truly limited, then United States banks could compete effectively.

Another suggestion to address the taxpayer exposure issue is the "core banking" proposal. This proposal would require federally-insured banks to become core banks that could pay only limited interest rates to attract insured deposits and could offer only low-risk products, such as home mortgages, credit cards, and small business loans. Riskier activities would be conducted in uninsured affiliates. Uninsured wholesale banks would not take retail deposits, but would have access to the Federal Reserve's discount window and payment system. Banks that chose to engage in new products and services, such as those currently forbidden under Glass-Steagall, would not have federally-insured deposits. The core banking proposal has been rejected thus far, although its proponents promise to raise it in the future.[74]

B. *Geographical Constraints: The McFadden Act and the Douglas Amendment to the Bank Holding Company Act*

The United States is the only major industrialized state that does not have a truly national banking system. Our dual state-federal system needs to be modernized. This means a change in both interstate banking and branching. The trend towards interstate banking is clear. Thirty-three states have adopted nationwide banking laws, thirteen have regional reciprocal laws, and only four states prohibit interstate banking.[75] The time has arrived for the whole nation to adopt nationwide banking. The Douglas Amendment to the Bank Holding Company Act of 1956 forbids interstate bank acquisitions by bank holding companies unless permitted by the acquired bank's home state, subject to certain limited exceptions.[76] The Bush Administration has proposed that the Douglas Amendment be repealed, with a three-year delayed effective date. Virtually all interstate expansion has been pursued by bank holding companies (BHCs), rather than by banks. This means that the acquired entity is operated as a separate subsidiary bank and not as a branch. This is a wasteful and duplicative method for interstate expansion. Allowing interstate branching would be more logical and productive. The BHC-sub-

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74. *See House Sticks With Compromise*, *supra* note 26, at 715 (opponents of core banking stated the amendment "could cause up to $1 trillion in deposits to leave the banking system, at a time when many consider a credit crunch to exist. 'This is not the time to play with the banking system,' Rep. Jim Leach (R-Iowa) warned."). *Id.*

75. Brady Report, *supra* note 18, at 50.

76. *See* 12 U.S.C. § 1823 (Supp. II 1990).

sidiary method of geographical expansion, however, is inevitable under the United States current statutes and regulations.

The most notable impediment to interstate branching is the McFadden Act.[77] The Banking Act of 1933 liberalized the McFadden Act to give national banks the right to establish and operate new branches in their home state to the same extent permitted for state-chartered banks.[78] This statute, which was initially adopted to give competitive equality between state and federally chartered banks within states, is an anachronistic barrier to interstate branching.

The branching issue must be viewed in both an intrastate and interstate mode. From an intrastate perspective, thirty-nine states and the District of Columbia now allow statewide branching, while only two states prohibit such branching.[79] This means a national bank may branch statewide in an overwhelming majority of states. The McFadden Act, however, has been interpreted as prohibiting interstate branching for national banks, prompting interstate expansion to take place via the BHC-subsidiary route. Unfortunately, this route is not the most efficient or desirable way to pursue interstate growth, but, given McFadden constraints, at least it is possible. As a recent Treasury Report stated, "[t]he issue is no longer *whether* there should be nationwide geographic expansion, but *how*."[80]

Contrast the United States system of geographical expansion to the EC's proposed structure. The EC's Second Banking Directive authorizes banks to provide their services anywhere in the EC through what is tantamount to a single banking license.[81] In light of the Second Banking Directive, our dual banking system must seem bizarre to Europeans. Why should we continue to labor under these antiquated statutes? The answer, once again, is domestic politics. Proposals to permit interstate banking or branching have not been successful. Each member of Congress has among his or her constituents local banks that fear out-of-state competition.

The United States system imposes hurdles to product and services development and creates unwarranted geographic constraints. This creates

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77. 12 U.S.C. § 36 (1988).

78. *Brady Report, supra* note 18, at XVII-7.

79. *Id.* at XVII-7-8.

80. *Id.* at 50. In an interesting move that angered small commercial banks, the Office of Thrift Supervision has recently "proposed to allow savings associations to branch nationwide." *Federally Chartered Thrifts Could Branch Nationwide Under Proposal By Regulator*, 58 Banking Rep. (BNA) NO. 1, at 21 (Jan. 6, 1992).

