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The Political Dynamics of Derivative Securities Regulation

Roberta Romano
Yale Law School

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The Political Dynamics of Derivative Securities Regulation

Roberta Romano

The U.S. regulation of derivative securities—financial instruments whose value is derived from an underlying security or index of securities—is distinctive from that of other nations because it has multiple regulators for financial derivatives and securities. Commentators have debated whether shifting to the unitary regulator approach taken by other nations would be more desirable and legislation to effect such a change has been repeatedly introduced in Congress. But it has not gotten very far. This article analyzes the political history of the regulation of derivative securities in the United States, in order to explain the institutional difference between the U.S. regime and other nations' and its staying power. It examines the four principal federal regulatory initiatives regarding derivative securities (the Future Trading Act of 1921, the Commodity Exchange Act of 1936, the Commodity Futures Trading Commission Act of 1974, and the Futures Trading Practices Act of 1992), by a narrative account of the legislative process and a quantitative analysis of roll-call votes, committee-hearing witnesses, and issue salience.

The multiple regulator status quo has persisted, despite dramatic changes in derivative markets, repeated efforts to alter it (by the securities industry in particular) and shifting political majorities, because of its support by the committee organization of Congress and by a tripartite winning coalition of interest groups created by the 1974 legislation (farmers, futures exchanges, and banks). In what can best be ascribed to historical fortuity, different financial market regulators are subject to the oversight of different congressional committees, and, consequently, the establishment of a unitary regulator would diminish the jurisdiction, and hence influence, of one of the congressional committees. The committee system is not, however, a sufficient explanation because committees' jurisdiction can shift over time. Jurisdiction over derivatives has not changed because of the stake of the key market players—the 1974 tripartite winning coalition—in its preservation.

† Allen Duffy/Class of 1960 Professor, Yale Law School. This Article is part of a monograph entitled The Dynamics of Derivative Securities Regulation, to be published by the American Enterprise Institute. I have benefitted from the comments of Ian Ayres, Brandon Becker, Franklin Edwards, Edward Kane, Al Klevorick, Philip Johnson, Jon Macey, Mathew McCubbins, Howard Rosenthal and participants at a University of Pennsylvania Law School Law and Economics Institute Roundtable, the National Bureau of Economic Research Summer Institute Corporate Finance Workshop, the Hoover Institution Collective Choice Seminar, and faculty workshops at the University of Chicago, George Mason University, University of Michigan, New York University, University of Pennsylvania, University of Southern California and Yale Law Schools, and at the business and law schools of the University of Missouri at Columbia and the University of Oregon at Eugene. I would also like to thank Keith Poole and Howard Rosenthal for making available to me their d-nominate scores for members of Congress.

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The regulation of financial markets in the United States is dispersed. Securities are regulated by the Securities and Exchange Commission (SEC) while derivatives on securities—financial instruments whose value is derived from an underlying security or index of securities—are regulated by a variety of agencies. Options on securities are regulated by the SEC; futures and options on futures by the Commodity Futures Trading Commission (CFTC); and off-exchange-traded forward contracts, options, and swaps are typically not subject to any federal regulation (unless undertaken by an institution which is itself federally regulated, such as banks). This multiplicity of regulatory authority has been the principal bone of regulatory contention for decades, as regulators, interest groups and legislators have sought to shift jurisdiction to their preferred agency. Even when a regulator does not object to another’s jurisdictional grab, market participants have contested the agencies’ authority to do so in court.

This Article analyzes the political history of futures regulation in the United States in order to explain what would otherwise appear to be the anomalous persistence of multiple financial market regulators in the United States. The U.S. regulatory scheme for derivative securities is distinctive from that of other nations, which have one regulator for both financial derivatives and securities. While some commentators have contended that multiple regulators foster efficient regulation, competition, and product innovation, others have maintained that it would be desirable to have a single regulator, to

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1. See, e.g., Edward J. Kane, Regulatory Structure in Futures Markets: Jurisdictional Competition between the SEC, the CFTC, and Other Agencies, 4 J. Fut. MARKETS 367 (1984).
reduce transaction costs for firms subject to multiple regulators and to coordinate more effectively intermarket activity during crises, such as the 1987 stock market crash, if not prevent such scenarios' occurrence. Whether to enhance social welfare or constituents' monopoly profits, legislation to establish one financial market regulator has repeatedly been introduced in Congress, and one version was advocated by the Bush Administration. Yet such efforts have not gotten very far. The Article's analysis suggests why fundamental change in regulatory organization has repeatedly been stymied by the political process, despite revolutionary change in financial instruments and markets.

The Article examines the four principal federal regulatory initiatives regarding derivative securities. These initiatives are: 1) the Future Trading Act of 1921, which initiated federal regulation; 2) the Commodity Exchange Act of 1936, which extended the coverage of federal regulation; 3) the Commodity Futures Trading Commission Act of 1974, which established the current institutional arrangement by creating the CFTC; and 4) the Futures Trading Practices Act of 1992, which reconfirmed the regulatory status quo, amid a panoply of new instruments. For each of the four initiatives, the Article includes a quantitative analysis of controverted congressional votes and, as a proxy for the exertion of interest group influence on the drafting committees, an analysis of the witnesses called before congressional committees in the years preceding legislation. It also provides an explanation for why the issue came to the top of the legislative agenda and traces, as a measure of issue salience, popular magazine coverage of commodities markets and related topics over time. To the extent that the important decisions are made behind closed committee doors rather than in roll-call votes, in contexts of both attentive and inattentive publics, the combination of the three types of data analyses (roll-call votes, interactions between committees and witnesses, and indices of public opinion) will provide an accurate account of interest groups' influence on policy-making regarding derivatives.


4. This technique has been used by political scientists to trace changes in popular sentiment concerning a variety of public policy issues. See FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENCIAS AND INSTABILITY IN AMERICAN POLITICS 50-51 (1993). I also searched for public opinion poll data as a measure of issue salience, using the Roper Center data bank, which is available through Mead's Nexis service. There was no polling on commodities trading issues, a finding that is itself persuasive evidence of the subject's low salience.

A key to understanding the persistence of multiple regulators of financial instruments is found in our political institutions, in particular the congressional committee system. By what is perhaps best ascribed to historical fortuity, the CFTC (the regulator of futures contracts) is within the oversight of the agriculture committees, while the SEC (the regulator of securities) is within the oversight of the banking and commerce committees, as are the federal regulators of banks (the Federal Reserve Board and the Office of the Comptroller of the Currency). Consequently, a merging of all financial instruments into the domain of one regulator, such as the SEC, would diminish the jurisdiction and hence the influence of the losing regulator's congressional committee.

But committee jurisdiction, though important, is only a part of the story. The jurisdiction of congressional committees expands and contracts over time, through the efforts of skillful political entrepreneurs, when new issues are presented. For example, Representative John Dingell was one of the most able of such entrepreneurs, successfully expanding the jurisdiction of the House Commerce Committee to include energy when it became a potent issue in the 1970s; other issues over which the Commerce Committee obtained jurisdiction include the regulation of insurance companies, international sporting events, health policy, and automobile safety. Moreover, because the CFTC is a sunset agency that requires periodic congressional reauthorization, parties dissatisfied with the regulatory outcome have repeated opportunities to campaign for legislative redress. For instance, the SEC persistently contested the CFTC's jurisdiction over financial derivatives during the agency's congressional reauthorization proceedings from 1978 through 1992. In the late 1980s and early 1990s, when institutional investors shifted their trading from securities exchanges to cheaper futures markets, the securities industry actively supported the SEC's efforts in order to increase their competitors' costs.

Multiple financial regulators have persisted despite what would appear to be excellent opportunities for an enterprising committee chairman to wrest jurisdiction away from the Agriculture Committee: A mix of new products and markets different from those envisioned by the enactors of the 1974 legislation establishing the CFTC, as well as an organized set of interests—securities exchanges and firms—needing an alternative policy venue to change the status quo. The status quo has survived in large part because key players with well-cultivated connections to the agriculture committees and who are traditional antagonists on futures legislation—the futures exchanges and farm organizations—have jointly supported the current regulatory arrangement against proposals to transfer authority over financial futures to

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7. Id. at 4, 84-86, 97-100.
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the SEC. In addition, banks and their regulators also have a stake in preserving the institutional balance due to the legislative agreement creating the CFTC in 1974, which exempted banks' off-exchange derivative activities from the CFTC's jurisdiction. This tripartite coalition of farm groups, future exchanges and banks is difficult to overturn by mobilizing political support because the regulation of derivative products is an issue of low salience to the public.

The tripartite coalition, which cuts across party lines, has been able to prevent the formation of potentially upsetting allegiances with the securities industry that would alter the dispersed regulatory authority. The many access points in our legislative process before a bill becomes a law further advantage the status quo, as its supporters need only to succeed at any one point in the process to block change. Indeed, the 1992 legislation enacted in the wake of the 1987 stock market crash, which briefly focused public attention on futures markets and provided ammunition for the securities industry to advocate the transfer of equity-based financial futures products to the SEC, left the dispersed regulatory arrangement unaffected. Only an event on the order of a financial crisis far more severe than the 1987 crash would enable the existing regime's opponents (the securities industry and SEC) to split the winning coalition or mobilize public support to overcome the coalition and produce a different political equilibrium. In the absence of a sustained exogenous shock which could focus public attention on the regulatory regime and alter the incentives of the coalition partners, we can predict with considerable confidence that, regardless of change in administration or congressional majority, the dispersed organization of the regulatory institutions of financial markets will remain unchanged.

I. The Origins of Federal Regulation of Futures: The Future Trading Act of 1921

Federal legislation regulating futures trading was enacted in August 1921. The Future Trading Act imposed a prohibitive tax on grain futures trading not undertaken through a member of an authorized exchange (termed a "board of trade" in the statute). The Secretary of Agriculture was given the authority to designate authorized boards of trade upon evidence that the petitioning exchange would comply with a series of statutory conditions, including transaction record-keeping, prevention of market manipulation, and admission of farm cooperatives as members. As with most successful policy
There had been numerous efforts to place futures regulation on the legislative agenda prior to the bill's passage. Several hundred bills, for example, had been introduced to regulate, ban or prohibitively tax futures and options trading between 1880 and 1920, and in the early 1890s one such bill passed both chambers of Congress but was not enacted. The successful legislation emerged after extensive hearings by the House Agriculture Committee in 1921.

A. Economic Conditions on the Farm

From 1920 to 1921, the United States experienced its most severe recession to that point, as real gross national product (GNP) fell 21% from 1918 to 1921. During World War I, U.S. agricultural production had significantly increased as prices rose with booming export demand from war-torn European countries. U.S. farmers expanded production into marginal land and borrowed significantly to mechanize production, and this made them quite vulnerable in an economic downturn. With the restoration of European agricultural production at the end of the war, U.S. farm prices collapsed "in the wake of bountiful harvests and the evaporation of European demand." The collapse in farm prices was accompanied by credit tightness due to Federal Reserve policy, creating a liquidity crisis for many farmers, evidenced by increased foreclosure rates throughout the decade.

Moreover, declining product prices were not accompanied by a decline in farm production input prices, thus shifting the terms of trade (also known as the "parity ratio") against the farmer. The decline in farm income from declining food prices as demand dropped resulted in a decrease in land value (which constituted the bulk of agricultural wealth). This led to the failure of many small rural banks. Not surprisingly, farm population declined...
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substantially throughout the 1920s—farm population fell by 1.5 million over the decade while the U.S. population increased by 8 million—reflecting "the declining economic opportunities" of rural farm life. The 1920 census was, in fact, the first to indicate that the urban population exceeded the rural population.

Futures markets were a political target of farmers' discontent because they claimed there was a negative relationship between futures trading and farm prices. With the onset of American involvement in World War I in 1917, the Wilson Administration had fixed the price of wheat, and the wheat futures markets, accordingly, closed for the duration of the war. The price controls were lifted immediately upon the armistice and futures trading resumed on July 15, 1920. As the price of wheat plunged with the war's end, given the new market conditions, farmers attributed the decline to the manipulative efforts of speculative short sellers on the boards of trade, rather than to changes in supply and demand for their products. Hence they revived their historical political agitation against futures trading, contending that prices would be higher if such trading was banned or severely restricted. Given the successful paradigm of federal government intervention in the economy during World War I, it was perhaps natural for them to turn to the federal government to effect a wheat price increase. Some historians, however, locate the idea of marketplace intervention as a unifying theme for the diverse reform efforts of the Progressive Era, rather than the nation's

OF THE AMERICAN ECONOMY 500-01 (7th ed. 1994). While Johnson may be correct concerning the relative distress of local bankers compared to farmers in the agricultural protest of the 1920s, rural bankers were not active in the fight against the commodity exchanges at the federal level. As indicated in Table I, no banks testified against futures trading in any of the 1920s congressional hearings on the issue.

18. ATACK & PASSELL, supra note 13, at 575.
20. Futures contracts fix the price at which the underlying commodity will be sold at a specified future date, and therefore enable contracting parties to hedge (that is, to shift their price risk): The futures buyer limits his risk of a price rise above the contract price, while the seller limits her risk of a price decline. In the agricultural context, millers buy futures, and grain elevators, the middlemen between farmers and processors, sell futures, to hedge their price risk.
21. See COWING, supra note 12, at 84-85. If the market price of the commodity is fixed, there is no reason to enter into a futures transaction, as there is no longer any business uncertainty—no price risk—and the Chicago Board of Trade (CBOT) therefore shut down for the war. Wheat was the only agricultural product whose price was fixed. The price was set at $2.20 a bushel in August 1917. What started out as a price three times the average prewar price, ended up by the summer of 1918, however, as less than half of the open market price, to the chagrin of wheat farmers, who saw unregulated crop prices surge. Cowing attributes Republican election successes in the Midwest in 1918 to their contention that the Democrats favored cotton (whose price was unregulated). Id. at 86.
22. Id. at 84.
23. Robert Higgs contends that World War I not only increased the scale but also permanently increased the scope of government, a phenomenon that he terms the "ratchet effect." ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 150-56 (1987).
mobilization during the War.

B. The Legislative Process

Without doubt, the severity of economic hard times in the farm belt increased the prospects of the 1920s advocates of futures regulation compared to their nineteenth century predecessors. The 1920 election was a Republican landslide. The new Republican majority in Congress was pressed by the deteriorating agricultural economic conditions to do something for grain farmers, a politically active group who had returned to the Republican fold after years of supporting independent farm party candidates. In the 1922 elections, for instance, as the farm recession persisted, Republicans lost many of the seats they had gained in 1920, including four Senate seats to farmer-backed candidates.

The Republicans' response to the farmers' plight proceeded at a rapid pace after the election. There were three congressional committee hearings on futures trading prior to the enactment of legislation, beginning shortly after the new chamber was constituted in January 1921, on five bills, one of which was sponsored by a committee member, and all of which were introduced by representatives of farm states. After the Supreme Court's invalidation of the 1921 legislation, there were two further hearings in 1922 on the proposed reenactment of the statute as an exercise of congressional power under the Commerce Clause. These five hearings are the linchpin in understanding the origins of the federal regulation of futures, given congressional committees' critical role in the legislative process.

1. The Role of Committees

Congressional committees, positioned as guardians of all legislative proposals within their policy jurisdictions, are the key formulators of

25. The 1880s and 1890s, the years in which farm agitation against futures markets began, were also periods of low farm prices. Economic historians now believe that the farm political protests of those decades were due more to disappointed expectations of agrarian prosperity compared to that of the urban manufacturing sector, rather than actual distress. See ATACK & PASSELL, supra note 13, at 419-25. The principal objects of attack by farmers in that period were the railroads, and secondarily, moneylenders and land speculators, not futures exchanges, and their Populist party platforms advocated railroad regulation, antitrust legislation and unit banking reforms. See id. at 422, 424.

26. HANSEN, supra note 19, at 35. The Republican defeat is, however, attributed primarily to the success of the Progressives over the GOP's old guard, rather than to the success of farmers. Id. at 36-37. Indeed, Hansen traces the development of federal agrarian subsidy policies with the emergence of national farm organizations as a potent political force in the late 1920s elections. Although Republican losses in 1922 would be expected, independent of the farmers' plight, by contemporary political scientists given the midterm election cycle (the President's party loses congressional seats in the midterm election), the phenomenon was only becoming established at the time. See ALBERTO ALESINA & HOWARD ROSenthal, PARTISAN POLITICS, DIVIDED GOVERNMENT, AND THE ECONOMY 83 (1995) (President's party loss of vote share in midterm elections a regularity since 1918).
legislation. When a bill is introduced, it is immediately referred to the committee with control over its subject matter, and it will not reach the floor until the committee releases it. This role of the committee is referred to as a screening or gatekeeping function, and it is the key to committees’ power—"the power to say no." Although there is a petitioning route for a majority of the chamber to force a committee to release a bill (the discharge petition), it is rarely used. In practice, committees have the ultimate say over whether a proposal will see the light of day. The committee’s power to withhold legislation is more significant than its power to place legislation onto the active agenda because the committee usually does not wield absolute control over the legislation once it reaches the floor due to the vagaries of the amendment process. But committees do exercise control over the post-floor progress of legislation by controlling the conference committee process (referred to as an “ex post veto”)—conferees are typically members of the committee with original jurisdiction of the bill and conference reports are often restricted to “up-or-down” votes.

How do committees develop expertise on policy proposals to be able to use their strategic position in the legislative process to their advantage? Committees hold hearings on potential and proposed legislation during which they obtain input from interested parties, most frequently through their professional representatives, registered lobbyists, who not only testify at hearings but also attend committee meetings and provide information to committee members and their staff. While lobbyists and interest groups control resources and can generate adverse publicity concerning members’ actions on legislation, there is, in fact, little evidence that lobbyists and the interest groups they represent control Congress or a substantial proportion of votes.

27. See, e.g., Paul E. Johnson et al., American Government 441 (2d ed. 1990) ("With rare . . . exceptions, a bill has no chance to pass unless it has the stamp of approval of a committee in each house of Congress").

28. Id. Evidencing the importance of this power is the statistic provided by Johnson, et al. that "in recent Congresses, less than 10% of all bills have made it out of committee." Id. at 442.

29. The exception is if the committee is granted a closed rule or other special order that limits amendment rights. The use of restrictive rules has increased in recent years. See Stanley Bach & Steven S. Smith, Managing Uncertainty in the House of Representatives: Adaptation and Innovation in Special Rules 122 (1988).


31. Of course, considerable information is available to members of Congress prior to a hearing. See, e.g., Walter J. Oleszek, Congressional Procedures and the Policy Process 98 (3d ed. 1989).

32. See Johnson et al., supra note 27, at 459 (stating that "it is going too far to say that [interest] groups are dominating Congress"); John W. Kingdon, Congressmen’s Voting Decisions 174 (3d ed. 1989) (contending that interest groups have negligible influence on voting decisions unless connected to congressman’s district constituencies); Larry Sabato, PAC Power, Inside the World of Political Action Committees 135-40 (1984) (arguing that occasions on which PAC contributions make a difference are few, and are on technical issues of low salience or issues on which the PAC
There is, however, substantial evidence that legislators are more likely to listen to proponents of views that they themselves favor and, more important, that they are influenced by interest groups when the groups represent their own local constituents. Legislators use interest groups to obtain information on the potential consequences of policies, particularly their effects on constituents. Correspondingly, interest groups lose access and influence—they are no longer relied on in hearings to formulate policy—when they advocate policies not responsive to congressmen's constituents (that is, policies that do not aid a congressman's reelection).

Congressional committees may use hearings to further a partisan legislative agenda rather than for informational purposes, since many other avenues are available to legislators for obtaining information on policy issues than committee hearings. The committee majority, for example, may use a hearing to publicize its agenda and galvanize political support for legislation, by stacking the hearing with witnesses whose position the majority favors. This tactic may not always work, however, because a proposal emanating from what is perceived to be a biased witness list may face difficulties later in the legislative process by subjecting the committee to the charge that it has not conducted a thorough or fair investigation.

Paralleling the divergent interpretations of the function of committee hearings, there is also disagreement about the import of committee control over the legislative process on policy outcomes. Political scientists have traditionally viewed committees as consisting of self-selected members with strong policy preferences on issues within their jurisdiction (whether due to personal ideology or constituent interest), such that their location on the relevant policy spectrum arrayed in a left-right ideological line will be an outlier compared to the location of non-committee members. Committees populated with such members are consistent with an "interest-advocacy-accommodation syndrome," and can produce legislation unrepresentative of the interest of the population as a whole, represented by the preference of the legislator's constituents); GRAHAM K. WILSON, INTEREST GROUPS 43-53 (1990) (summarizing studies showing that importance of interest groups in American politics is overestimated).

34. See, e.g., HANSEN, supra note 19, at 12-15 (arguing that legislators rely on interest groups when they aid in reelection goals such as providing communication channels to legislators’ constituents). Because of this phenomenon, as Wright points out, interest groups use witnesses who are not Washington-based lobbyists but are members located in the congressmen's districts. WRIGHT, supra note 8, at 41, 94.
35. HANSEN, supra note 19 at 15-16. The decline of the American Farm Bureau, from center stage lobbyist in the 1930s and 1940s to a subsidiary role in the 1970s, in conjunction with its position in favor of flexible price supports that divided Midwest and Southern farmers, is a prime example. See id. at 166-73.
36. See WRIGHT, supra note K, at 42.
37. Id.
39. Id. at 231.
full House. Such a scenario is possible because of the committees’ gatekeeper function: The committee keeps proposals that conflict with its unrepresentative preferences from reaching the floor for a vote. The committee will also be able to enact proposals that conflict with the preferences of the majority when legislators follow a norm of reciprocity, whereby the majority defers to committee proposals, despite the policy preference disjuncture, in the expectation of logrolling (similar deference for its own committees’ work).40 Self-selected or preference-outlier committees may be more prone to using hearings for advocacy than for informational purposes.

An alternative interpretation of the institutional function of committees, and one that has recently received increased attention among political scientists, emphasizes the organizational need for information and postulates majority control of committee membership selection.41 On this view, the majority delegates power to committees in order to induce members to develop policy expertise on which the majority can rely. But the majority does so only to the extent that the committees are representative of the majority’s preferences. While majority-controlled committees may also use hearings to mobilize support for their legislative preferences, this explanation of the committee system is most consistent with an informational use of hearings.

2. The Hearings on Futures Trading

The five hearings on futures trading during 1921-22 occupied forty days, with a total of 139 witnesses.42 Table 1 aggregates witnesses by type and general position (in support of or against federal regulation). As the Table confirms, the prime supporters of the legislation were farm organizations and their congressional representatives (27 of 45 witnesses who favored legislation). Administration officials also testified in support of legislation. The opponents were members of the grain trade (elevator operators, grain

41. See, e.g., KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 4-7, 15-19 (1991). A variant on the informational hypothesis of committee composition is that the majority controlling the committee is the majority party, not the chamber majority. See GARY W. COX & MATHEW D. McCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 161 (1993).
42. The hearings took place in the House in January-February 1921, April-May 1921 and June 1922; and in the Senate in May-June 1921 and July 1922. There was a third hearing in 1922 in the Senate to consider bills extending regulation to cotton futures trading (which spanned across January, February, March and June); this hearing is not included in the witness tabulations because, as noted in the text following notes 90 and 133 infra, cotton was not included in either the 1921 or 1922 legislation. The number of individuals testifying is 82; 23 individuals testified at more than one hearing, with two witnesses, a member of the grain trade and an employee of the Department of Agriculture, testifying at all five hearings. Of the witnesses speaking at more than one hearing, eight represented exchanges, five the grain industry, three farm groups, three were Department of Agriculture officials, three were members of Congress and one was a state official, representing a total of ten supporting and thirteen opposing witnesses. Tallying the witnesses for and against by individual rather than by hearing, Congress heard 25 witnesses for, and 70 witnesses against, the proposed legislation to regulate futures markets.
dealers, millers) as well as the exchanges (80 of 94 witnesses who opposed legislation). At four of five hearings, the opponents of regulation substantially outnumbered the proponents; the exception is the second 1921 House hearing, in which the two sides were about equally represented because the committee allocated three days of testimony to each side rather than follow the first hearing’s procedure by which all interested parties were permitted to testify. The restriction on witnesses was a function of the influence on the committee of the legislation’s advocates, who had repeatedly objected during the initial hearing to having to endure the testimony of the legislation’s numerous opponents and who characterized their desire to testify as a delaying tactic.

Farm groups sought far more restrictive regulation of futures trading than what was eventually enacted. In particular, they proposed either abolishing futures markets entirely or eliminating speculation by requiring futures transactions to be undertaken solely by individuals with an equivalent cash market position, thus limiting the use of futures contracts to hedgers. Their rationale was that speculators’ activities manipulated and depressed cash prices, causing them to fluctuate unduly. In support of this contention, they cited the huge discrepancy between the quantity of wheat underlying the number of futures contracts traded and the actual cash supply of the crop.

Farm witnesses and their allies on the committee attacked speculators as “predatory parasites,” thieves, gamblers, and wealthy individuals who “live like lords and ride in high-powered automobiles and live in great residences.” The record is also replete with moralistic proclamations against gambling, which exchange opponents equated with speculating. This is not

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43. The number of witnesses for and against the legislation by hearing in chronological order and by chamber were, for the House, 17 to 55, and then 15 to 12, in 1921 and 1 to 3 in 1922; and for the Senate, 8 to 16 in 1921 and 4 to 8 in 1922.
45. See id. at 17 (statement of C.H. Hyde, Farmers’ Union of Oklahoma) (“[Farmers] believe that there has been a movement, by concerted action on the part of those that have dealings on the board of trade, to force the market down early after the harvest season, on account of the credit conditions the most of the farmers, growing cereals as well as cotton, having to sell their crops immediately.”)
46. See id. at 80 (statement of William Eckhardt, Director, Illinois Agricultural Association) (“We are told from the reports that approximately 600,000,000 bushels of grain actually passed through Chicago.... (T)he speculative trading of that market amounts to a figure.... 40 times as much as the actual grain that goes through.... It does not seem as though the farmer gets much good from it.... The point I am making, gentlemen, is: Does not this tremendous volume of speculation push the price away beyond the point it would go if the true law of supply and demand were maintained.”)
47. Id. at 63 (statement of C.S. Barrett, President, National Farmers Union).
48. Id. at 47 (statement of Rep. Tincher).
49. See e.g., Future Trading, Hearings Before House Comm. on Agriculture, 67th Cong., 1st Sess. 17 (1921) [hereinafter Futures Hearings II] (statement of Rep. Tincher) (“The principle of this legislation has been conceded by everyone for years, that is, that gambling is a moral wrong in the United States, pure unadulterated gambling is wrong, and why it should be tolerated with reference to food...
an unusual strategy. Lipset contends that a quintessential American characteristic is the definition of political issues and conflicts in ethical terms, in which political dramas are seen as morality plays.\(^5\)

But even if farmers found gambling more reprehensible than did other citizens, the gist of the farmers’ grievance was decidedly material not moral. One reason for farmers’ impassioned opposition was that the grain exchanges were established to facilitate the transactions of middlemen and millers, and few farmers used futures contracts to hedge their crop price risk in the 1920s. The following interchange during the legislative debate illustrates this point—the economic rather than moral basis of the farmers’ opposition to futures trading—quite succinctly:

*Mr. McKenzie:* My understanding of this bill is that its purpose is to make it possible for the producer of grain to get a better price for his product, and that it is not the purpose of this bill simply to abolish gambling on account of its immorality or to assume the character of an agent of morality.

*Mr. Tincher* [the bill sponsor]: The gentleman is entirely correct.\(^5\)

Consider as well the telling testimony of the Secretary of Agriculture, Henry Wallace, concerning the use of private wires. In order to facilitate trading, brokerage firms and agents leased their own telephone and telegraph wires in rural areas that connected them to the exchanges, or their offices in the cities in which exchanges were located. The Tincher bill proposed prohibiting these wires. Wallace suggested that the prohibition be eliminated because the individuals using the wires were “small fellows,” “mostly the suckers” who provided valuable buying power because they expected food prices to rise and therefore “do not cause the evils of which we complain.”\(^5\)

Moreover, in discussing the elimination in his revised bill of a provision limiting futures trades to three times the amount of actual grain because of objections that it might facilitate cornering the market, Representative Tincher stated: “[B]eing from a producing section, I never feared a corner, because that invariably has raised the price, but, wanting to be fair to the consumer, I was willing to abandon that proposition.”\(^5\) To put it mildly, the


\(^{51}\) 61 Cong. Rec. 1314 (1921).

\(^{52}\) *Futures Hearings II*, supra note 49, at 329 (testimony of Henry C. Wallace, Secretary of Agriculture). The Secretary termed this taking the “business” rather than the “moral” standpoint.

\(^{53}\) *Futures Hearings I*, supra note 44, at 12 (statement of Rep. Tincher). Representative Tincher acknowledged that his goal was to protect producers, but maintained that it was fair to consumers...
enforcement of a public morality disapproving of gambling had little to do with the motivation of prominent supporters to restrict futures trading. Rather, rent-seeking—using the political system to redistribute wealth to farmers from the grain trade, the by now hated middlemen who were the backbone of the futures exchanges—is a more accurate description of the objective of the legislation’s proponents.

Grain trade witnesses, who opposed restrictions on futures trading, spent most of their time explaining hedging strategies and the need for speculators to provide liquidity to commercial hedgers, and distinguishing speculation from gambling. They emphasized that a high ratio of futures contracts to cash crop was to be expected because a bushel of grain is handled numerous times as it is sold from producer to elevator to shipper to processor, and each side of each transaction in the chain hedges. Exchange witnesses testified similarly, seeking to explain why market manipulations involve upward and not downward price movements. Their explanation was that substantial capital is required to finance the cash market purchases necessary to succeed in a downward market manipulation, whereas in upward price manipulation no such capital is required, because the requisite cash market conditions—commodity shortages—often occur naturally, such as after a natural disaster.

Economic theory and empirical research support the analyses of the opponents of the legislation, in that both formal models and empirical studies indicate that the farm groups’ assumption that speculation produces artificially low and increasingly volatile cash prices is incorrect. Nevertheless, even if the more sophisticated contemporary literature had been available in the 1920s, it is doubtful that the legislation’s proponents would have listened and altered their views on futures trading. This conclusion is suggested by the behavior of congressional supporters of the legislation, who on a number of occasions spent their time questioning the integrity of the opposing witnesses rather than addressing their analyses of the issues.

For example, the one witness with an academic background in the hearings, a professor of agricultural economics, was subject to very few questions, virtually none of which concerned the substance of his remarks. He was instead questioned on how many copies of his book on speculation were

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54. For an examination of changing attitudes to gambling, particularly in relation to the expanding legitimation of commercial speculation and the futures exchanges’ redirection of attacks on “gambling” speculators into attacks on “counterfeit” speculators who traded in bucket shops, see generally ANN FAHAN, CARD SHARKS, DREAM BOOKS AND BUCKET SHOPS (1990).

55. See, e.g., Future Trading in Grain, Hearings Before Senate Comm. on Agriculture and Forestry, 67th Cong., 1st Sess. 202-08 (1921) [hereinafter Future Trading in Grain] (statement of George T. McDermott, attorney for Kansas Grain Dealer’s Association).

56. See, e.g., Futures Hearings II, supra note 49, at 157 (statement of Joseph P. Griffin, President, CBOT).

bought by the CBOT. In addition, bill sponsors challenged the truthfulness of individuals who stated they were farmers but testified against the proposed regulation, and questioned whether they were truly in the business of farming.

One congressman even suggested that the opponents of the legislation “might just as well register their names [with the Committee] and the positions they occupy” rather than waste everyone’s time by testifying.

While not all committee members had closed minds or supported the most intrusive regulatory proposals, they all came from agrarian districts and were well aware of the financial pain back home. It takes no great political insight to recognize that a congressman’s failure to act against individuals (speculators) who were perceived by agitated voters (farmers) to be scoundrels, just because some economists thought that what the scoundrels did was socially beneficial, would not have been a winning political strategy.

This narrative of the testimony on futures trading suggests that despite the House Committee’s apparent informational, rather than partisan, approach to its witness list—a higher number of opponents than proponents testified in most of the hearings—the members had a focused policy objective in mind from the start, assisting farmers by regulating futures markets. This raises the question whether the committee members were ideologically representative of the chamber majority in placing futures trading legislation on the agenda. When the general ideological preferences for economic regulation of the committee and the chamber are compared, however, the results are consistent with the informational, rather than self-selection, hypothesis concerning committee composition: The Agriculture Committee was not an outlier committee.

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59. See, e.g., Futures Hearings II, supra note 49, at 227 (statement of Rep. Tincher, questioning Charles Kenning, President, Minnesota Farmers’ Grain Dealers Association, concerning farm organizations to which he belonged); Futures Hearings I, supra note 44, at 275-83 (statement of Rep. Tincher, questioning cotton grower E.A. Calvin, concerning the names and addresses of farmers who asked him to testify, who paid his expenses to testify, and for whom he worked). As Table 1 indicates, there were very few such individuals.
60. See Futures Hearings I, supra note 44, at 723 (statement of Rep. McLaughlin).
61. The variable used to measure ideological preference is the Poole and Rosenthal first dimension d-nominate score, which is described at note 84 infra, and in the accompanying text. The median first dimension score of the House committee is insignificantly different from the median score of the non-committee members (.247 compared to .265, respectively). Because the median voter determines legislative outcomes when the issue space is one-dimensional, the median score is the appropriate comparison. Krehbiel examines committee-chamber differences in mean, as well as median, ideological scores, to examine committee representativeness. See Krehbiel, supra note 41, at 123-28. (The committee members are excluded from the chamber in the calculation of chamber statistics.) The mean first dimension scores are also not significantly different (.114 for the committee compared to .117 for the chamber). As a final test, Krehbiel compares the variance in committee and chamber preferences to determine whether a committee is more homogeneous than the chamber (statistically measured by a lower variance in d-nominate score), and therefore likely to reach a bipartisan consensus. Such a committee, Krehbiel argues, is more consistent with an outlier committee hypothesis because a heterogeneous committee has legislators on both sides of the policy spectrum, and therefore will be more representative of the chamber. The variance test is also useful to distinguish what he terms a bipolar outlier committee, which will have a mean insignificantly different from the chamber mean but a higher variance than the
Rosenthal of the representativeness of committees for the first 100 Congresses. They find that prior to 1946, there were very few outlier committees.62

3. Output of the Process: The Final Bill

The final legislation, however, might well have been tempered by the explanation by the bill's opponents of the economic benefits of hedging. Representative Tincher revised his bill following the first hearing to permit unlimited futures trading by persons in the grain or milling business (in contrast to his original limitation of futures trading to three times the amount of actual grain) and insisted that his bill did not prevent speculation, as opposed to gambling.63 But it is equally, if not more, plausible that these revisions were pragmatically made to obtain the necessary votes for enactment, rather than out of an intellectual conviction of the benefits of futures trading. The opponents of the legislation had employed a two-track strategy, alternating between opposing all regulation and proposing changes to the Tincher bill, which was the least draconian bill before the committee, to mold it more to their liking.

The efforts of the opponents of regulation to weaken, as opposed to defeat entirely, the legislation were on the whole successful. The statute incorporated many of their proposals, including elimination of the restriction on trading to participants in the grain industry (adopting instead the exchange-trading requirement). In fact, it is reported that the CBOT did not bring the initial lawsuit challenging the statute's constitutionality because it had been actively involved in drafting the compromise that took the bite out of the farm groups' proposals; it left the legal challenge to be undertaken by individual members.64 When the Future Trading Act was promptly reenacted as a regulation of interstate commerce, substantively unchanged after its invalidation by the Supreme Court, the CBOT brought the legal challenge itself as it was not active in the 1922 deliberative process.

The CBOT did obtain some benefit for its members from the compromise...
legislation. The substitution of the exchange-trading requirement provided greater certainty to the speculative trade, as grain speculators might not have been considered in the grain industry, the qualification for avoiding taxation in the original bill. In addition, the legislation rid the organized exchanges of competition for the business of individual traders from "bucket shops." Bucket shops were off-exchange enterprises in the business of taking bets on commodity prices. They undercut the exchanges because they had much lower operating costs—they did not operate a cash market or place and execute contract orders for the underlying assets, but instead used board of trade prices to pay off customers who won their bets and to take money from those who lost. The 1921 legislation was perceived as putting bucket shops out of business, because they would not meet the statutory criteria for designation by the Secretary of Agriculture as a contract market.

C. Saliency of Futures Trading: Tracking Public Opinion

The intensity of opinion of committee witnesses and congressmen concerning the regulation of futures markets was apparently not shared by the public. It is well established that for technical, uncontroverted issues of low or invisible salience to the public, the views of the subset of the population who are immediately affected by the issue will substantially influence the making of public policy. Under these circumstances, policy-making will produce outcomes that are an equipoise among competing interest groups, or are captured by one group with a strong stake in the policy where there are no other equally interested, organized groups.

In order to measure issue salience (that is, public interest in futures markets regulation), I tracked article entries on a number of related topics in the Readers' Guide to Periodical Literature, following an approach of political scientists for gauging changes in public sentiment over time. As

65. When winning bets were numerous, the bucket shops typically filed for bankruptcy or disappeared. The exchanges attempted to prevent bucket shops from using their quotes, contending that the quotes were protected proprietary information, but they achieved only mixed success in the courts. Many agrarian states, however, enacted legislation prohibiting bucket shops as gambling.

66. See, e.g., JOHNSON ET AL., supra note 27, at 406; SABATO, supra note 32, at 135-37 (discussing "invisibility" rule).

67. See BAUMGARTNER & JONES, supra note 4. I searched for entries under the following words: futures, commodity (grain/ wheat/ cotton/ produce), commodity (grain/ wheat/ cotton/ produce) exchanges, exchanges, Boards of Trade, bucket shops, commission merchants, speculation, trade and trading; as well as the entries under the more general topics of Congress, agriculture, Department of Agriculture, grain, and gambling. Baumgartner and Jones track sentiment by whether the entries (article titles) evoke positive or negative images of the relevant industry, which is translatable into support for or opposition to the regulation of the industry. See id. at 48-50. Their approach turns out to be infeasible for studying futures regulation because almost all of the article titles were neutral and could not be classified as either positive or negative. I read the articles on commodity exchanges to determine a classification, and most of these were best classified as "neutral." I also read the entries under "speculation," when the titles were ambiguous, in order to determine whether they covered stock or commodity trading. In addition, I read all agricultural entries involving political activities to determine whether they concerned futures trading legislation. The other topics were tracked simply by number, as a gauge of public interest.
Table 2 indicates, there was very little media coverage of the grain futures industry during the 1920s (and earlier). There were no specific entry topics in these Guide volumes for futures exchanges or futures trading, and very few articles on individual exchanges or futures trading under other entry topics, such as grain or wheat trade. Moreover, of the entries involving grain futures trading, only one could be characterized as an article critical of the industry from its title, *Grilling the Grain Gamblers*, and it was actually an article favorable to the industry. Far more attention was directed at the stock market than the grain exchanges. This gap in media interest parallels the disparate level of public participation in these markets. The pattern is also reflected in the other entries: All but one of the twenty-three articles under the heading “speculation” discussed stock, as opposed to commodity, trading. These data indicate convincingly that there was no heightened interest in futures trading at the time Congress acted compared to prior and subsequent periods; in fact, little popular attention was paid to futures markets at all.

Agricultural topics were, however, quite widely reported in periodicals. Only a few of the many subheadings under agriculture are tracked in Table 2, those explicitly related to economic conditions or political activities. The attention paid to agriculture is several orders of magnitude greater than that directed to futures trading. Popular interest in the farm situation clearly increased over time, as agrarian economic conditions deteriorated. Moreover, as farmers began to organize, their political activities also became a subject of interest. For instance, the congressional “farm bloc,” which was formed in 1921, was referred to in nineteen articles in the volume covering 1922-24; there were no such entries in the prior volume. In addition, a sub-heading under “farmers” entitled “political activities” began in the volume covering 1919-21, and the subheading “farm relief” under the heading “U.S. Agriculture” first appeared in the 1925-28 volume (several years after the Future Trading Act was enacted). None of the entries on farmers’ political activities or the farm bloc contained a reference to futures trading issues in their titles; a reading of the articles confirmed that they did not discuss grain futures legislation.

These data make plain that the reason for the absence of articles on commodity futures trading was not an absence of public interest in the economic situation or political activities of farmers. Rather, the public simply was not interested in, or concerned about, futures markets. I am therefore confident in concluding that futures trading was an issue of low salience in 1921.

The paucity of reporting in the popular media on futures markets and issue salience. This provides a useful measure of issue salience independent of assessing changes in the industry’s image. For a more detailed breakdown of Guide entries, see ROBERTA ROMANO, THE POLITICAL DYNAMICS OF DERIVATIVE SECURITIES REGULATION tbl. 2 (Yale Law School, Program in Civil Liability Working Paper No. 203, 1996).