81. The ECs Second Banking Directive was enacted in December 1989 and takes effect January 1, 1993. *See Second Banking Directive, supra* note 50.

for some peculiar "reciprocity" problems. As one well-known economist noted:

> [Under the EC's Second Banking Directive] [t]he American bank would be free to set up branches or subsidiaries in any other EC nation and be subject only to the regulatory supervision of the home EC country (e.g., Great Britain or France). This would replace the cumbersome system of "host country control" of banks in each country where they do business, a regulatory regime that greatly limits Continent-wide competition.
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> This new national treatment or "home country control" is far more liberal than the powers that the United States grants foreign banks. From our point of view, we treat them fairly—the same as domestic financial institutions. The catch is that our regulations are far more restrictive than the new European approach, especially with regard to the limits on interstate banking and the wall separating investment banking from commercial banking. (Within the existing framework, the United States is very generous in providing deposit insurance to commercial banks, regardless of the composition of their assets and liabilities.)[82]

Another problem with dual banking is that the state regulators may permit risky activities, knowing that the FDIC will be left holding the bag. Addressing this issue, the FDICIA generally restricts certain activities of state-chartered banks to those permissible for national banks, unless the FDIC finds these activities pose no risk to the insurance fund.[83] In particular, under the FDICIA, insurance underwriting by state-chartered banks is prohibited except to the extent permissible for national banks.[84]

V. Moving Toward Accommodation: The Separate Subsidiaries Issue

Originally, the Bush Administration proposed legislation that would have required foreign banks to roll up their United States branches and agencies into separately capitalized banks that could not draw on their parents' capital. Foreign banking groups, however, lobbied against this proposal, arguing that it would be too costly and unfair and would ham-

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82. Weindenbaum, *supra* note 56, at D2.

83. *See Summary of Major Provisions*, *supra* note 27, at 954. "Exceptions are made for certain equity investments and qualified housing projects. There is a five year divestiture transition period for impermissible equity investments." *Id.*

84. *Id.* "Subsidiaries are limited to activities permissible for subsidiaries for national banks (unless the FDIC finds they pose no risk to the insurance fund). Certain institutions and subsidiaries are grandfathered (if they were lawfully providing insurance as of November 21, 1991)." *Id.*

per foreign banks' ability to lend in the United States. They said it would force cuts in lending because banks would have to base their lending amounts on the capital of the United States-based subsidiary rather than the European-based parent. Eventually, both the House and Senate Banking Committees passed banking reform bills that do not contain roll-up requirements. This issue, however, may not be fully resolved. The FDICIA "requires a study and report on whether foreign banks should be required to conduct banking operations in the United States through subsidiaries rather than branches."[85]

VI. Looking Toward the Twenty-First Century

The United States, as is increasingly clear, is no longer able to impose its economic will around the globe. Nor will it be able to revert to isolation, splendid or otherwise. The neo-isolationists are the economic Luddites of the coming decades. The world will unfold in the coming decades as a tri-polar economic market consisting of North America,[86] the EC, and Japan and the Asian Tigers. Each will have to play a part in aiding lesser developed countries in Eastern Europe, Latin America, Africa, and elsewhere. With global economic ascension will come concomitant responsibilities. The United States must repeal or at least modify the McFadden Act and Glass-Steagall Act, which were statutes dating from the 1920s and 1930s to compete in the twenty-first century. It must stop thinking in terms of "Fortress New Jersey" when confronted with "Fortress Europe."

The United States may wring its hands, bash the Japanese and Europeans, and threaten retaliatory tariffs. These, however, ultimately are futile and vain acts. Surely, it will do what it can to open markets for its goods and services, including financial services. The United States, though, must look first to reform its own regulatory structure and rid itself of anachronistic laws. To borrow a phrase from the environmentalists, it must think globally and act locally. Will the United States be an eagle or an ostrich? The choice is its own, and time will tell.

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85. *Id.* at 955.

86. Perhaps "Canamerico", a North American counterpart to the EC consisting of Canada, the United States, and Mexico.