68. See *Grilling the Grain Gamblers*, LITERARY DIG., Feb. 12, 1921, at 12.
regulation does not mean that political elites did not follow the issue. The New York Times did report on the progress of the bill, publishing reports on the hearings that emphasized the testimony of opposition witnesses. This need not indicate sympathy for the exchanges’ position, as the opponents of legislation were more numerous than its proponents. The New York Times did not, however, run exposes on speculators in futures markets or on the activities of grain exchanges, items of the sort to be useful in mobilizing public sentiment in support of the proposed legislation. In addition, the Times did not publish any editorials on the legislation.

The Wall Street Journal’s coverage of the futures trading legislation was even more abbreviated than that of the New York Times. A search of Chicago and other farm belt newspapers—papers not read by national political elites but published in locales where futures trading would be expected to be of greater local interest—also did not reveal much coverage in the months surrounding the legislative process. Although they did mention the bill and report sparingly on its progress, these newspapers focused more on other issues of interest to farm organizations, such as tariff legislation.

While I have no measure with which to gauge whether the coverage of the futures trading bill was typical of the New York Times’ congressional coverage, it is probable that at least some subset of the readership of the Times (which was then a Republican newspaper), such as the stock exchanges, financial institutions and the largest grain exporters, which were based in New York and used futures markets, was leery of the legislation. It is possible, for instance, that the stock exchanges saw themselves as a potential future target. The New York financial community was in all likelihood opposed to government intervention in markets, and the bill’s progress would have therefore been of some interest to them. In fact, their representatives tended to oppose the legislation along with representatives of states with major futures exchanges (see Table 3).

The key finding, then, is that the national media paid almost no attention to futures markets. The elite media was only slightly more attentive. Policy-making regarding futures trading was thus left to congressmen responding to

69. Gina Raimundo, Yale Law School class of 1998, provided excellent research assistance by reading the Chicago Tribune, Daily Oklahoman and New Orleans Times-Picayune farm belt papers available at Yale University, for the months of the hearings on the grain futures legislation in 1921 and 1922. It is possible that news stories unfavorable to exchanges appeared in earlier years in the farm belt papers or the New York Times and were not referenced by reports covering the legislation, but this does not seem to be a plausible scenario. In 1989, for example, a scandal involving the Chicago exchanges resulted in articles “dredging up” old scandals as well. See Leo Melamed, Escape to the Futures 392 (1996).

70. I doubt whether the coverage was particularly unusual. In their study of media coverage of a variety of issues, Baumgartner and Jones found little difference between the Readers’ Guide and the New York Times as an indicator of trends in public sentiment, although the Times covered government actions more fully than the periodicals in the Guide. See Baumgartner & Jones, supra note 4, at 258.

the interest groups most immediately affected (farmers and exchanges), without being subject to the more thorough public scrutiny that accompanies high salience issues.

D. Analysis of the House Vote on the Future Trading Act

The Future Trading Act of 1921 passed the House by a sweeping margin of 269 to 69 (92 not voting). It was adopted by the Senate without a recorded vote. The House vote on the bill’s passage was the only roll-call vote taken by either chamber during deliberations on both the 1921 and 1922 statutes. One plausible explanation for the absence of a roll-call in the Senate involves institutional logrolling. The legislation’s consideration appears to have been part of an agreement between the Republican leadership and farm state senators, known as the “farm bloc,” who agreed to support the leadership’s motion to adjourn only after the Senate passed a series of pending farm bills.

The vote distribution in the House, by party and by region, is indicated in Table 3. The regional differences are striking and significant. The opposition was based in the manufacturing states of the North (New England and Northeast regions). The support came from the farm states (South, Border, West and Midwest—which, pursuant to the U.S. census convention, is subdivided into West North Central and East North Central regions). The exception is Illinois (location of the major futures exchanges), whose representatives voted against the legislation by a two-to-one ratio (14 to 7).

The vote on the bill was not a “party” vote as defined in the political science literature because a majority of both parties supported the legislation, but the difference in voting across parties is significant. Although they were the majority party, Republicans opposed the legislation more, and Democrats supported it more, than would be predicted if voting were random across parties (59 Republicans and 10 Democrats voted no, compared to 170 Republicans and 98 Democrats voting yes). Controlling for region, the votes differ significantly by party only in the Midwest and

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72. 61 CONG. REC. 1429 (1921).
73. The farm bloc first became active when it helped to defeat the leadership’s adjournment motion because their bills would otherwise not be on the agenda; this vote led to the agreement referred to in the text, between the Republican leadership, President Harding and the farm bloc senators, in which they agreed to support the recess in exchange for a chamber vote on six pending farm bills. See Hansen, supra note 19, at 31. After this victory, the bloc accomplished nothing else in the session, and it was not reorganized during the next Congress. See id. at 32.
74. The chi-square of the contingency table cross-tabulating votes by region has a value of 57.9 (six degrees of freedom) and is significant at less than .001.
75. A party vote is defined in the literature as one in which “a majority of one party [is] opposed to a majority of the other party.” John H. Aldrich, Why Parties? 305 n.19 (1995).
76. The chi-square for the contingency table cross-tabulating votes by party has a value of 12.28 (one degree of freedom), which is significant at less than .001.
Northeast, the geographical bases of the opposition to the Act’s passage. This suggests that the party effect relates to differences in the constituent interests represented.

Standard multivariate econometric techniques can be used to analyze the roll-call vote, to identify better the relationship among party, region and voting behavior, and to probe more deeply the sources of political support for, and opposition to, the legislation. I performed a logit regression of the House vote to explain the probability that a congressman voted for or against the legislation as a function of the influence of interest groups and legislator ideology. In doing so, I followed the two-stage approach of Kalt and Zupan to parcel out the effect on a representative’s vote attributable to constituent preferences, as opposed to personal ideology. This technique first regresses the measure of the congressman’s ideology on a set of district-level constituent variables (using ordinary least squares), and then uses the predicted and residual values of this ideology decomposition regression as the regressors in the logit regression of the roll-call vote, along with variables proxying for the specific interest groups affected by the legislation. The idea is that the predicted values of the ideology decomposition indicate how the legislator would vote based on the preferences of his constituents, whereas the residuals—which are uncorrelated with the constituent variables—measure the legislator’s personal ideology independent of constituent influences.

A common criticism of the Kalt and Zupan technique is that when the decomposition regression is not well-specified, any statistical significance of the residuals in the regression on congressional votes may be better explained as indicating missing explanatory variables of constituent preferences, rather than as evidencing the impact of personal ideology on voting behavior. Exacerbating the specification problem is the difficulty that, to the extent a successful (that is, reelected) legislator’s personal preferences coincide with the economic interests or preferences of his constituents, the two will not be distinguishable. While there is no general solution to the specification issue

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77. Controlling for region, the significance test used was either Fisher’s exact test (for tables with fewer than forty observations) or the continuity-adjusted chi-square test (for tables with over forty observations) because too many of the cells in the tables had expected frequencies fewer than five to use the standard chi-square test. See Sidney Siegel & N. John Castellano, Jr., Nonparametric Statistics 123 (2d ed. 1988).

78. For the functional form of the logit regression, see, for example, Robert S. Pindyck & Daniel L. Rubinfeld, Econometric Models & Economic Forecasts 258-63 (3d ed. 1991).


80. See, e.g., Peter Van Doren, Politics, Markets, and Congressional Policy Choices 93-94 (1991); John E. Jackson & John W. Kingdon, Ideology, Interest Group Scores, and Legislative Votes, 36 AM. J. POL. SCI. 805, 813 (1992). Jackson and Kingdon further criticize the use of voting indexes as an ideology variable, but they do not provide a superior quantitative measure: They suggest the use of interviews of legislators, and legislators’ speeches and writings. These data are not only impractical to obtain on a systematic basis but also fraught with classification difficulties.

(putting aside data limitations regarding district constituent characteristics, we have no good theory of what specific constituent characteristics determine a legislator's election), recognizing these criticisms of Kalt and Zupan's approach, I also report the results of vote regressions using as explanatory variables the undecomposed measure of legislator ideology and the general constituent variables.

A final problem for either the two-stage Kalt and Zupan technique or the approach directly including all of the variables is that if legislators form coalitions that engage in long-term logrolling, variables that identify contemporaneous constituent interests may not successfully explain particular votes. For example, if urban district representatives vote for farm subsidy programs in exchange for rural district representatives voting for Food Stamp programs over many sessions of Congress, farm constituent variables may not be significant in regressions on the farm subsidy program votes. As with other voting studies, this is a caveat to interpreting the results because the analysis cannot control for such an effect.

Table 4 provides descriptive statistics for the regression variables. The ideology variable is the Poole and Rosenthal d-nominate score, which identifies legislators' preferences by a multidimensional scaling technique applied to all roll-call votes in the specified Congress. D-nominate(1), the

82. See Keith T. Poole & Howard Rosenthal, Congress and Railroad Regulation: 1874 to 1887, in THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 81, 96-97 (Claudia Goldin & Gary D. Liebcap eds., 1994) [hereinafter Congress and Railroad Regulation].

83. For an effort to try to identify coalitions from a regression analysis of several votes in the 93d Congress—and thereby to separate out the influence of ideology on voting—by using a two-stage technique similar to the Kalt and Zupan technique, see James B. Kau & Paul H. Rubin, Self-Interest, Ideology, and Logrolling in Congressional Voting, 21 J.L. & ECON. 365 (1979).

84. See Keith Poole & Howard Rosenthal, Patterns of Congressional Voting, 35 AM. J. POL. SCI. 228 (1991) [hereinafter Patterns of Congressional Voting]. The term stands for dynamic nominal three-step estimation. The statistical procedure identifying the d-nominate scores assumes a spatial theory of legislator preferences that are single-peaked over the issue dimensions recovered. The statistical technique essentially recovers the dimensions that account for the same people voting together repeatedly. The dynamic component of the estimation process estimates the legislators' preferences over all of the roll-call votes taken in the first 99 Congresses, and thus permits legislators' preferences to move over time. For the most comprehensive description of the estimation procedure, see POOLE & ROSENTHAL, supra note 62, at 233-51. Two dimensions suffice to predict virtually all of the votes over all Congresses, with the bulk of the work (80%) being done by the first dimension, which Poole and Rosenthal identify as the ideological dimension. See id. at 252; Patterns of Congressional Voting, supra, at 229. Common interest group rankings of legislators, such as those published by the Americans for Democratic Action (ADA) are generated from a more limited number of votes deemed to be of interest to the ranking organization, as compared to the d-nominate scores. Although these ratings do not exist for pre-World War II Congresses, where they exist, they are highly correlated with the first dimension d-nominate score. For example, the Pearson correlation between the ADA ratings and D-nominate(1) for the members of the House in the 93d Congress is .92, and that for the members of the Senate in the 102d Congress is .93, the two Congresses whose votes are analyzed in this Article for which both measures are available. As an additional cross-check on validity, for the vote in the 93d Congress, I ran the regressions using both the d-nominate scores and ADA rankings of the representatives; there were no significant differences. I report only the results of the d-nominate regressions, as the d-nominate scores provide better ideological proxies because they use all roll-call votes rather than a subset of votes filtered by the
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first dimension, is the ideology variable, as it is interpreted by Poole and Rosenthal as representing a political ideology left-right continuum (the more liberal members of Congress have negative scores while the more conservative members have positive scores). \textit{D-nominate}(2), the second and typically less significant dimension, is interpreted as corresponding to a geographical, urban-rural division (the members of Congress from urban areas have negative scores, while the rural area members have positive scores).\textsuperscript{85} To restate the interpretation of these variables for our context, the first dimension captures the continuum of legislator preferences for more or less government intervention in markets. The second dimension represents agrarian (rural) versus commercial (urban) interests.

The constituent variables used to decompose the ideology variable are the percentage of the district population that was (i) engaged in agriculture (\textit{FarmPop}), (ii) illiterate (\textit{PctI1lit}), (iii) black (\textit{PctBlack}), and (iv) voted for the Democratic presidential candidate in the 1920 election (\textit{PctDemPres}).\textsuperscript{86} These variables attempt to capture the ideological proclivities of the electorate (for example, African-Americans and supporters of the Democratic presidential candidate tend to be more liberal voters)\textsuperscript{87} and therefore their use interest group undertaking the rating, and because their availability for all of the votes under study makes the results across Congresses more readily comparable.

85. Poole and Rosenthal find that, compared to the first dimension, the second dimension has only been important in explaining voting in the 1840s and 1950s-60s, when racial issues were dominant. They interpret this dimension as representing a North-South divide in those periods, proxying for racial politics, and as an agrarian dimension in the period when it is not significant between the Civil War and the Great Depression. \textit{See Congress and Railroad Regulation, supra} note 82, at 81. Because this dimension is related to the specific economic constituent interest supporting futures market regulation, farm organizations, there are complications in its use for the regression analysis. \textit{See infra} note 92 and accompanying text.

86. The constituent variables are similar to those that other researchers have found to have explanatory power with respect to differences in voting behavior. \textit{See, e.g.}, John E. Jackson \& David C. King, \textit{Public Goods, Private Interests, and Representation}, 83 AM. POL. SCI. REV. 1143, 1150-51 (1989); Kalt \& Zupan, supra note 79, at 292-95. They are limited in number and in some cases crude, because the 1920 census included very limited county-level population information and I can do no better than the variables indicated in the text. For example, while the use of the percentage of the population that is college-educated would be preferable to literacy as a demographic representation of constituent preferences because there is a strong correlation between education level and likelihood to vote, which impacts upon the security of a congressman’s seat and hence his responsiveness to voters’ preferences, the 1920 census only inquired into the population’s literacy level. Where counties overlap districts, the data were allocated across districts proportionately. The data were allocated uniformly where the district’s proportion of a county could not be ascertained. In some instances, the data were allocated disproportionately: For example, the wheat acreage for a fully urban district was assigned a value of zero rather than proportionately allocated the county’s wheat acreage. In some states, such as Massachusetts, it was impossible to allocate county data to congressional districts. Such states were excluded from all of the regressions. It is obvious that the allocation technique will generate measurement error. To test for this, regressions were run again using only “clean” districts (excluding districts with overlapping counties), and the results were substantially unchanged. The text therefore reports the regressions using the full sample.

87. The 1920 Democratic presidential nominee, James Cox, was a Progressive, in contrast to the Republican nominee Warren Harding, who emphasized a “return to normalcy.” \textit{See CHAMBERS, supra} note 24, at 272-73. To the extent that African-Americans were effectively prevented from voting in the South because of their exclusion from voting in Democratic primary elections, \textit{see id.} at 143.
in the d-nominate regressions will parcel out to what extent a congressman's ideology, represented by his d-nominate score, is a faithful representation of his constituents' preferences as opposed to his personal taste. Dummy variables for the congressman's party (Party; I = Democrat) and whether he represents a Southern state (South; I = South) were also included as explainers of ideology. 88

These constituent variables explain a substantial proportion of the variation in congressmen's d-nominate scores (adjusted R² of .8842 and .5012, respectively, for the first and second dimensions). 89 From these regressions, the ideology regressors for the logit regressions of the roll-call vote are derived, denoted Pred(i) and Res(i), i = 1,2 for the two dimensions, the fitted and residual components, respectively, of the regressions on the d-nominate scores.

Although Poole and Rosenthal suggest that the two dimensions are sufficient to explain overall congressional voting, 90 I am interested in examining the impact on votes of very specific constituent interests (one could call it "constituent service") that cannot be distinguished by the two dimensions recovered through the d-nominate estimation, such as the interpretive usefulness of the PctBlack variable is limited in this and the 1936 vote regression when compared to the regressions of the 1974 and 1991 votes.

88. Following Kalt and Zupan, supra note 79, two formulations were used in the decomposition: one in which the party variable is included in the fitted component of the d-nominate scores and one in which it is included in the residuals. The text reports the decomposition with party in the fitted component, as it is most plausible to consider the candidate's party affiliation as a function of constituent preferences. When the d-nominate decomposition regressions are run putting the influence of party into the residual instead, then the fitted component of the first-dimension (picking up the legislator's proclivity toward regulation) is no longer significant in the logit regression. All other significant statistical results are the same as those reported in Model 1 in Table 5. This change probably reflects the correlation between D-nominate(1) and Party: Democrats are more liberal than Republicans. In fact, if the regression of D-nominate(1) on constituent variables excludes the party dummy, the explanatory power decreases (adjusted R² is .6985), but when it is excluded from the regression on D-nominate(2), the decrease is less (adjusted R² of .457).

89. Party is negative and the most significant regressor on the first dimension score, while the most significant regressor on the second dimension score is FarmPop, which is positive. FarmPop and South are negative and significant regressors on D-nominate(1); the other regressors are insignificantly positive (PctDemPres and PctIllit) and negative (PctBlack). Party and PctIllit are negative and significant regressors on D-nominate(2), and PctDemPres is positive and significant; the other regressors, South and PctBlack, are negative and insignificant.

90. Patterns of Congressional Voting, supra note 84; see Poole, supra note 81. Heckman and Snyder contend that a higher number of dimensions is necessary to explain voting in, at least, post-World War II Congresses. James J. Heckman & James Snyder, Linear Probability Models of the Demand for Attributes with an Empirical Application to Estimating the Preferences of Legislators, 28 RAND J. ECON. S142 (1997) (special issue). They use a simpler statistical technique for identifying the significant factors that predict roll-call votes, and find that if they model the space as of low dimension, their estimates are highly correlated with the d-nominate scores, but if the space is of higher dimension, the estimates differ. However, the first dimensions of both sets of researchers are highly correlated, particularly in the post-war Congresses that I am examining in this paper. POOLE & ROSENTHAL, supra note 62, at 252-55. In addition, the first dimension d-nominate score is highly correlated with the ADA ratings, and consequently, I believe that it is a good measure of ideology, despite the estimator's possible inconsistency identified by Heckman and Snyder.
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presence of a futures exchange in a district, or wheat as opposed to cotton farmers. The interest group variables that represent supporters of futures regulation are the district’s farm population (FarmPop) and wheat and cotton acreage (Wheat and Cotton respectively). Because the 1921 Act regulated only grain and not cotton futures and there are substantial regional differences in crops, crop variables are included to eliminate noise created by using only the farming population variable. The variable that proxies for the legislation’s opponents is the presence of a futures exchange in the district (ComEx; 1 = exchange). The FarmPop (or Wheat) variable should be positively, and the commodity exchange (ComEx) variable negatively, related to the probability that a congressman votes for the legislation.

An institutional feature besides party included in the regressions is a dummy variable for the congressman’s membership on the Agriculture Committee (AgCom; 1 = member of committee), as this is the committee with jurisdiction over the legislation, and whether it is a predictor of voting behavior in 1921 will be useful for comparative purposes when examining the 1974 and 1991 votes where jurisdictional issues are of greater importance. The remaining variables in the table are attributes that should make a legislator less responsive to constituent preferences (that is, more likely to vote his personal ideology), measures to proxy for a safe seat: the proportion of votes obtained in the congressman’s 1920 race (ElectPct) and the congressman’s consecutive terms in office (Terms), which indexes the strength of an incumbency electoral advantage. A caveat needs to be made with respect to the incumbency effect on a legislator’s ability to vote his own personal preferences in distinction to constituent interests: Longevity in office may well be a function of having personal preferences that are identical to constituent interests.

The regression results for the 1921 House vote are reproduced in Table 5. The equations estimated include a Kalt and Zupan model (Models 1, 2 and 5), a model including the d-nominate scores and party and South dummy variables directly (Model 3), and a model further including the constituent variables directly (Model 4). In all models, the most important predictors of a congressman’s vote on the Future Trading Act of 1921 are the presence of a commodity exchange in the district (ComEx), the representative’s ideology (Pred(1), Res(1) and D-nominate(1)), and agrarian roots (Pred(2) and D-

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91. The exchange variable is an imprecise indicator of constituent interest because exchange members may live in districts other than the district in which the exchange is located. As a consequence, the effect of exchanges on voting is likely to be understated, because some representatives voting against the legislation have exchange members as constituents but they are not classified as such. This classification error is, in all likelihood, not a serious problem. To the extent that the exchange members are dispersed across many districts, they are not likely to have a significant impact on their individual representatives, nor are they likely to have an incentive to lobby. The exchange eliminates free rider problems concerning individual members’ political activity by centralizing the lobbying effort, and it also provides significant business revenue to the district in which it operates. Thus, it will have a greater impact on its representative’s vote than individual members will have on their representatives.

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nominate(2)): The more liberal representatives were more likely to vote for the bill and those with an exchange in their district were less likely to support it. If the agrarian-related d-nominate score is omitted, the proportion of the district’s population in farming is positive and significant, and the signs on Wheat and Cotton, although insignificant, are in the predicted direction (Model 5). This suggests that the explanation of the insignificance of the farm constituent variable in the other four models is collinearity with the second dimension score. Committee membership was also not a significant predictor of support for the bill.

Comparison of Model 1 with Model 2 indicates that personal ideology—the residual component of the decomposition of the congressional d-nominate scores—is a significant explainer of the 1921 futures regulation vote: There is a significant loss in the regression’s explanatory power when the residual variables are excluded, and a likelihood ratio test of the excluded residual variables is significant at less than 5%. Moreover, in Model 5, where the second (agrarian) dimension d-nominate score is excluded, only the residual, or personal ideological component of the first dimension score, is significant.

It should be noted that none of the district constituent variables are significant when entered directly into the vote regression (Model 4) although some of them are significant explainers of the representatives’ ideology in the d-nominate decomposition regressions. Moreover, they add no significant power to the model, as a likelihood ratio test of Model 4 against Model 3 is insignificant (chi-square of 1.59). The finding that generic constituent attributes do not affect legislators’ votes is in accord with the proposition that regulation of futures trading was an issue of low saliency, as suggested by the data in Table 2 reporting the periodical index search results.

The variables measuring the likelihood that a representative can deviate from his constituents’ preferences (terms in office and election vote percentage) have no explanatory power when included in the logit regressions of votes (added to either Model 3 or 4), and a likelihood ratio test of their exclusion is insignificant (chi-square values, with two degrees of freedom, of 1.28 and 1.07, respectively). Accordingly, these regression results are not included in the tables. Ordinary least squares regressions were also run fitting the residuals of the d-nominate decomposition regressions to the security of seat variables, as they are expected to affect the legislator’s responsiveness to constituent preferences, but these regressions explained virtually none of the variance in the residual values (adjusted R²’s of less than .01).

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92 The Pearson correlation between FarmPop and Pred(2) is .73, and between FarmPop and D-nominate(2), .52.

93 The test statistic, twice the difference of the log-likelihoods of the unrestricted and restricted regressions (Model 1 and Model 2), which is distributed as a chi-square with two degrees of freedom, has a value of 41.44.

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The nicest regression result is that the commodity exchange variable (the "constituent service" variable) is a significant predictor of votes. Given Poole and Rosenthal's finding concerning the power of two dimensions to explain congressional voting, we might not have expected such a result. The commodity exchange constituent interest discriminates across legislators aligned dimensionally over votes according to the d-nominate scores, the farm-state Republicans. Its significance thus graphically underscores the nexus between legislators and local constituents that the political science literature emphasizes.

Another test of the importance of the constituent variables compared to the d-nominate scores is a likelihood ratio test of the unconstrained regressions (Models 1 and 3) against regressions with only the d-nominate variables (entered into the regression as either the decomposed components or directly). The test statistics are significant at 5% (chi-square values of 11.09 and 15.15 respectively). Hence, the constituent variables add explanatory power to the vote regressions. The d-nominate variables do provide more predictive power, as would be expected by Poole and Rosenthal, because the likelihood ratio tests of the unconstrained regressions against regressions with only the constituent variables (that is, tests of the explanatory power of the d-nominate regressors) are even more significant (chi-squares of 46.498 and 44.98, respectively). However, in the regressions with only the d-nominate scores for regressors, the second dimension is more significant than the first dimension. Because this dimension is closely related to the economic interest of constituents in the legislation (farmers), while the other dimension indices ideology, this provides further evidence that constituent concerns are critical to an explanation of the vote on the Future Trading Act.

E. What Did Farmers Gain From Futures Regulation?

As indicated by the legislative record, farmers sought the abolition of futures trading in the belief that this would raise commodity prices. Even had they obtained the legislative prohibition that they desired, rather than the more modest regulation that was enacted, the economics of the relation between futures and spot market prices makes clear that eliminating futures markets would not have raised spot prices. If anything, it would have further lowered prices as the increased cost of hedging would reduce the price elevators and millers were willing to pay farmers in forward contracts for wheat.

A rather obvious question follows: Why would farmers pursue what would appear to be a fruitless strategy? One rationale for farmers' political activism against futures trading has been offered by Pashigian. He contends that commercial line elevators, which dominated the market in some states,
used futures prices to sustain monopsonist pricing against producers. In such a scenario, farmers have a perfectly rational economic reason to oppose futures exchanges: To end the elevator's ability to collude on prices. To test this hypothesis, Pashigian examines three Senate votes on bills to ban or prohibitively tax futures trading that were considered after the Future Trading Act was enacted, in 1927, 1928, and 1938. He finds that the farm state senators who supported the legislation were from states where commercial line elevators were more important and thus more likely to have monopsony power, than were the farm state senators who opposed the legislation. He also finds that farm-state senators from states in which futures exchanges were located were less likely to vote for the proposed futures transaction tax.

There is not even a hint in the extensive testimony in the 1921-22 hearings on futures trading of the kind that Pashigian hypothesizes concerning the use of futures markets by commercial line elevators to sustain noncompetitive prices. Indeed, the principal architect of the 1921 Act, Representative Tinch, was from a state (Kansas) in which commercial line elevators had the smallest market share of any grain-producing state. However, to ascertain whether Pashigian's hypothesis holds up for the passage of the Act, I reestimated the logit regression for the 1921 vote for the fourteen grain-producing states using the two factors that Pashigian uses in his analysis of subsequent votes by those fourteen states' senators: the market share of commercial line elevators and the presence of a futures exchange. In contrast to his results, only the commodity exchange variable is significant. The elevator share variable is insignificant, and its inclusion in the logit regression adds little explanatory power besides that provided by the commodity exchange variable. Accordingly, Pashigian's hypothesis that farmers exposed to an elevator cartel formed the political base for futures regulation does not explain the voting on the legislation creating the regulatory regime.

Pashigian's explanation is therefore an unsatisfactory answer to the question why did farmers seek to eliminate futures markets. A more fruitful alternative explanation inverts Pashigian's thesis. Because futures markets play an important role in price discovery, if wheat farming had been concentrated in the hands of a small number of producers, then the elimination of futures markets could have enabled those farmers to charge millers and other grain end-users above-market prices. Such a political end

96. \textit{See id.} at 374 tbl. 2.
97. The Federal Trade Commission collected the elevator market share data; it is available only at the state level. \textit{See Futures Hearings I, supra note 44, at 793-94. For the exchange variable I continue to use my district-level data.}
98. The chi-square statistic for a likelihood ratio test of the regression model including the exchange and elevator share variables against the model including only the exchange variable is an insignificant 1.04.
would not be an economically irrational strategy. But wheat production was not concentrated in a few large farms. Futures legislation therefore only held out the potential to raise prices if the farmers’ parallel political effort at organizing producers’ bargaining agents into farmers’ cooperatives was successful. Moreover, to the extent that regulating futures trading raised the costs of the cooperatives’ competitors, the grain middlemen, this might assist farmers’ efforts to develop a national marketing and distribution system that could compete with the middlemen (the increase in hedging costs from the legislation might offset other cost advantages middlemen had over cooperatives).

Political activists in the farm belt were, in fact, strongly committed to the cooperative movement. For example, a piece of legislation that had been high on farm groups’ political agenda was the Capper-Volstead Act, which was enacted closely in time to the futures trading legislation, in February 1922, and exempted agricultural cooperatives from the antitrust laws. In addition, several recommendations of the Joint Commission of Agricultural Inquiry, created by Congress in 1921 after serious farm protests, involved measures to aid cooperatives. A final datum in support of this alternative explanation for farm support of futures legislation is the fact that farm organization witnesses during the futures hearings repeatedly expressed the belief that farmers’ prosperity depended on the success of a cooperative movement. In this scenario, farm representatives would not consider futures legislation a failure, even if it initially lowered grain prices as hedging costs increased, because it was the first step along the road to a new marketing system through cooperatives.

Prohibiting futures trading, then, would not immediately raise prices, but could achieve a price increase in the long run if it led to producer control of the grain marketing system. Grain-producing districts were not numerous enough to enact a specific public policy, whether it was futures market regulation, a program of direct farm income support, or a government-sponsored cooperative movement that envisioned producers’ monopolizing the grain distribution system to secure higher prices. Although there was undoubtedly sympathy for farmers’ economic distress, there was not yet popular support for a policy of national income redistribution to farmers. Farmers’ emphasis of the need for higher commodity prices throughout the hearings would surely not be a winning strategy on the chamber floor with non-farm state legislators, whose constituents would have to pay for increased food prices. Targeting futures trading in relation to the problem of depressed farm incomes (“low” prices for agricultural products) provided a basis for

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100. See WALTON & ROCKOFF, supra note 17, at 511.
101. For example, Benjamin C. Marsh, Secretary and Director of Legislation for the Farmers’ National Council, repeatedly raised this point. See, e.g., Future Hearings II, supra note 19, at 26-27; Future Trading in Grain, supra note 55, at 466.

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creating a winning political coalition.

Non-farm-state representatives, for instance, would have far less difficulty explaining to constituents a policy aimed at rooting out gambling, which was claimed to cause price distortions, rather than one explicitly directed at raising prices. Americans' attitude to gambling, as opposed to commercial speculation, has historically been complex, as the two activities have been ambiguously intertwined in the public imagination. 102 Although there was not any public outcry against, much less notice of, futures markets outside the farm belt in the 1920s, having just experienced a decade of a politics infused with morality in the Progressive movement, legislators may have wanted to distance themselves from an activity that could be equated in the public imagination with gambling, even if their constituents were not farmers who saw first hand the "devil" in the "gambling hells" of the boards of trade. 103

The interweaving of the two issues, gambling and farmers' increasing financial distress, may have provided the basis for enough "constituent-indifferent" legislators (non-farm, non-exchange district legislators) to vote with grain-producing district legislators and pass the futures trading legislation. Equally important, the market intervention contemplated by the final bill was modest, so there would not be any significant cost to the non-farm district legislator from voting for the bill, such as an increase in food prices, despite the aspirations of farmers and the criticism of the grain trade. 104 In short, for a legislator concerned about reelection, voting for the legislation had some upside, and very little downside, return.

The most important consequence of the Act, particularly from the farmers' standpoint, was the introduction into political discourse of the principle of federal government involvement in commodities markets. It

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102. See FABIAN, supra note 54, at 2-7. Gambling was a topic of only slightly greater salience than futures exchanges with six entries in each of Readers' Guide volumes 5 (1919-21) and 6 (1922-24). It was therefore not at all comparable to the interest in stock market speculation or the economic plight of agriculture at the time, as indicated in Table 2. In addition, very few of the articles under the gambling entry concern stock market speculation or commodity trading, as opposed to "straight" gambling, betting on horse racing, card games, and lotteries.

103. The phrase is from a farmer testifying to Congress in 1892, quoted by Fabian as a key metaphor indicating a "moral" component to the late nineteenth century economic debate over speculation. FABIAN, supra note 54, at 153. Chambers considers the "distinct" quality of the Progressive movement a "combination of moralism and pragmatism," providing as examples, Progressives' successful crusades against alcohol and political corruption. See CHAMBERS, supra note 24, at 169. The prohibition amendment to the Constitution had, in fact, only recently gone into effect, in 1920. Other objects of the Progressives' moral concern were the "social evils" of prostitution and narcotics. Id. at 164-65. They were also intensively concerned over the corruption of politics by business interests. See Richard L. McCormick, "The Discovery that 'Business Corrupts Politics': A Reappraisal of the Origins of Progressivism," 86 AMER. HIST. REV. 247 (1981).

104. The legislation was not likely to have a large effect on trading costs. Large traders, as well as institutional hedgers, did not place their orders with bucket shops, so it is unlikely that the elimination of such operations by the Act would result in higher commissions on the theory that competition from bucket shops had kept exchange trading fees low.
created a regulatory toehold that could be expanded over time, through farm groups' influence on the political process, to guarantee that the existing marketing network did not disadvantage a nascent cooperative one. Successful advocacy of futures legislation may also have provided a second auxiliary benefit besides the potential to increase farm prices, experience in forging a political coalition to enact the farmers' agenda. Although it can plausibly be contended that the farmers' victory in the enactment of the Future Trading Act was more symbolic than real, such a characterization is not inconsistent with a rational political program: the restructuring of the grain marketing system through cooperatives.

II. Futures Regulation in the New Deal: The Commodity Exchange Act of 1936

In the 1920s grain producers sought to assert control over market prices, and the futures exchanges were an impediment to this objective because they were a central feature of the pricing mechanism, an institution of the grain trade middlemen. Speculators were easier targets of opprobrium than middlemen in the farmers' efforts to broaden support for their cause (the raising of food prices) given their association in the public mind with gambling. But the lack of public interest and the intense opposition by the

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105. The use of futures exchanges by cooperatives was not a far-fetched possibility. An issue of interest to a small number of farm witnesses during the 1920s was enacting a provision to require exchanges to grant memberships to cooperatives. Exchanges wanted cooperatives to revise their patronage dividend policies (which were based on the farmers' volume of business with the cooperative) in order to be admitted as members, on the ground that patronage dividends violated exchange rules prohibiting the rebating of commissions. The 1921 act contained a non-discrimination clause, requiring the admission of cooperative members as a criterion for contract market designation, and prohibiting exchanges from applying anti-rebating rules to cooperatives' patronage dividends to "bona fide members". Future Trading Act of 1921 § 5(e), 42 Stat. 188 (1921). This language was undoubtedly considered responsive to exchanges' concerns regarding a non-discrimination clause, that cooperatives could circumvent the no-rebating rule and refund commissions to any trader, and that there was a host of "sham" cooperatives, associations a majority of whose business was by non-members, that would take advantage of the situation. The 1921 language was changed in the 1922 Act to require cooperatives to comply with all exchange rules and to prohibit exchanges from construing any rules to forbid patronage dividends to "bona fide members" paid out of "moneys collected in excess of the expense of conducting the business of such association". Grain Futures Act of 1922 § 5(e), 42 Stat. 998, 1000 (1922) (codified at 7 U.S.C. § 7(e)). Further protection was derived from the definition of a cooperative in a separately enacted federal statute, the Capper-Volstead Act, see supra note 99, which included a requirement that more business be conducted for members than for non-members.

106. Farm political agitation in earlier eras, such as the populist movement, had expressed bigoted sentiments against specific groups, including Jewish and Catholic immigrants, some of which were related to anti-banker sentiment. In addition, the Ku Klux Klan, an exponent of prejudice against those groups, had strong rural support in the 1920s-30s. See LIPSET, supra note 50, at 165. It is possible that such biases accounted for some part of the farm groups' animus toward futures exchanges: The Chicago Mercantile Exchange (Merc) was established by descendants of Jewish immigrants from Eastern Europe; the CBOT was established by descendants of Irish Catholic and German farmers. See BOB TAMARKIN, THE MERC: THE EMERGENCE OF A GLOBAL FINANCIAL POWERHOUSE 50 (1993). But I found no evidence
organized exchanges prevented them not only from abolishing the futures market, but also from implementing a regulatory apparatus with real bite. It took the Great Depression to introduce a government subsidy program for farmers through price supports in conjunction with the broad scale intervention of government into all sectors of the economy in the New Deal, to achieve, albeit through a different mechanism than direct control of the grain marketing system, the farmers’ goal of guaranteeing a particular income level.

A. Creation of the Federal Price Support Program and Futures Regulation

The core of all farm political protests, whether directed against futures exchanges in the 1920s or against railroads and mortgage banks as was the focus of protests in an earlier era, was a grievance concerning the marketing of crops, that the producer was receiving too little, and the middlemen too large, a proportion of the retail price, given the relative importance of their services. Abolishing futures trading was ancillary to addressing this core grievance, and some farm representatives acknowledged as much when they indicated to the congressional committees investigating futures trading in 1921 that the true solution was a farmer-run agricultural marketing system, supported by the government, that eliminated middlemen. By neither abolishing futures markets nor prohibiting speculative trading, the 1921 legislation did little to disrupt the marketing system of the loathed middlemen. Nor was the fledgling cooperative movement quickly replacing that marketing system. Therefore, with much of the farm belt still experiencing hard times, farmers’ political agitation was not assuaged with the enactment of the Future Trading Act and its successor, the Grain Futures Act.

At the time of the congressional consideration of the Future Trading Act, legislators from agrarian states organized into an official voting coalition, which cut across party lines, known as the “farm bloc.” The centerpiece of of such attitudes in the congressional hearings, nor in the small number of Readers’ Guide articles concerning futures trading in 1919-22.

107. See COWING, supra note 12, at 267.

108. See, e.g., Futures Hearings I, supra note 44, at 190-93 (testimony of Benjamin Marsh, representing Farmers’ National Council); 61 CONG. REC. 1314 (1921) (“To present a bill which would eliminate the evil features [of commodities exchanges] has been a difficult problem. I believe the bill which has been presented at least tends to accomplish this purpose. I believe that in time a new system will grow up which will make the exchanges as they are conducted at present wholly unnecessary. An effort is now being made through a system of cooperative marketing to secure a substitute for the system which now prevails.”) (statement of Rep. Jones of Texas).

109. The Senate farm bloc was organized in May 1921, at a meeting attended by nine senators in the American Farm Bureau Federation’s office, at the Farm Bureau’s prodding. See HANSEN, supra note 19, at 31. At its peak it had thirty members. See id. The House counterpart was less well organized, and estimates of its membership vary between twenty-eight and one hundred. See id. Hansen does not indicate when the House group was formed.
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farm bloc legislative efforts in the mid-1920s, known as "McNary-Haugenism" after the congressional leaders, was a demand for "parity prices," which referred to crop price supports calculated by reference to nonagricultural product prices that would restore the farmers' position to what it had been during the high point of agrarian prosperity, 1909-14, rather than a demand for further futures market regulation. The parity price was to be implemented by tariffs on imports and a private government-chartered corporation that would buy commodities in order to raise prices up to the parity level, financed by a tax on the protected commodities. A parity price program was not enacted in the 1920s. President Coolidge vetoed McNary-Haugen bills twice. The farm programs enacted after the Future Trading Act instead were the high tariffs and duties in the Smoot-Hawley Act, the exemption of agricultural cooperatives from antitrust laws, the establishment of intermediate credit banks for agricultural paper, and the creation of the Federal Farm Board in 1929 to stabilize farm prices through private cooperative marketing associations supported with a $500 million fund for the Board.

A parity-price-based program was finally enacted in the Agricultural Adjustment Act (AAA) of 1933, which directly compensated farmers who voluntarily reduced production according to a government schedule intended to calculate the crop size necessary to achieve the parity price. But the AAA was held unconstitutional in 1936. Congress enacted in its place the Soil Conservation and Domestic Allotment Act of 1936, which paid farmers to plant soil-conserving crops rather than to limit production of soil-depleting crops (which were the crops covered by the AAA), and two years later, the Agricultural Adjustment Act of 1938, which established marketing quotas and specific price supports. This dramatic policy shift followed what is often referred to as a critical election, an election that involves cross-cutting issues on which the major parties take clearly opposing positions and results in fundamental political realignment that lasts for decades.

110. See Gilbert C. Fite, American Agriculture and Farm Policy Since 1900, at 10-12 (1964).
111. See Walton & Rockoff, supra note 17, at 501-02.
112. Id. at 502.
113. See id.
114. See Atack & Passell, supra note 13, at 671.
116. See Atack & Passell, supra note 13, at 675; Walton & Rockoff, supra note 17, at 504-06.
117. See David Brady, Critical Elections and Congressional Policy Making 4 (1988). There have been three realigning or critical election periods in U.S. history, the Civil War, 1890s and 1930s. Consistent with the critical election literature, as Poole and Rosenthal indicate in their discussion of their data set containing all congressional roll-call votes, congressional voting patterns are extraordinarily stable, changing only by replacement of legislators rather than by individuals experiencing a change of heart. See Patterns of Congressional Voting, supra note 84, at 257. Their spatial analysis suggests, however, that the New Deal was not a realigning election but a massive shift in the congressional majority. See Poole & Rosenthal, supra note 62, at 86, 106-8, 114.
After the adoption of the first AAA but before its constitutional reenactment in 1938, Congress systematized the federal regulation of futures markets in the Commodity Exchange Act (CEA) of 1936. The CEA expanded the authority of the Secretary of Agriculture to include the licensing of futures brokers and the setting of speculative position limits, required the segregation of customer accounts from brokers' own funds, and extended regulatory coverage to commodities other than grain, including cotton, butter and eggs. Apart from the provision to segregate customer funds, the regulatory reforms in the CEA had been high on the legislative agenda since 1934 when a similar bill passed the House. Some commentators today do not consider the 1936 statute as significantly altering the regulatory regime instituted in 1922. But the legislation's opponents did not share this view. The CEA was vigorously opposed by the commodity exchanges, including both those already regulated by the Grain Futures Act and those which would be newly subject to it (see Table 7).

The 1934 version of the CEA was not the first attempt to alter the 1922 regime. Bills to expand the federal regulation of futures markets or to prohibit all futures trading or only trading by speculators continued to be introduced after the 1922 Act (see Table 6). The Secretary of Agriculture, in particular, had sought at least since 1925 increased authority over futures trading from Congress. A change in the position toward government intervention by cotton state legislators, whose constituents had experienced declining cotton prices in 1935, was in all likelihood the decisive factor in the success of these efforts in 1936. Another factor that may have effected the timing of the legislation's success was the adoption in 1934 of federal laws regulating stock markets: Supporters of futures regulation maintained that legislation had become essential because "professional" stock market speculators would move into commodities if those markets were not equally regulated.

B. The Legislative Process

A number of hearings were held by the agriculture committees in the 1930s on the issues that were resolved in the CEA. The hearings followed a similar pattern to those in the 1920s, as the witnesses' positions summarized in Table 7 evidence. Exchanges and their markets' users (millers, elevators, shippers and other members of the grain trade) testified in large numbers against the bills and farm groups, legislators and executive branch officials...
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tested in their support. The hearings were more pro forma,\(^\text{121}\) and the tone even less civil, than those of the 1920s. For instance, committee members instructed witnesses opposing legislation to keep their statements short, often reminding them that they had testified in previous years against the same proposals,\(^\text{122}\) and the committee chairmen followed strict time limits on witnesses’ testimony and questioning.\(^\text{123}\) Even fewer committee members expressed any sympathy for the exchanges’ position than in the 1920s, and when government witnesses from the Department of Agriculture expressed support for futures trading or disagreed with proposed restrictions, their competence and integrity were challenged.\(^\text{124}\)

The arguments for and against regulation were largely unchanged from those of the 1920s, with farmers and their legislative sponsors claiming that speculation in futures markets created fictitious supply and thus had caused the disastrous decline in grain prices, and exchanges, millers and shippers maintaining that prices were a function of supply and demand.\(^\text{125}\) Proponents of increased regulation, including the Secretary of Agriculture, did provide new rationales for legislation, principally the difficulties that had arisen under the 1922 Act, including judicial rulings that certain manipulative conduct could not be reached under the statute and an unacceptably stringent sanction for misconduct—suspension of the contract markets’ operations rather than of

\(^{121}\) The duration and subject of several of the hearings was strictly limited in advance. See, e.g., To Amend the Grain Futures Act, Hearings Before the Sen. Comm. on Agriculture and Forestry on H.R. 6772, 74th Cong., 2d Sess. 10 (1936) [hereinafter 1936 Hearing] (statement of Sen. Murphy); Regulation of Commodity Exchanges, Hearing Before the House Comm. on Agriculture, 74th Cong., 1st Sess. 8 (1935) [hereinafter 1935 Hearing] (noting that witness testimony is to be limited to provisions in bill that were not in 1934 bill).

\(^{122}\) See, e.g., 1936 Hearing, supra note 121, at 22 (statement of Sen. Murphy) (“Before you proceed with your testimony, Mr. Boylan, may I suggest that this great long list of witnesses that you presented be restricted? It would appear that most of them would express the same state of mind regarding this bill, based on much the same reasons”); Regulation of Grain Exchanges, Hearing Before House Comm. on Agriculture, 73d Cong., 2d Sess. 115 (1934) [hereinafter 1934 Hearing] (statement of Chairman Jones) (“Heardings on the same subject or similar subjects in former bills are already available, and it seems that there is no essential reason why we should have further extended hearings and go into great detail in regard to most of the phases of the subject.”).

\(^{123}\) See, e.g., Commodity Short Selling, Hearing Before House Comm. on Agriculture, 72d Cong., 1st Sess. 152 (1932) [hereinafter 1932 Hearing] (statement of chairman restricting questions to ten minutes); 1934 Hearing, supra note 122, at 115 (statement of chairman suggesting that members limit questions to matters not previously covered).

\(^{124}\) When the administrator of the Grain Futures Administration appeared to be defending futures trading he was challenged by congressmen who “would like to know why the $200,000 or more is appropriated for [his] department” if it was not “functioning for the people who actually grow the agricultural products,” 1932 Hearing, supra note 123, at 206 (statement of Rep. Glover), or why he was “sitting idly by, apparently unconcerned, and not taking action against some of these speculators,” id. at 228 (statement of Rep. Larsen). He was further asked if he had ever worked for an exchange when his testimony countered a legislator’s proposed restrictions on short selling. Id. at 225 (statement of Rep. Larsen).

\(^{125}\) This reprise of the issues is in keeping with Poole and Rosenthal’s characterization that the New Deal was not a fundamental realignment of the issue space. See POOLE & ROSENTHAL, supra note 62, at 86, 106-08, 114.
the individual violators' operations—which stymied enforcement efforts.\textsuperscript{126}

Although Department of Agriculture representatives emphasized the importance of short selling and futures markets, they were the driving force behind the proposal for government-set position limits. Their position was buttressed by a department study of the grain futures market, using data obtained under its 1922 Act powers, that contended that large speculative trades typically resulted in substantial price movements and were undertaken by a very small number of traders.\textsuperscript{127} Farm groups still wanted to ban all speculative trading, rather than simply limit it, and sympathetic legislators particularly wanted trading restrictions to apply only on the sell side, rather than the Department's more evenhanded treatment of buyers and sellers. They gave their support to the Department's more restrained proposal, however, in the hope of ensuring that a bill would be enacted.

The grain exchanges particularly objected to the provisions permitting the government to set speculative position limits, to require the licensing of brokers, and to require segregation of customer margin accounts from brokers' funds. The cotton, butter and eggs exchanges objected to being subject to the grain futures regime in the first place, as well as to the new proposals. All of the exchanges insisted that the provisions were unnecessary and ill-suited to achieve higher prices. Although they did not dispute the contention of the Grain Futures Administration (GFA), the entity established by the Secretary of Agriculture to implement the Grain Futures Act, that very few traders would be directly affected by the Secretary's contemplated trading limit of two million bushels of grain, they maintained that permitting the government to set speculative limits would chill speculative activity (because a trader could be required to liquidate a position without warning if the Secretary were to change the limit), and thereby reduce trading and further lower prices.

The exchanges' principal new defense against regulation was that a newly established Grain Exchange Code would effectively take care of all of the concerns underlying the legislative proposals and should at least be given an opportunity to work.\textsuperscript{128} This code was a "code of fair competition" for the grain exchanges adopted in March 1934 with the President's approval under

\textsuperscript{126} See, e.g., 1934 \textit{Hearing}, supra note 122, at 9 (statement of J.M. Mehl, Asst. Chief, Grain Futures Administration) (contending that proposed bill corrects current situation where only remedy against manipulation is revocation of contract market designation); 1935 \textit{Hearing}, supra note 121, at 77 (statement of J.M. Mehl) (lamenting that cross-trading and taking orders into broker's account not "manipulation" within meaning of 1922 Act under Commodity Exchange Commission opinion and proposed bill will correct that); 1936 \textit{Hearing}, supra note 121, at 246 (statement of Wendell Berge, Special Asst. to the Attorney General) (discussing enforcement problem).

\textsuperscript{127} See, e.g., 1934 \textit{Hearing}, supra note 122, at 13 (statement of Dr. J.W.T. Duvel, Chief, Grain Futures Administration).

\textsuperscript{128} See id. at 86 (statement of Robert P. Brylan, Vice President, CBOT); id. at 93 (statement of E.J. Grimes, Chairman, Grain Exchange Code Committee); 1935 \textit{Hearing}, supra note 121, at 39-41 (statement of George H. Davis, Vice President, Terminal Elevator Grain Merchants' Ass'n and Chairman, Code Authority of the Grain Exchanges).
the National Industrial Recovery Act (NRA) of 1933, and negotiated by the exchanges with the Agricultural Adjustment Administration, a division of the Department of Agriculture, and the Administrator of the NRA. It was undoubtedly viewed by the exchanges as a mechanism for preemption of the proposed federal legislation,129 and featured a 10% speculative margin requirement as opposed to the proposed legislation's limit on speculative positions. The code also required exchanges to establish business conduct committees. In a further effort to preempt legislation, the business conduct committees agreed to establish voluntary speculative position limits (albeit at a number higher than the GFA desired). Although the exchanges saw a world of difference between voluntary limits set by their self-regulatory organizations and a government official establishing position limits, legislators considered this action as demonstrating the feasibility of providing such authority to the government.

While a dispute over the regulation of cotton rather than the presence of the code is the more probable explanation for the failure of the Senate to enact the bills passed by the House in 1934 and 1935, the enhanced self-regulation provided by the code may well have aided the cotton state legislators seeking to put off the legislation’s consideration. The grain code defense became moot, however, after the Supreme Court struck down the NRA and its system of industry code regulation in May 1935.130 In the remaining legislative session in 1936, the cotton dispute was resolved through its inclusion in the CEA and the Senate approved the 1935 House bill. The decision on the NRA is therefore illustrative of how nonlegislative actors, such as the Supreme Court, can influence congressional action: By changing the status quo, an expansion of futures regulation that had not been attainable by voting coalitions arrayed against the old equilibrium point became possible.131

C. The Changing Market Conditions of Cotton, Regional Alliances and Popular Opinion

Why was the inclusion of cotton in futures trading bills a matter of controversy, yet key to enactment of grain futures reform? Cotton was not subject to either the 1921 or the 1922 futures trading legislation because the cotton industry—producers, dealers, and processors—was opposed to federal regulation. There are three reasons for this difference. First, in the 1920s, cotton farmers were not experiencing the severe financial problems that wheat

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129. In a discussion of the relation between the Grain Exchange Code and the proposed legislation, a department official stated that, in the exchanges' "panic of fear that there would be legislation, they have been willing to write into the code almost anything, whether it was workable or not." 1934 Hearing, supra note 122, at 255 (statement of J.M. Mehl, Asst. Chief, Grain Futures Administration).


131. For another illustration of this phenomenon, see Congress and Railroad Regulation, supra note 82, at 108-09 (describing effect of Supreme Court decision on passage of Interstate Commerce Act).
producers were. The end of World War I had reopened European markets for cotton, so that Southern farmers prospered in contrast to Midwestern grain farmers. This difference was incorporated in the parity price scheme of the AAA of 1933: Cotton prices were pegged to post-war prices, while the other commodities’ prices referenced pre-war years.

Second, federal regulation of the cotton futures market had been the subject of legislative debate during the previous decade when there had been a large decline in cotton prices. The resulting legislation in 1914 established a national grading system for deliverable cotton and required the use of commercial differences rather than fixed prices at settlement for delivered cotton of a non-basis grade; it did not otherwise regulate cotton futures trading. In the 1920s, the participants in the 1914 legislation did not want this legislative solution redrafted. Finally, the potential success of federal regulation in raising commodity prices by restricting futures trading was even more circumscribed for cotton than for grain because there were competing foreign futures exchanges in the United Kingdom for cotton (servicing the textile industry), while there were no foreign rivals to the Chicago wheat futures market.

The changing attitude to federal regulation of futures trading by cotton state legislators is paralleled by the timing of national farm groups’ influence on Southern legislators: Hansen notes that these farm groups did not gain access to legislators in the South until the 1930s when Southern agriculture became financially distressed in the worldwide depression, in contrast to the Midwest where the agricultural depression began in the 1920s. In other

132. See Hansen, supra note 19, at 61. For example, by 1923, cotton was selling for twice its historical average price. See id. In addition, the farm foreclosure rate in 1926 was 60.8 per 1,000 farms in Minnesota and 52.5 per 1000 in South Dakota, both wheat-producing states, while only 9.3 per 1,000 in Texas, a major cotton-producer. See Atack & Passell, supra note 13, at 575.

133. See Cotton Futures Act, Pub. L. No. 63-174, 38 Stat. 693 (1914) (repealed and replaced with substantially identical language by the Cotton Futures Act, Pub. L. No. 64-190 Pt. A, 39 Stat. 476 (1916)). Unlike grain, cotton was a large export crop and the onset of World War I disrupted its market, as the British embargo blocked shipment to the Central powers. See Richard F. Bensel, Sectionalism and American Political Development: 1800-1980, at 120-21 (1984). Numerous bills were introduced to ban cotton futures before and after World War I, and in both 1910 and 1912 bills to abolish cotton futures passed the House but were not considered by the Senate. See, e.g., H.R. Rep. No. 765, 63d Cong., 2d Sess. 17 (1922) (statement of E.B. Norman, member, New Orleans Cotton Exchange).


135. See Hansen, supra note 19, at 67-69.
words, the national farm group lobbyists were now important to the Southern legislators because their constituents were now inclined to support government intervention. This influence is consistent with Markham’s assertion that the experience of a sudden collapse in cotton futures prices (200 points) in March 1935 at the time grain futures regulation was being considered in the House undercut opponents of the legislation, as Midwestern representatives desirous of increased market regulation gained allies among the Southern representatives.

The one roll-call vote on the CEA, the Senate’s vote adopting it in 1936, illuminates the regional alliance between grain and cotton farmers. As indicated in Table 8, all of the Western and Southern state senators, and all but one Midwestern senator, voted for the legislation. The opposition was only in the Northeast and New England (where mills and exporters were located). The regional division appears, on visual inspection, to be even starker than it was in the 1921 vote on the Future Trading Act but we cannot ascertain whether it is statistically significant; the small number of observations per table cell renders invalid the standard chi-square test.

The Senate Republicans voted somewhat more frequently against the CEA than did the Democrats and, as in 1921, they were more numerous in the Northeast and New England. Visual inspection of the data in Table 8 compared to Table 3 suggests that the regional effect more clearly predominates the party effect in 1936 than in 1921. This comparison is supported by the insignificance of the continuity-adjusted chi-square ratio from a cross-tabulation of the 1936 vote by party (a value of 2.85 significant only at the 9% level). Of course, the composition of Congress had changed significantly between the two votes, as had economic conditions; the Democratic party’s victories and the deterioration of the economy surely made the remaining Republican officeholders more cautious on economic legislation and more amenable to government intervention. In fact, in the floor debates on the bill in 1935 and on the CEA’s predecessor bill in 1934, remarkably not one representative voiced opposition—a marked contrast to the 1920s.

The muted House opposition to futures legislation in the 1930s may also be due to greater public interest in matters pertaining to futures trading. As indicated in Table 2, there was a more than three-fold increase in the total number of articles concerning futures exchanges from the 1920s to the 1930s. But we should be cautious in interpreting this increase as a sign of heightened issue salience. The comparable increase in articles concerning stock exchanges was over seven-fold, and the four-fold increase in articles on

136. See Markham, supra note 12, at 25.
137. One member of the House Agriculture Committee had dissented from reporting the bill to the floor in 1934 without a more thorough set of hearings to investigate whether there was misconduct on the exchanges, but he did not appear on the floor “to defend his views” during the bill’s consideration in the chamber. See 78 Cong. Rec. 10,450 (1934) (remarks of Rep. Hope).
speculation again concerns stock and not commodity speculation. Moreover, the economic condition of agriculture still predominated financial markets as a topic of popular interest. Indeed, the situation merited a new category, agricultural relief, whose coverage alone equals the reportage of futures and stock markets combined.

These comparisons of issue salience suggest that although the futures markets' higher visibility in the 1930s may have made the opposition to regulation more circumspect, futures markets were still of comparatively minor concern to the public, so that legislators would still be able to follow the dictates of constituent interest groups or personal preference without fear of a large electoral backlash. But the data suggest that those seeking increased regulation had an advantage. To the extent that futures regulation could be successfully linked in the public imagination to farm relief, that is, as a solution to the farm problem, which was clearly a subject of heightened public awareness, then legislators would be even more hard-pressed to vote against farm interests than they were in the 1920s.

As in the 1920s, there was a slight divergence in the coverage of futures trading legislation by the elite and popular media. The New York Times covered the legislative process with somewhat greater attention than did more popular periodicals. And in contrast to the earlier period, when the House passed the CEA bill, it ran an editorial which criticized the House for "legislating on the run" without "real debate" and advised the Senate to undertake a "more careful study" of the bill before acting. 138 The newspaper's guarded assessment of the need for increased regulation was undoubtedly in accord with the sentiment of many of its readers, the New York financial community (such as the New York cotton exchange) and the export trade, and is consistent with the opposition of Northeastern senators to the CEA. In accord with such constituents' views, these senators were also ideologically more conservative, hence more opposed to government intervention in the economy, as measured by the D-nominate(1) scores (median score of .217 compared to the chamber median of -.271).

D. Analysis of the Senate Vote on the CEA

The year-long delay between the House's passage of the CEA and the Senate's passage of the same bill was caused principally by a fight over the inclusion of cotton under the grain futures regime. 139 One of the opponents of cotton's inclusion under the GFA's authority was well situated to delay enactment: Senator Ellison Smith, the chairman of the Senate Committee on

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139. See, e.g., 80 CONG. REC. 7,849 (1936) (statement of Sen. Pope) (recounting history of committee's consideration of House bill and actions on inclusion of cotton); Commodities: Senate Passes New Bill Regulating Exchanges, NEWSWEEK, June 13, 1936, at 30 [hereinafter Commodities].
Agriculture and Forestry. Senator Smith was from South Carolina, a cotton producing state. He wanted a separate regime for cotton futures and he added to the House bill a set of cotton amendments establishing such a regime that were opposed by several senators from other cotton producing states who were not on the Agriculture Committee. The House Agriculture Committee was aware that cotton’s inclusion in a bill would be highly controversial: In both 1934 and 1935, the futures regulation bill was debated under a suspension of the rules, which precluded the offering of amendments, and thereby minimized the possibility that a split among cotton state representatives could result in a realignment with Northeastern state opponents and defeat the bill by the use of killer amendments such as Smith’s Senate strategy.

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As the 1936 elections approached, Senator Smith began to encounter political pressure, presumably from grain state legislators whose constituents were keenly interested in the legislation. In May 1936, with sentiment in the Senate running against him, Senator Smith agreed to withdraw his amendments from the bill and to offer them instead as committee-sponsored amendments to the bill on the floor. This compromise released the bill from the holds of other senators who were opposed to Smith’s amendments, as the Senate would now be able to vote on the Smith amendments and House bill separately. Political pressure may also have been directed by the White House, which supported the House bill and opposed Senator Smith’s amendments: Journalists provided conflicting accounts of the events, from the prediction that the Administration would “muffle the cotton senator and get the aged bill through,” to the characterization that the Administration “sighed with relief” when Smith “surrendered.”

After some debate on the chamber floor, Smith’s amendments were rejected. The votes were not close—there was no need or request for a roll-call vote. Senators from other cotton producing states, particularly Texas, opposed the amendments on the floor. The differences appear, in part, to be constituent-driven, based on differences in the proposals’ impact due to differences in crop quality as well as marketing in the two regions. In particular, a multistate cotton cooperative based in Texas, which was said to have short-changed South Carolina producers and to now be insolvent at the

140. See, e.g., 79 CONG. REC. 8,593 (1935) (statement of Rep. Fulmer) (describing cotton amendments he might have been able to offer “if the bill had been brought up in the regular way”). A “killer” amendment is an amendment to a bill designed to defeat a bill that would otherwise pass were it not amended. A killer amendment adding a second issue dimension to a bill creates a voting cycle, with the adoption of the amendment (often phrased as a “motherhood and apple pie” issue on which it is impossible to vote no) sinking the bill. See, e.g., POOLE & ROSENTHAL, supra note 62, at 152, 157-62. The effect of dimensionality on voting cycles is discussed infra at text and accompanying notes 174-75. If legislators vote strategically rather than sincerely on the killer amendment, however, the strategy will not succeed (the amendment will be defeated). Id. at 157.

141. COMPARE ALL IN ONE BASKET, BUS. WK., Apr. 18, 1936, at 41 with COMMODITIES, supra note 139.
taxpayers’ expense, would have been adversely affected by Senator Smith’s amendments. A further problem for Senator Smith was that his proposals were not likely to draw support from grain producing state senators, apart from those who had reached a compromise with him on the committee, because they would have been concerned that the controversy over cotton would defeat their proposal for grain futures regulation.

Because there were no roll-call votes on the cotton amendments, it is not possible to determine whether the agreement of the grain state legislators on the committee to support Smith’s amendments held up on the floor and whether it was an alliance of conflicted cotton interests and manufacturing state senators that produced the defeat. The data on the one available vote, the final vote adopting the CEA, cannot shed light on the committee coalition issue. Senator Smith did not vote on the bill’s final passage. His abstention may have been due to dissatisfaction with the defeat of his amendments, but there was no statement offered to explain his absence or how he would have voted, as there was for most of the other non-voting senators.

One change was made in the analysis of the 1936 vote compared to the 1921 vote because of the difference in chamber. The use of state-wide constituent variables to explain senators’ voting raises a more serious issue than does the use of district-wide data to analyze representatives’ votes because states are often represented by senators from different parties, a fact that suggests that a senator’s reelection constituency is a subset of state voters. Accordingly, one would expect a senator to respond to that subset’s preferences, rather than state-wide preferences. As a consequence, the average characteristics of state residents will not adequately capture a senator’s reelection constituency, and thus may render less accurate the fitted components of d-nominate scores relying on such data (the residual components will contain the omitted reelection constituencies’ preferences as well as the legislators’ own tastes). The problem of a split electorate cannot, of course, occur at the district level, and the likely greater homogeneity of a district compared to a state suggests that for representatives, district-wide...
average characteristics are likely to coincide with the characteristics of the reelection constituency.

To address the senatorial reelection constituency issue, another variable was included to proxy for senators’ reelection constituencies in undertaking the decomposition of the d-nominate scores. The variable is the average d-nominate score of the congressmen elected in a senator’s state from the same party as the senator (HouseD(i), i=1,2 for the corresponding dimension). The idea is that such congressmen are elected by the voters most likely to have voted for the senator. Descriptive statistics for the variables in the regression are summarized in Table 9.

An analysis of the 1936 Senate vote (66 in favor to 18 against) reveals a number of differences from the 1921 House vote. As indicated in Table 10, none of the interest group variables are significant, nor are the ideology variables, although the variation explained by the model is extremely high (a goodness of fit of over .85), much higher than that of the comparable 1921 regression (Model 1). The data demonstrate the decline in influence of the exchanges in the 74th Congress, which accords with the legislative history indicating far less vocal support for the exchanges among legislators than in the 1920s. It is also consistent with the possibility already mentioned that heightened public attention to farmers’ economic distress, as well as greater public awareness of futures exchanges, undercut the influence of the exchanges on legislators’ voting.

As in the 1921 data, the farm interest group variable is positive and significant only in the regression model omitting the second dimension of the d-nominate scores (Model 3). In this case the personal ideology variable (the residual from the decomposition of the D-nominate(1) score) is also negative and significant—more liberal senators were more likely to vote for the CEA. When the personal ideology variables are omitted from the regression (Model 2), both of the constituent-driven ideology variables, the fitted components of the d-nominate score decompositions, are negative and significant. The omitted personal ideology variables (the decomposition residuals) are, however, also important as there is a loss of explanatory power across the models and a likelihood ratio test of their predictive importance is significant (the chi-square of 15.97 is significant at less than 5%).

There is no ready explanation for why the rural dimension of the d-nominate scores is negatively related to senators’ votes. The variable’s insignificance when the residual components are included makes it difficult to attribute much to its significance in Model 2. The instability in significance persists in the other models: The second dimension d-nominate score is


147. All of the regression models were run with separate dummy variables for grain and cotton exchanges and there were no differences from the models reported in the text that use a dummy for the presence of either type of exchange in the state (AI/Ex).
negative and significant when the d-nominate variables are entered into the vote regression directly (Model 4), but it is not significant when the state-level constituent variables are also included (Model 5). This bolsters the decision to attribute little import to the finding of significance.

It is possible that the insignificance of the ideology variables in the 1936 regression compared to the 1921 regression is related to the difference in chamber of Congress—the regression model has not captured as adequately the election constituency of the senators as it did for the representatives—but I doubt that this is the case. Although the House d-nominate score is a crude proxy for a senator’s reelection constituency, the decomposition regressions for the 1936 Senate vote including it are not worse predictors of their scores than those for the 1921 House vote: adjusted R²s of .7781 and .3576, for the first and second dimensions, respectively. Moreover, the House d-nominate score is a significant predictor of the first-dimension score, and its inclusion improves significantly the explanatory power of the decomposition regression. 148 When the constituency variables are entered directly, rather than through a decomposition of the d-nominate scores (Model 5), none are significant explainers of the votes, including the House d-nominate scores, as was true of the 1921 House vote regressions. 149 Given the similarity in these results, the distinct reelection constituency explanation can be rejected as the explanation of the insignificance of the ideology variable (the first dimension score) for the 1936 vote.

The institutional variables, membership on the agriculture committee and political party affiliation, are also not significant explainers of the vote (although committee members voted yes in a higher proportion than non-committee members, 93% compared to 67%, and Democrats voted yes in a higher proportion than Republicans, 83% compared to 62%). The insignificance of the party variable is expected given that it was not a “party vote” (a majority of both parties voted for the bill), and it is consistent with participants’ claims that the legislation was bipartisan. 150 It is also consistent with the interpretation of Table 8 as showing that the regional effect was more important than the party effect. The insignificance of the committee variable is not surprising, as the Senate Agriculture Committee was representative of the chamber, just as the House Agriculture Committee was in 1921. 151

A further institutional variable was added to each of the regression

148. Other significant predictors in both of the dimensions’ decomposition regressions are the percentage vote for the Democratic presidential candidate in 1932, party and farm population. The fit of the decomposition regressions excluding the special constituency proxy, the House d-nominate score, is much worse, particularly for the first dimension score, with an adjusted R² of .6247 and .3283, for the first and second dimension score regressions, respectively.
149. The model failed to converge when the cotton and wheat variables were included, so they are therefore omitted from the regression (Model 5).
151. The median, mean and variance of the committee and chamber D-nominate(1) scores do not differ significantly (.367, -.261, .14, and -.276, -.144, .06 respectively). See note 61, supra.
models of Table 9: a dummy variable indicating whether the senator was up for election in 1936 (Upin36). The motivation for this refinement is the possibility that senators who must stand for reelection will be more responsive to public opinion and constituents than those who are not up for reelection. A failure to control for this institutional difference (which is, of course, irrelevant to members of the House) could obscure the constituent variables' effects, and thus provide an alternative chamber-based explanation to the distinct reelection constituency explanation for those variables' insignificance. The election-year indicator variable was not, however, significant in any of the models that could be estimated, and although it increased the models' goodness of fit and percentage of observations correctly predicted, its inclusion did not alter the finding of the insignificance of the constituent variables. This finding is consistent with that of studies of voting practices of legislators not standing for reelection, which conclude that the effect is to reduce the frequency with which the legislator votes, rather than to alter his or her substantive positions.

There are some additional simple tests to explore whether constituent or ideological factors influence congressional voting that make use of the distinctive feature of the Senate, that the same geographical base elects more than one legislator. The theory underlying the tests is that if legislators are the agents of constituents, then two senators from the same state should vote together (because they represent the same interests). Senator pairs that vote differently on the roll-call vote are classification errors; a high percentage of such errors indicates that the constituency model is of little explanatory power. Of course, a low level of classification errors does not mean that a constituent voting model is robust unless it represents an improvement over the errors that would arise if senators voted randomly. To account for the contention that senators serve different constituent groups within the state, the classification errors of the senator pairs can be adjusted to exclude

152. Systematic information concerning whether House members had in 1921 announced plans to retire prior to the 1922 election (which was more than a year away at the time of the vote) is not available to include a similar variable in the House vote regression. I do not have such information for the Senators voting in 1936 either.

153. Models 3, 4 and 5 did not converge when the reelection dummy was included and could not be estimated. Model 4 could be estimated excluding farm population, and in this case both D-nominate(1) and D-nominate(2) were negative and significant.


156. While we would expect at least 50% of the pairs to vote together if voting is random, the more appropriate baseline comparison adjusts for the actual distribution of the votes. It asks what proportion of matches would we expect for the observed vote outcome if voting was independent of constituent characteristics? See Krehbiel, supra note 155, at 26. For the 1936 vote, with 56 of 74 yes votes for the 37 voting senator pairs, the expected or random match rate is .64 (the sum of the squares of the probabilities of a yes and a no vote).
disagreeing vote pairs whose senators are from different political parties. 157 To test whether the senator’s constituency matters less than his or her ideology on the vote, the proportion of classification errors occurring in the constituent and political party models can be compared to the classification errors arising from using senators’ ideology (the D-nominate(1) scores) alone to predict the vote. 158

There are thirty-seven pairs of voting senators for the vote on the CEA’s passage. Of these, only four state pairs had disagreeing votes. Table 11 reports the match rates derived from the classification errors of the three models of senator voting for the vote on the CEA. As the Table makes clear, the constituency models perform significantly better than a random model, and more importantly, than the ideology model. 159 The constituency model has fewer errors than the ideology model in classifying the senators’ votes (four errors compared to twelve). In addition, the simple constituent model performs virtually as well as the political party variation (only one disagreeing pair consisted of senators from different parties). This simple test of constituent influence comparing senator match rates indicates that there is a significant constituent, as well as an ideological, component in the vote on the CEA, consistent with the 1921 voting regression analysis.

E. The Legacy of the New Deal

The enactment of the CEA did not end the efforts of farm-state legislators, nor the demands of their constituents, for further farm relief legislation because, not surprisingly, the CEA did not increase prices. Direct income support was eventually enacted in 1938 with subsidies received in exchange for government control over decisionmaking, through the acreage reduction program of the AAA. The more interventionalist approach taken toward the perceived farm problem in the second New Deal with the AAA differed substantially from the more private-sector orientation of McNary-Haugenism and the 1920s legislation. Concurrently with the implementation of a program to raise farm income through payments to reduce plantings, as indicated in Table 6, the political activity directed against futures markets declined sharply.

It is no coincidence that the farm group effort to abolish futures declined

157. See Ideologues or Agents?, supra note 155, at 708-09.
158. See id. at 709. To determine the classification errors, the senators are ordered by D-nominate(1) scores and then the cutpoint is found that minimizes the classification error. The minimum classification error identified by this technique for the CEA vote is 12.
159. This result differs from the findings for aggregated Senate roll-call votes of both Krehbiel, supra note 155 (one Congress) and Ideologues or Agents?, supra note 155 (100 Congresses). One explanation for the difference is that the aggregated Senate votes include procedural votes, which tend to be dominated by party line considerations (cases where the ideological voting model should be superior to the constituent model), and such votes may swamp the effect of constituent influence on other votes in the sample involving substantive issues.
dramatically upon the New Deal’s establishment of a comprehensive federal farm subsidy program. The New Deal also effectively ended the cooperative movement as the mechanism to improve farmers’ income, for the AAA directed payments to individual farmers. The cooperatives had expended considerable political effort on the futures exchanges because their integral connection to the agricultural marketing system made them business rivals. For instance, the CEA provision most opposed by the exchanges after the provisions directly affecting trading (position limits, broker licensing and customer account segregation) was a provision that extended the rights of cooperatives to be admitted to exchange membership.\textsuperscript{160}

The controverted provision addressed a problem for cooperatives under the 1922 law. A cooperative denied a membership on an exchange could appeal to the GFA. However, because the only sanction the GFA could take against a wrongful denial was to close down the exchange, if an exchange appealed an adverse GFA determination, the courts would maintain the status quo, exchange operation without the cooperative as a member, until the appeal was concluded. This practice imposed significant additional trading costs on a cooperative that eventually won its dispute; it had to pay the commission fees charged to non-members pending resolution of the litigation, which could take years. Exchanges contested the legal qualifications of cooperatives seeking membership because patronage dividends (which were a function of members’ usage, that is, of their trade volume) undermined the exchanges’ rule against the rebating of commissions. The exchanges were concerned that cooperatives would do substantial business with non-coop members at lower commission rates than exchange members charged.

The new 1936 provision required an exchange to accord cooperatives full membership rights during litigation brought by the exchange over the cooperative’s admission, unless the exclusion was authorized by the Commodity Exchange Commission (CEC), which was created by the CEA to carry out the Act’s regulatory functions and was comprised of the Secretaries of Agriculture and Commerce and the Attorney General. This resolution reduced a challenged cooperative’s costs—it still paid the reduced fees of a member pending the exchange’s appeal of a CEC order to admit the cooperative.

The proponent of the provision was an important constituent of the Agriculture Committee members, the Farmers’ National Grain Corporation (FNG), a cooperative established to serve as the national grain marketing agency under the Agricultural Marketing Act of 1929. The FNG estimated that it had lost over $250,000 in additional trading fees because of litigation.

\textsuperscript{160} The cooperative membership issue played a more prominent role in the 1930s hearings than in the 1920s, precisely because of the constituent connection, discussed \textit{infra} at note 161 and accompanying text, a dispute between the Farmers’ National Grain Corporation (a national cooperative) and the CBOT.
over membership rights with the CBOT.\textsuperscript{161} The connection between cooperatives and futures trading reform could not be more graphic than this case: FNG, with its intense concern over the cooperative membership rights provision, was also in charge of shepherding all of the witnesses testifying in support of the CEA before the Senate.\textsuperscript{162} With the grain and cotton cooperative interest groups' disappearance from the political scene on the adoption of the New Deal programs that assisted individual farmers directly, there were no competitors to the exchanges to lobby for increased regulation in order to advantage their marketing efforts as against the exchanges.

In addition, farmers' concerns over regulating futures markets were, in truth, a second best solution to their goal of establishing control over the cash markets, for this was a circuitous means of raising commodity prices. Indeed, during the 1932 hearings on futures markets regulation prior to the enactment of the New Deal AAA program, witnesses noted that restricting speculative trading would not raise farm incomes, and that the only policy that would maintain farmers' income levels would be the institution of cash subsidies—which they did not believe was an acceptable national policy at the time.\textsuperscript{163} Thus, the advocacy of increased futures regulation in the 1930s performed the same two-fold function as it did in the 1920s, increasing the extent of government intervention into the agricultural marketplace and coalition-building in the larger drive for farm relief, although the political agenda was shifting from concentrating bargaining power through cooperatives to obtaining an income maintenance program.

Another piece of suggestive evidence that the demand for regulation of futures markets is inextricably connected to farmers' desires to obtain government price supports and not a concern to perfect the market, is that, as Simpson observes in reviewing the development of cotton futures trading in Liverpool, there was "no active hostility to futures trading" in the "regular law" of England, and there also were no English cotton producers.\textsuperscript{164} This characterization of the priority of farmers' regulatory concerns is also supported by the political dynamics of more recent futures regulation reform: Farm organizations often support the exchanges' position against opponents and efforts to abolish futures trading have been focused upon only a few

\textsuperscript{161} See 1934 Hearing, supra note 122, at 42 (statement of Irving B. Goldsmith, counsel for FNG). The CBOT had refused to admit the cooperative to membership in the CBOT's clearinghouse because a majority of its business was for nonmembers, based on FNG's extensive transactions for the federal government's Grain Stabilization Corporation. The CBOT contended that this rendered it an illegitimate cooperative under the Capper-Volstead definition, despite its recognition by the government as a cooperative. See id. at 156, 173 (statement of Howard Ellis, counsel for the CBOT).

\textsuperscript{162} See 1936 Hearing, supra note 121, at 156 (statement of Irving B. Goldsmith, counsel for FNG).

\textsuperscript{163} See, e.g., 1932 Hearing, supra note 123, at 148 (response of Siebel C. Harris, Chairman, Grain Committee on National Affairs, representing several grain exchanges); 80 CONG. REC. 8,088 (1936) (statement of Sen. Frazier) (noting CEA was "simply...a step in the right direction" toward more important legislation that "we have not been able to get," legislation that would fix commodity prices).

\textsuperscript{164} Simpson, supra note 133, at 207.
contracts (onions and Irish potatoes) introduced immediately after World War II.\textsuperscript{165} While the shift in farmer attitude is, no doubt, to some extent a function of their greater economic sophistication, as farmers now use futures markets to hedge price risk, it is also true that the federal price support program eliminated the principal source of farmers’ antagonism to exchanges: Speculators on exchanges no longer were “setting” the price farmers received for their products, the government was.

III. Setting the Stage for the Dispersion of Financial Market Regulation: The 1974 Reforms

Although the overall regulatory approach to derivative instruments was established in 1922, the present regulatory institution is not much more than twenty years old. The 1974 amendments to the CEA, known as the Commodity Futures Trading Commission Act of 1974,\textsuperscript{166} established an independent agency to regulate futures, the CFTC, along the lines of the regulator created by the New Deal for securities, the SEC. The new futures regulator was given exclusive authority over futures contracts and the

\textsuperscript{165} See text following notes 190 and 286, infra (1974 and 1991 legislation). Onion and potato farmers lobbied for elimination of futures trading in the 1950s when futures contracts on these commodities were introduced after price supports were lifted at the end of World War II. The onion growers succeeded in 1959, when Congress outlawed onion futures after a trading scandal, but the potato growers did not. Several competing explanations have been advanced for these farmers’ advocacy of a futures trading ban. Cox contended that by reducing risk, futures markets increase crop supply, and that under certain conditions this increases optimal farm size, correspondingly decreasing the number of producers. Charles Cox, The Regulation of Futures Trading (1975) (Ph.D. dissertation, University of Chicago). Cox provides data that the size of onion and potato farms increased during the period of futures trading more than did farm size in general, and that the number of onion and potato farms also decreased during the period of futures trading. In this view, the protesting onion and potato farmers would have been inefficient small producers, whose livelihoods were threatened by the scale economies brought about by futures trading. Working offered a contrary hypothesis: he suggested that because futures markets make product prices more transparent, they eliminated the monopoly bargaining power of large onion producers and dealers to set prices. See Holbrook Working, Futures Markets Under Renewed Attack, 4 FOOD RES. INST. STUD. 13 (1963). In this view, the protesters would be the larger, and not smaller, onion farmers. Hieronymus offered a third explanation. He maintained that the source of the onion farmers’ agitation for a ban was the farmers’ substantial trading losses from speculating in long positions on the futures exchanges at the time onion prices collapsed. To Prohibit Trading in Irish Potato Futures on Commodity Exchanges, Hearings on H.R. 7287, a Bill to Ban Maine Potato Futures, Before Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture, 92d Cong., 2d Sess. 119 (1972) (testimony of T. Hieronymus, Prof. of Agricultural Economics, Univ. of Illinois). It should also be noted that, in contrast to wheat and cotton exchanges which produced numerous witnesses in support of their cause such as millers and processors, who were important congressional constituents, the onion exchange had little outside support. This is because most onions are not processed but are marketed directly to consumers. Consequently, there were few onion users to lobby for the maintenance of their hedging markets. For the most part, the hedgers were onion producers. Besides affecting the exchange’s ability to rally political support, this market characteristic is more likely to produce a thin trading market, which is more easily manipulated, than other crop markets, because hedging demand is key to futures market liquidity. See Basil S. Yamey, Scope for Futures Trading and the Conditions for Success, in HOW COMMODITY FUTURES WORK 14, 20-22 (1985).

definition of its authority was expanded beyond that of its predecessor in the Department of Agriculture to all futures trading.

The key structural change, the separation of the futures market regulator from the Department of Agriculture, was opposed by the futures exchanges, farm and grain organizations, and commodity trading firms. Despite the opposition, the measure had specific appeal to legislators because it strengthened congressional control of public policy, and in particular that of the Democratic majority, against that of the Republican administration. Creating an independent agency was an attempt to leverage congressional influence in an era of divided government. But neither the proponents nor the opponents of the change foresaw the legislation’s most significant consequences: Dispersion of U.S. financial market regulation.

A. Choice of Venue for Reform

The agriculture committees held three hearings from 1973-74 on what became the 1974 amendments to the CEA. An important impetus for the hearings was a steep increase in food prices. From December 1972 to April 1973, food prices rose 8.3%, in contrast to a 2.6% increase in the C.P.I. One congressman stated that without the price controls instituted by the Nixon Administration, 1973 food prices would have increased by 16% over 1972 prices. Consumer groups formed to organize boycotts of meat because of spiraling prices. Farmers were an obvious potential target for the swelling consumer discontent. The agriculture committees sought to be responsive to these concerns while at the same time ensuring that legislation adverse to farming interests would not be enacted.

The first hearing was held, in part, in response to the entrepreneurial activities of Congressman Neal Smith, a Democrat and self-described farmer from Iowa, who held investigative hearings on grain marketing in 1973 in his position as chairman of a special subcommittee of the House Permanent Select Committee on Small Business. Smith’s subcommittee produced a report with several recommendations concerning the regulation of futures


169. Food Price Hearings, supra note 167, at 76-78.

170. Trained as a lawyer, Smith identified his occupation as a farmer in his official congressional biography. See 1974 Official Congressional Directory, 93d Cong., 2d Sess. 67 (1974). Directory biographies are furnished or authorized by the members. Id. at 3.
trading, a subject not within his committee's jurisdiction. These included a proposal to create a stronger futures regulator—an independent agency, analogous to the SEC. Smith's subcommittee deemed such an entity necessary to ensure the effective implementation of new regulatory powers that it was proposing, which included margin setting and designation of contract delivery points (matters the CEA had left in the exchanges' control).

Because Smith was not a member of the House Agriculture Committee that had jurisdiction over futures markets, his investigation provided an opportunity for venue-shopping by interest groups dissatisfied with the existing futures regime and seeking to place new regulatory proposals onto the active legislative agenda. On occasion, interest groups who have lost in a policy arena are able to alter the status quo by skillfully changing the public perception of an issue; such successful issue redefinition typically occurs by the groups' attaching themselves to a competing policy-making venue from the status quo's defender (such as a different congressional committee), one more sympathetic to their position. This issue redefinition activity is referred to in the political science literature as expanding (or manipulating) the dimensions of the issue. The key fact is that as an issue expands beyond a single dimension (where a dimension refers to a relevant variable property of an alternative and voters' tastes), voting outcomes are more likely to cycle, producing no unique majority vote winner. Under such circumstances, a coalition can be formed that offers a proposal that successfully defeats the status quo.

For example, if the issue is a school budget, dimensions might be the range of teachers' salaries or the student-teacher ratio. If only one dimension mattered, such as salary, then all the voters' preferences could be arrayed

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171. Although there is a technical distinction between the terms independent agency and independent regulatory commission, see JOHNSON ET AL., supra note 27, at 534, I use them interchangeably, as was done in the legislative debate.

172. See Small Business Problems Involved in the Marketing of Grain and Other Commodities, Hearings Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business, 93d Cong., 1st Sess. 1-2 (1973) [hereinafter Small Business Hearings] (opening statement of Rep. Smith). Farmers sought government control over margin setting to prevent the exchanges' practice of raising a contract's margin requirements when the market moved substantially (a reasonable and prudent policy, from the exchanges' point of view, as a means of ensuring performance and thus protecting the clearinghouse). In 1973, as soybean prices increased dramatically, margins were raised, creating cash problems for short sellers (hedging farmers and elevators to whom farmers had sold produce forward). The demand for government regulation of delivery points arose because regional markets were not designated delivery points for the Chicago exchanges' futures contracts, putting regional farmers at a disadvantage because their produce could not practically be used to deliver on the contracts.

173. See BAUMGARTNER & JONES, supra note 4, at 29-35.


175. The technique—increasing issue dimensionality—can, of course, also be used to preserve the status quo from a new majority that would otherwise implement a different equilibrium point. See, e.g., POOLE & ROSENTHAL, supra note 62, at 157-58 (discussing Powell amendment to the 1956 School Aid Bill).
along a line, from low to high salary ranges, and there would be a clear
majority winner (the median voter's preference). When two or more
dimensions enter the decision, voters' preferences need no longer neatly line
up in the multi-dimensional choice space to produce a clear-cut winner and,
depending on the order of the alternatives (i.e., budget proposals combining
different salary ranges and class sizes) to be voted on, the majority decision
will differ. Thus, voters who disagree with the median voter's salary
preference could seek to include in a school budget vote both salary and class
size proposals, and thereby produce a different salary range choice closer to
their preferred outcome. This strategy may not succeed, however, if the
opponents recognize the strategy's intended effect (to break up their winning
coalition), for then the opponents will not vote sincerely on the new
dimension to ensure that their coalition, and hence, preferred outcome, is
maintained.

Baumgartner and Jones relate issue dimension expansion to choice of
institutional venue. Status quo opponents can choose a new dimension that is
within the jurisdiction of a political institution different from the current issue
guardian, in order to change the equilibrium. For example, opponents of
civilian nuclear power succeeded in stemming the industry's expansion by
redefining the issue from economic growth and clean energy to health and
safety hazards, which appealed to different political actors than the nuclear
power regulator, the Atomic Energy Commission. The opponents of the status
quo did not attempt to counter proponents' data on the economic benefits of
nuclear power but rather shifted the focus of debate to new issues subject to
different venues (federal court, state and local government officials, and
congressional committees other than the Joint Congressional Committee on
Atomic Energy). This strategy succeeded before public sentiment turned
decisively against the nuclear power industry in the wake of the Three Mile
Island reactor incident.

A similar venue-shifting strategy is at work in the Smith subcommittee
investigation. Although there is nothing in the legislative record to suggest
that Smith had closer relations to farm groups than Agriculture Committee
members, the Agriculture Committee also had ties to the futures exchanges, which would delay pursuit of the farming agenda as well as temper the legislative output. Smith’s subcommittee would therefore be a preferable arena for farm groups seeking new institutional arrangements. The venue-shopping scenario is indeed quite apt. One of the principal items on Smith’s agenda was to evaluate whether the Commodity Exchange Authority, the successor to the GFA created by the Secretary of Agriculture to administer the CEA, was effectively discharging its duty under the Act. This inquiry principally focused on farm groups’ grievances against exchange practices that were tolerated by the Authority. In fact, the bill that was eventually presented to the House by the Agriculture Committee was less restrictive of exchange activities than Smith’s subcommittee’s recommendations (for example, it did not grant margin-setting authority to the government.) It also did not create an independent regulatory agency.

The subcommittee of the House Judiciary Committee with jurisdiction over the regulation of monopolies also investigated food prices in 1973 and entertained the possibility of eliminating the antitrust exemption for agricultural cooperatives. This is yet another example of venue-shifting efforts in pursuit of regulatory reform. It is not surprising that criticism of producers would emerge in this forum, the one committee investigating food prices without ties to farm interests.

B. The Futures Legislative Process in the Turbulent Politics of the 1970s

Farm-state representatives attending the Judiciary subcommittee hearing defended their constituents by noting that for the first time in twenty years farmers were “getting a decent return,” and sought to identify other potential villains. Given the political history of futures regulation, it should come as no surprise that futures exchanges were one such target. Smith aggressively pursued this agenda in his subcommittee. He placed a substantial part of the blame for higher food prices on futures exchanges, suggesting that wide fluctuations in grain futures prices as food prices increased were the work of manipulation by speculators. In his subcommittee’s work, the rest of the blame was apportioned to other familiar villains: the nation’s grain distribution network, railroads and other middlemen. But it should be noted

182. See Food Price Hearings, supra note 167, at 76-78.
185. See generally Small Business Problems Involved in the Marketing of Grain and Other Commodities (Vol. II), Hearings Before the Subcomm. on Special Small Business Problems, House Permanent Select Comm. on Small Business, 93d Cong., 2d Sess. (1974). Farm groups also raised concerns about the adequacy of railroad facilities that prevented them from shipping their produce on
that the impetus for Smith’s inquiry, ironically, was not so much the complaints of consumers concerning rising food prices as it was the complaints of farmers (and grain elevators) who had hedged their crops on futures markets and sustained considerable losses on the futures transactions as prices rose. Because of the daily marking to market of gains and losses in futures markets, farmers’ losses on the futures side of the hedge were immediately recognized, whereas the offsetting gains on the cash side would not be realized until they sold their grain.186

Smith was the lead-off witness of the House Agriculture Committee’s hearings reviewing the CEA, and his subcommittee’s earlier work may well have propelled the issue of revamping the CEA, in response to rising food prices, to the top of the Agriculture Committee’s agenda. Some newspapers suggested that the increases in food prices were caused by speculators’ trading, a proposition at the core of Smith’s subcommittee’s work,187 which called for Agriculture Committee action to reform the CEA. The Assistant Secretary of Agriculture, however, testified to the Agriculture Committee that such claims were incorrect,188 and there is nothing in the extensive legislative record to suggest that the claim had any validity. In fact, notwithstanding Smith’s subcommittee’s investigation of futures exchanges and the sporadic newspaper reports, attacks on speculation were not as prominent in the hearings on the CEA in 1973-74 as they were in the hearings in the 1920s and 1930s.

The decline in importance of speculation in the 1970s futures debate is consistent with other trends. Speculation was an issue in the 1920s and 1930s due to farmers’ attacks on exchanges as the source of their financial difficulties. In the 1970s, commodity prices were rising and speculation was therefore not a prominent concern of farmers. Moreover, as Table 2 makes clear, popular concern over speculation was virtually nonexistent by the 1970s compared to the Depression years. Its absence from the legislative discourse was therefore consistent with the national mood.

While animus towards speculators was not shaping the public discourse, it was surely an intelligent strategy for farmers and their committee supporters to move quickly to advocate reform of the CEA and increased regulation of futures markets in the inflationary economy of the 1970s. Prompt action would preempt other committees from responding to consumer concerns over rising food prices by revising laws under their purview which could adversely time to comply with contract deadlines. See, e.g., Small Business Hearings, supra note 172, at 14-15 (testimony of Argie Hall, Farmers Grain Dealers Ass’n of Iowa).

186. This cash-flow difficulty was the reason farmers sought federal regulation of exchange margins. See note 172, supra.
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affect producers, such as eliminating the previously mentioned antitrust exemption for producer cooperatives under the Judiciary Committee's jurisdiction. This would ensure agricultural interests controlled the legislative agenda concerning commodity prices.

C. Creation of the CFTC: The Debate over an Independent Futures Regulator

The broadening range of groups interested in futures regulation was reflected in both the witness list and legislators' remarks in the record as a new political actor was introduced. Consumer "representatives" were explicitly called to testify and, in contrast to the 1920s, there are scattered references to consumers' concerns throughout the 1970s hearings. Another measure of this new phenomenon of consumer representatives is the tracking in Table 2 of national periodical coverage on food prices: Media coverage during 1974-75 is higher (averaging over thirty stories a year) than the years immediately before and after the legislation, and it is much higher than during the previous periods of futures trading reform in the 1920s and 1930s (which averaged four and sixteen stories a year on food prices, respectively).

Although farm organizations were the source of the federal initiatives to regulate futures trading in the 1920s and 1930s, they were not the principal advocates of the structural change in the 1974 legislation, the creation of an independent futures regulator. This was notwithstanding Representative Smith's association with farming interests. This is evident from Table 12, which tallies the witnesses in the House and Senate hearings by their position on the creation of an independent agency. As Table 12 makes clear, the principal proponents of an independent agency were legislators and self-described consumer advocacy groups.

1. The Farm Groups' Position

In sharp contrast to the regulatory initiative of the 1920s, farm organizations were split or undecided on the proposed change to an

189. See, e.g., 1974 Sen. Hearings, supra note 183, at 1 (opening statement of Sen. Talmadge); CFTC Hearings, supra note 188, at 13 (testimony of Clayton Yeutter, Asst. Secretary, Dep't of Agriculture).

190. Coverage in the Guide has increased over time, in terms of number of periodicals covered per volume and pages per year (since the earlier volumes covered multiple years). But, given the stability of a low number of food price articles per year both before and after the 1970s, I do not think that expanding coverage alone explains these data, as opposed to increased public interest in the issue. For a chart of the changing coverage of Guide volumes by page and periodical numbers, see BAUMGARTNER & JONES, supra note 4, at 264-66.

191. Nearly one-third of the witnesses expressed no position on the issue. The reason in many cases was that the witnesses were testifying on specific issues unrelated to the new agency's structure, such as, whether international agricultural commodities futures should be regulated or whether metal options trading should be banned, which would be the effect of the proposed expansion of the CEA's coverage to all commodities.
independent regulator, rather than uniformly in support of it. One explanation
of the farm organizations’ split on creation of an independent agency is that
their influence within the Department of Agriculture varied. Another, perhaps
related explanation for this change is that by 1974, a number of farmers and
cooperative elevators were using futures markets to hedge, and although they
still may have been wary of speculators, they were far more integrated into
trading markets than they were fifty years earlier. In addition, as previously
mentioned, the changed economic circumstances motivating the demand for
legislative action—rising prices—meant that political agitation did not
originate in farming communities.

Farm organizations did support Smith’s other substantive
recommendations calling for the government’s setting of margins and
contract delivery points. The exchanges’ practice of raising margins when
prices rose dramatically and the single delivery point on certain grain
contracts exacerbated farmers’ hedging losses in the rising grain market.
Farmers thought that the government would implement policies more
favorable to them. Although Smith thought an independent agency would
handle such authority best, farm groups may have been less confident of that
outcome. Alternatively, they may have been positioning themselves to forge a
compromise with opponents of the structural change in exchange for support
on other futures reforms (for instance, the transfer from exchanges to the
government of authority to set margins and delivery-points) or on other farm
programs.

2. Support for an Independent Futures Regulator

Several disparate arguments were advanced in support of creating an
independent agency, none of which had any bearing on farming issues, a
factor that further highlights the difference between this legislative effort and
that of the 1920s and 1930s. The most frequently expressed rationale was that
the proposed expansion of regulation to cover previously unregulated futures
trading in nonagricultural products, such as silver and foreign currency, and
internationally-grown agricultural products, such as coffee and sugar,
required expertise beyond the Agriculture Department’s competence. The

introduced legislation to create an independent agency, cited all of the rationales discussed in the text in
introduced legislation to create an independent agency, cited all of the rationales discussed in the text in
CBOT's contemplation of marketing a financial futures contract on Government National Mortgage Association (Ginnie Mae) pass-through certificates (a fixed-income security) raised a similar concern regarding institutional competency. However, it is difficult to characterize the concern over expertise as the primary reason for creating an independent agency because very few witnesses, including independent agency proponents, foresaw that the market would shift dramatically away from a predominance of agricultural products in a few years.

A related impetus for the desire to regulate all futures contracts, which underscored the expertise issue, was a scandal involving substantial investor losses from the failure of a California firm, Goldstein, Samuelson, Inc., a modern-day bucket shop trading options on precious metals. The firm's activities were not within the Commodity Exchange Authority's jurisdiction (metals were not a commodity under the CEA) and the SEC was apparently slow to assert jurisdiction over the failed firm, arguably because its authority was uncertain (whether options on metals were "securities" under the federal securities laws was uncharted legal terrain).

Another frequently stated rationale for the establishment of the CFTC was a perceived structural weakness in the Commodity Exchange Authority. It was thought that there was an inherent conflict of interest in assigning futures market regulation to the Department of Agriculture because it was an organization that had a statutory duty to protect farmers' income, a duty considered inconsistent with acting impartially toward futures trading. Concern over conflict of interest surfaced as an issue for the first time in the 1970s because food prices were spiraling upward rather than downward as they were when the futures regulator was created in the 1920s and 1930s. No specific charges of an actual conflict, however, were ever made. The Commodity Exchange Authority was at most criticized for not being sufficiently vigilant in policing the exchanges' enforcement of their own rules. Given the absence of any suggestion of actual misconduct, the conflict of interest contention is not a convincing explanation for the creation of an independent agency.

195. A Ginnie Mae certificate is a security backed by a pool of mortgages; investors in the certificates receive the interest and principal paid on the underlying mortgages, less some administrative fees. Futures contracts on foreign currencies had been traded on the Merc, through a separate division, the International Monetary Market (IMM) division, since 1972.

196. See Review of Commodity Exchange Act and Discussion of Possible Changes, Hearings Before the House Comm. on Agriculture, 93d Cong., 1st Sess. 11 (1973) [hereinafter CEA Hearings] (statement of Rep. Smith) (noting that over $100 million was lost in unregulated commodity option trading). The bucket-shop characterization is apt because the firm sold naked options, relying on the London Metals Exchange for transaction prices, and when prices moved against it, it could not cover the options and pay off its customers. See Options Trading Comes Up Short, BUS. WK., Mar. 10, 1973, at 43.


198. Id.
A more persuasive explanation for the independent agency proposal, albeit one never explicitly stated in the legislative record, involves the subtext of the Democratic Congress' maneuvering for greater leverage over agricultural and regulatory policy, given its objections to the Nixon Administration's deregulatory approach (which in agriculture consisted of an attempt to reduce farm subsidy programs). An independent agency would be expected to be more responsive to congressional concerns than an agency within a cabinet department. The success of the Democrats' agenda was undoubtedly facilitated by the Nixon administration's secret grain agreement with the Soviet Union, which farmers claimed produced substantial profits only for middlemen because they had sold their crop unaware of the impending purchases that raised domestic prices. Having been shut out of the negotiations with the Soviets, farm organizations may well have viewed the Administration, and hence the Department of Agriculture, as an untrustworthy ally. By weakening constituent support for the Administration, the Soviet grain agreement strengthened the Democrats' leverage in shaping a regulatory institution more amenable to congressional control than to control by a Republican Administration. The evidence in Table 12 that federal legislators were the principal advocates of the institutional change accords with such an explanation.

It is important to review the political context in which the debate over the futures regulator took place because it bolsters the institutional explanation for the independent agency proposal. The debate coincided with the initiation of impeachment proceedings against President Nixon. In addition, the Democratic Congress and the Nixon Administration continued to clash over the conduct of the Vietnam War. Finally, Democrats were battling the Administration's efforts to reduce government spending, at the expense of their budgetary priorities through impoundment. In such a politically-charged context as the early 1970s, the Agriculture Department's testimony that futures trading was not the cause of higher food prices fell on deaf ears.

3. Opposition to an Independent Futures Regulator

One might have predicted that the exchanges would support an independent agency proposal, on the view that the Department of Agriculture would be more closely associated with the interests of farmers than those of the exchanges (the premise of the conflict of interest rationale for an independent agency). However, the independent agency proposal was opposed by virtually all exchanges, as well as the Department of

199. See id. at 201 (statement of Sen. Clark); Russian Grain Hearings, supra note 168, at 2-3 (statement of Sen. Jackson).

200. The unregulated exchanges and the CBOT took no position on the issue. The unregulated exchanges focused their efforts on opposing the extension of the CEA to their activities. The explanation provided for the CBOT's failure to take a position was that the CBOT's board was divided on the issue.
Agriculture. Grain organizations, like the farm organizations, were split on the issue. 201

The exchanges’ position is consistent with regulatory capture, the thesis that regulators come under the influence of the regulated, and implement policies that favor the regulated industry over the public at large. 202 Following the enactment of the CEA in 1936, a separate office, the Commodity Exchange Authority, administered by a civil servant, had been established in the Department of Agriculture to implement the Secretary’s responsibilities under the Act. This office’s personnel, in contrast to the rest of the Department, would have more contact with exchanges than with producers, which gives surface plausibility to the hypothesis of agency capture by exchanges. Because the entity administering the CEA was not autonomous, however, regulatory capture is inapt as an explanation. Ultimate authority resided in the Secretary of Agriculture and the other executive branch officials on the CEC, political appointees who would be highly sensitive to the political cost of adopting policies adversely affecting farmers.

Little can be gleaned about the validity of a capture explanation for the exchanges’ opposition to an independent agency from the position on the bill of the Commodity Exchange Authority. Besides opposing the creation of an independent agency, the Authority’s administrator, Alex C. Caldwell, testified against proposals that the exchanges were vigorously resisting such as government supervision of margins. But he endorsed an equal number of proposals that the exchanges intensely opposed such as expanding governmental emergency powers over exchanges. 203 Caldwell was well aware of the regulatory capture hypothesis concerning his office’s activities; in fact, he maintained that an independent agency would be more susceptible to capture by the industry than a commission in which the Secretary of Agriculture participated. 204 The moving force behind the activities of the Merc, Leo Melamed, has asserted in his memoirs that he influenced the choice of commissioners and staff at the newly-established CFTC. 205 This claim, if true, is consistent with Caldwell’s position, that an independent agency, rather than one within the Department of Agriculture, would be more

See 1974 Sen. Hearings, supra note 183, at 524 (statement of Frederick Uhlmann, Chairman, CBOT). There is no publicly available information concerning the reason, substantive or strategic, for the CBOT board’s split.

201. The only cooperative grain organization testifying at the hearings opposed an independent agency, while the commercial organizations were divided on the issue.


203. See CEA Hearings, supra note 196, at 25, 29 (statement of Alex C. Caldwell, Administrator of the Commodity Exchange Authority). The 1974 legislation essentially tracked Caldwell’s recommendations with one notable exception, the creation of an independent agency.

204. 1974 Sen. Hearings, supra note 183, at 229 (statement of Alex C. Caldwell).

205. MELAMED, supra note 69, at 222, 292. Moreover, in detailing his reasoning for insisting on granting the new agency discretion over key issues, he stated that because “the exchanges had the experts,” their positions would “ultimately prevail.” Id. at 217.
susceptible to capture.

The exchanges’ negative reaction to the independent agency proposal is also compatible with a risk aversion, rather than a regulatory capture, explanation. Risk-averse individuals will prefer a known regulator to an unknown one, even if they have not captured the regulator, because they are more concerned over the worst-case scenario, the possibility that regulation will be more burdensome under a new regulator, than the upside scenario, that a new regulator will implement significant improvements in the regulatory regime. The risk aversion explanation of the exchanges’ position on an independent agency is supported by the CBOT’s experience in 1972, when it created a separate entity, the Chicago Board Options Exchange (CBOE) to trade stock options,206 and registered it as an exchange with the SEC. Negotiations with the SEC were frustrating and protracted, as the SEC sought to force the products into the utterly inappropriate securities regime.207 Such an experience undoubtedly made the CBOT extremely wary of being subject to a new regulator. By contrast, the Department of Agriculture staff at least had experience with, and appreciation of, the economic essentials of futures contracts.208

The most important objection to the independent agency proposal voiced by the exchanges, consistent with either the capture or risk aversion theses, was that the agriculture committees could lose oversight jurisdiction if an independent agency was created.209 Grain and farming organizations opposed to the independent agency proposal similarly raised this jurisdictional objection.210 While this concern may have played to the audience, it highlights an institutional consideration somewhat different from, although not at odds with, agency capture or risk aversion. It illustrates the strong ties between interest groups and oversight committee members, and is in accord with what political scientists refer to as “fire alarm” oversight of regulatory agencies by Congress. In this perspective on oversight, Congress controls


207. For example, it insisted that there be an “issuer” and a prospectus, as well as 50% margins. See Memorandum from Philip McBride Johnson, former Chairman of the CFTC, to Author, Apr. 11, 1996, at 4 (on file with Yale Journal on Regulation).

208. This experience probably also accounts for the exchanges’ support of the expanded and exclusive authority over all futures contracts given to the CFTC. The CBOT did not want the SEC to be able to assert authority over the financial futures products it was planning to launch. Id. Melamed also considered the exclusive jurisdiction provision critical to his support of the legislation because it ensured that the SEC and state regulators would not have oversight over futures markets. See MELAMED, supra note 69, at 217.

209. See 1974 Sen. Hearings, supra note 183, at 190 (statement of Michael Weinberg, Chairman, Merc); CFTC Hearings, supra note 188, at 118 (statement of Carlos Bradley, President, Kansas City Board of Trade).

210. See CEA Hearings, supra note 196, at 140 (statement of William F. Brooks, President, National Grain Trade Council); CFTC Hearings, supra note 188, at 262 (statement of L.C. Carpenter, Vice President, Mid-Continent Farmers Ass’n).
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administrative agencies by reacting to constituent complaints about agency action ("fire alarm" oversight) rather than by its own active preventative monitoring of the agencies through committees ("police patrol" oversight).\textsuperscript{211} Congressional oversight thereby ensures that agencies are responsive to the concerns of the key legislators' constituents. The witnesses' intense interest in retaining the Agriculture Committee's control over the futures regulator is consistent with participants in the policy process having an expectation of a fire alarm institutional arrangement.

In a system of fire alarm oversight, even if a group has "captured" an agency and does not have to resort to appeals to Congress for regulatory assistance, a change in the oversight committee is potentially devastating. A new committee might have stronger ties to constituents with a different agenda for the agency and thus could produce an adverse alteration in regulatory policy. This is a variation of the Baumgartner and Jones venue-shopping explanation of how a regulatory status quo changes. If the committee overseeing futures regulation were to change with the establishment of a new agency, then new lines of communication and relationships would have to be developed between the new set of legislators and exchanges, farm and grain trade groups, in order to maintain a mutually satisfactory system of congressional oversight. The fire alarm perspective, by highlighting the importance of the constituency connection to the successful operation of congressional oversight, aids in explaining why committees do not cede jurisdiction to other committees over matters that affect their constituents.

The issue of committee jurisdiction was, then, a potent criticism of the independent agency proposal for both constituents and legislators. Supporters of the proposal in the Senate and House went to great lengths to emphasize that chamber rules guaranteed that the agriculture committees would retain jurisdiction over any new entity. For example, the retention of Agriculture Committee jurisdiction was emphasized by Congressman Smith in his opening statement to the House Agriculture Committee's second hearing on CEA reform, in response to independent agency opponents' having raised the issue during the first hearing.\textsuperscript{212} It was also a focus of his testimony to the Senate committee.\textsuperscript{213} Allaying concerns over the potential loss of agriculture


\textsuperscript{212} See CFTC Hearings, supra note 188, at 3 (statement of Rep. Smith) (noting House rules and precedents provide agency created in a bill is under oversight jurisdiction of committee to which original bill was referred). Committee jurisdiction was a sensitive issue for representatives in 1974 for another reason as well. The House had established a committee, chaired by Representative Bolling, whose purpose was "a wholesale realignment of jurisdictions and a limitation of one major committee per member." King, supra note 6, at 76. Bolling's reforms were opposed by committee chairs and defeated in the House Democratic Caucus, and a second committee, chaired by Representative Hansen, was established by the Caucus, to devise weaker alternatives to Bolling's recommendations. Id. That committee's proposals were adopted in October 1974.

committee jurisdiction was, without question, a key requirement for developing support for the independent agency proposal.

A final objection to the independent agency proposal invoked by some Republicans in committee and on the floor was more philosophical: opposition to intervention in markets. This small number of critics emphasized that there was no support in the public record to justify a "takeover" by the federal government of the futures markets because there was no evidence that manipulation or speculation in the futures markets had caused the increase in food prices. The anti-regulatory objection was joined to fiscal concerns. These congressmen asserted that the inflation of the 1970s was due to "big spenders" in Congress, and that a new agency requiring vastly increased staff would add to the already onerous burden on taxpayers. This objection to the expansion of government intervention in commerce, albeit by a small minority, is one theme that ties the debate on futures regulation in the 1970s to the 1920s debate.

D. Enactment of the Commodity Futures Trading Commission Act: Analysis of the House Vote on Agency Independence (the Sisk Amendment)

The House Committee bill modified Representative Smith's proposal of an independent futures regulator and proposed instead an "independent" agency inside the Department of Agriculture. This agency was to be called the Commodity Futures Trading Commission and to be composed of the Secretary of Agriculture and four part-time public commissioners. Advocates of the independent agency proposal, who had lost in the committee, sought to amend the bill on the floor to make the public commissioners full-time. In their view, part-time commissioners were at a disadvantage compared to the Secretary of Agriculture and the Department staff, who were full-time government employees. Hence, a shift to full-time commissioners would be a move toward greater institutional independence. The full-time commissioners proposal (the "Sisk" amendment, named after

214. E.g., 120 Cong. Rec. 10,742 (1974) (statement of Rep. Goodling) (proposed CFTC as "one more instance where the Government is attempting to get its long arm around necks of more people" creating a "new bureaucracy"); H.R. Doc. No. 975, 93d Cong., 2d Sess. 165 (1974) (statement signed by Reps. Price, Baker, Symms and Young) (claiming that bill "represents a total lack of faith in our market-oriented free enterprise system," and "if... passed, bureaucrats in Washington will run the market"). Similar concerns were occasionally expressed by a witness, e.g., 1974 Sen. Hearings, supra note 183, at 760 (letter from Great American Silver Co.) (stating "It is my understanding that there is a bill pending for the government to meddle in commodity trading. As the SEC has been such a horrible failure in this regard, I fail to see how an additional bureaucracy could possibly do any good. Aside from wasting money, it would be a further restriction of free enterprise in this country.")

215. See, e.g., 120 Cong. Rec. 10,743 (1974) (statement of Rep. Price); Minority Views, supra note 214, at 165 (statement signed by Reps. Price, Baker, Symms, and Young) (claiming that bill lacks "evidence that the new and far-ranging authorities proposed by the bill are either necessary or desirable").


the sponsoring representative) lost by a vote of 158 to 179 (95 not voting). The Sisk amendment vote was a party vote: A majority of the Democrats voted for the amendment, and a majority of the Republicans voted against it.

The party-line vote on the Sisk amendment is distinctive among votes on futures legislation. It is consistent with the thesis that the motivation for establishing an independent agency was to leverage congressional influence over agency policy. Neither the final vote on the CFTC Act, which passed by a vote of 281 to 43 (108 not voting) shortly after the amendment's defeat, nor the earlier votes on futures regulation in 1921 and 1936 (nor the 1991 vote discussed below) were party votes. Moreover, the voting pattern on futures trading bills is at odds with the modern trend in House voting: Party votes in the House steadily declined since the New Deal, from 60% of the recorded roll-call votes during Roosevelt's Administration to under 35% during the Nixon and Ford Administrations. These data make plain that the political dynamics concerning the modern organization of U.S. futures regulation were anomalous for the issue space, as well as for the historical era.

Analysis of the vote on the Sisk amendment confirms the party-line component of the vote and that this issue was fundamentally different from prior futures-trading issues. Table 13 decomposes the vote on the Sisk amendment by region and party, and reveals strikingly different results from the analyses in Tables 3 and 8 of the 1921 and 1936 votes. In virtually all regions, the difference in voting across party is dramatic, with almost all Democrats voting for and almost all Republicans against the amendment. The cross-tabulation of the vote on the amendment by party is statistically significant at less than .001 (chi-square of 130.3). In two regions, the South and New England, where Democrats are more conservative and Republicans more liberal than the members of their party in other states, the voting was more evenly divided across the parties, so that the party-line characterization of the chamber's vote is obscured. But party affiliation, rather than ideological alignment, best describes this vote. This is because a majority of the Southern Democrats voted for the amendment, which would not be the case had this been an ideological vote (a conservative coalition vote). These

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218. See 120 CONG. REC. 10,763 (1974).
221. In two of the cross-tabulations by vote and party, controlling for region, the border and New England regions, using Fisher's exact test because there are too few cells with expected counts greater than five to use the conventional chi-square test, the test statistic is not significant. For all the other regions, the chi-square test can be used and it is significant at less than 1%.
222. Using the D-nominate first dimension scores as the proxy, both the median and mean score of the Southern Democrats are significantly more conservative, and of the New England Republicans significantly more liberal, than the median and mean scores of their parties.
223. A conservative coalition vote is defined as a vote where a majority of Northern Democrats are opposed by a majority of Southern Democrats and a majority of Republicans. ALDRICH, supra note 75, at 313, n.2.
data are persuasive evidence that party politics, rather than constituent interest, explains the 1974 vote. The same result is evident in Table 15, which presents a regression analysis of the vote on the Sisk amendment, paralleling the analyses of the 1921 and 1936 votes provided in Tables 5 and 10. The variables' descriptive statistics are reported in Table 14; they include additional district-level characteristics that became available with the 1970 census. No specific constituent interest variable is a significant explainer of the vote: Only ideology, and party when included directly in the vote regression (Models 3 and 4), matter. Moreover, the second dimension is less significant in explaining the vote than the first dimension in all of the models reported in the table, as well as when the D-nominate scores are the only regressors (not shown). In addition, the farm variable does not become significant if the second dimension is excluded (not shown), as it did in the 1921 and 1936 vote regressions. These results underscore that farm state concerns were not at stake in the vote on the CFTC's independence and are consistent with the farm organizations' not having been united on the question of agency independence.

In addition to legislators' ideology as a function of constituent preferences \((\text{Pred}(1)\) and \(\text{Pred}(2))\), personal ideology \((\text{Res}(1)\) and \(\text{Res}(2))\) is an important explanatory variable. Both the fitted and residual components from the decomposition of the first dimension score are significant, but the regression loses explanatory power when the residual is omitted (compare Models 1 and 2). This is the only finding of significance paralleling the results of the 1921 regressions. The significance of \(D\)-nominate(1) and its decomposed components is undoubtedly picking up the effect of party (the more liberal voters are Democrats). But it may also reflect the voting patterns of Northern Republicans and Southern Democrats, depicted in Table 13, which were at variance with the majorities of their parties, and whose ideological proclivities were closer to their political counterparts than compatriots. This further suggests that the institutional prerogatives issue was related to divided government: Differences with the President over substantive policies led legislators to seek to assert control over the executive.

224. The decomposition regressions were again significant: the adjusted R\(^2\) for the regression on \(D\)-nominate(1) was .7789, and for that on \(D\)-nominate(2) was .6393. There are additional district-level variables in these regressions because of the greater availability of data in the 1970 census: median income (\(\text{MedIncome}\)) and median age (\(\text{MedAge}\)). In addition, college education (\(\text{PctCollege}\)) was used in place of general literacy. These three new variables correlate closely with likelihood to vote, and therefore proxy for measuring the ability of a congressman to deviate from his constituents' preferences. The significant regressors for the first dimension were party, South, percentage voting for McGovern for president, percentage black and farm population; the significant regressors for the second dimension were farm population, median voter age, median income, party, South and percentage voting for McGovern for president.

225. It is possible that farm constituents' concerns were important but trumped by strict enforcement of party loyalty, but there is no reference in the record to arm-twisting by party leaders to obtain votes, and, of course, the amendment was defeated.
branch, and the outliers in the Democratic (Republican) party who agreed (disagreed) with the Administration's policies were less (more) likely to want to exert such control in the context of futures trading regulation.

Membership on the Agriculture Committee has, as before, no impact on voting, a predictable result as the committee's preferences were representative of the chamber's (see Table 16). In addition, the district-level constituent variables again have no explanatory power when included in the vote regression (Model 4).

The explanatory factors for voting on futures regulation in 1974 are therefore at variance with those of the 1921 and 1936 votes: The specific constituent variables are not significant. One possible explanation is suggested by Poole and Rosenthal's analysis of voting on railroad regulation in the nineteenth century. They hypothesize that in the formative stages of regulatory policy, legislators may not fully understand how an issue relates to long-term preferences and stable coalitions will not yet be formed. In those circumstances, the d-nominate variables will provide a poor fit of the voting data. As legislators obtain more information, issues become mapped into the coalitional pattern of the historically low (two) dimensional space, and the d-nominate scores will dominate economic constituent variables in explaining votes. Such a scenario is consistent with the difference between the 1974 vote and the 1921 and 1936 votes concerning the significance of the constituent variables.

An alternative explanation of the insignificance of the farming constituent variable is the decline in importance of farm districts. The average farm population per district declined from .38 to .04 from 1921 to 1974 (compare Tables 4 and 15) and the median district farm population dropped from .41 to .02. Moreover, the top quartile of district farm population in 1974 began at .06, compared to .54 in 1921. The number of legislators who would be sensitive to farmers' concerns therefore had dramatically declined between 1921 and 1974. Thus, for farmers to obtain support for the policy positions they supported, they would need to engage in logrolling, which, if successful, would undercut the explanatory power of the farm variable in the regression. However, at odds with this explanation is the result of a regression analysis of the House vote on the CFTC Act's final passage (not shown), in which the farm population variable is positive and significant in explaining the vote. In contrast to 1921 when almost all commodity exchange districts'
legislators voted against regulation, in 1974 virtually all of these legislators voted for the full-time commissioner amendment. The exchange variable is also not significant in the regressions on the final vote. The number of districts with a futures exchange remained, however, essentially unchanged from 1921 to 1974. Thus, diminished local presence cannot explain the exchange variable's insignificance. Given the exchanges' expressed disapproval of this institutional arrangement, it is possible that heightened issue salience due to rising food prices reduced the influence of the exchanges on their legislators. Commodity exchanges were also more frequently a topic of popular reporting in the 1970s than in the 1920s, as shown in Table 2, although the coverage of commodities exchanges continues to be swamped by that of stock exchanges. And, as already noted, consumer concerns about food prices were substantial. Higher visibility of an issue diminishes a legislator's ability to support an interest group whose concerns conflict with popular sentiment.

A legislator's decision to vote against the exchanges' position on an independent agency due to constraints created by heightened issue salience conveniently dovetailed with institutional reasons to oppose the exchanges' position, the desire to create an agency more responsive to Congress than the President. Although the more independent agency structure was defeated in the House vote, as the exchanges and many farm groups desired, the insignificance of the variables representing those interest groups in explaining the vote suggests that their influence on the issue outcome was weak, as subsequent events demonstrated, when an independent agency was established.

E. Differences Between the House and Senate on Independence

The Senate rejected the House's approach to the CFTC and enacted a provision creating a separate independent regulatory commission. As Table 12 indicates, the House Committee heard more witnesses testifying against an independent agency than did the Senate Committee. The discrepancy across House and Senate Committee witness lists parallels the divergence in the chambers' enactments: The House retained the agency in the Department while the Senate did not. The difference in witnesses' positions is largely due to a change in who testified. Of the twenty-six Senate witnesses who had not testified in either of the House hearings, fourteen supported an independent

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228. Of the voting representatives, 13 had an exchange in their district in 1974, compared to nine in 1921.

229. Even in the 1970s, commodity trading's salience was low compared to other issues. Baumgartner and Jones find over 50 entries for most of their subjects in the 1970s, and in some years over 100 entries. BAUMGARTNER & JONES, supra note 4, at 91 (tobacco consumption), 95 (pesticides), 130 (urban affairs), 162 (alcohol abuse).

230. There was no Senate vote on the independent agency provision, nor any Senate roll-call votes on the bill or any amendments to it.

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agency, one was against it and the rest expressed no opinion on the issue.231

This obvious example of witness-stacking is at odds with the contention that
committees use balanced witness lists.232

One possible explanation of the difference in policy preferences between
the chambers is institutional. House members may be closer to interest groups
than senators because of the greater frequency of House elections. Cutting
against this claim are the possibilities that frequent elections make legislators
more responsive to voters and that the interest groups concerned with futures
trading are concentrated in only a few regions. In addition, senators have
broader and more heterogeneous electorates than representatives because they
are elected statewide. With more potential groups among a voting
constituency, a senator may well be more responsive to specific interest
groups than a representative because the broader electoral base increases the
likelihood that a group is associated with a local constituency.

There is, however, little evidence of a differential interest group effect on
voting between representatives and senators: House members who become
senators vote no differently from the remaining House members in their state

231. Only three witnesses changed their position in the interim between the House and Senate
hearings, and five organizations developed a position over the period. Two witnesses (an unregulated
exchange and a commodity broker) changed to support an independent agency from initial opposition,
and one witness (a grain company) changed to support the House bill and oppose an independent agency
from initial support of it. I have no information concerning the motivation for the reversals in position.
Of the five witnesses newly taking a position in the Senate hearings, three were opponents of an independent
agency (the Department of Agriculture and two potato farmer groups), and two were supporters (a
commodity exchange firm and the cotton shippers association).

232. See WRIGHT, supra note 8, at 42. The differential stacking of witnesses by the House
committee is consistent with both an informational and publicizing role for a hearing (despite Wright's
suggestion that informational hearings have balanced lists). The House hearings occurred earlier in the
legislative process than the Senate hearing, when reform proposals were first being formulated. Those
organizations most concerned over the expansion of regulation would have expressed greater interest in
testifying, in accordance with the view that asymmetric stakes in legislative outcomes produce differences
in political activity: namely, groups that will experience losses from legislation will lobby more intensely
than groups that will benefit from it. See RUSSELL HARDIN, COLLECTIVE ACTION 82-83, 129-21 (1982).
If the committee did not limit witnesses, it would end up with an unbalanced list without having intended
to bias the record in favor of a predetermined policy outcome. But it is also possible that the House
committee deliberately sought the testimony of opponents of increased regulation in order to be able to
justify modification of the Smith subcommittee's recommendations. Such an interpretation is consistent
with the memoirs of one of the industry participants on the creation of the CFTC: Melamed suggests that
the futures exchanges turned to the Agriculture Committee when they came under attack by the Smith
subcommittee, and gained the Agriculture Committee Chairman's ear by claiming that Smith was
"poaching" on his jurisdiction; when the Chairman placed the issue in the hands of the committee's
associate counsel "to save" the exchanges from Smith, it was decided that the committee had to hold its
own hearings. MELAMED, supra note 69, at 215. The Senate committee hearing is less ambiguously
characterized as in the publicizing mode because all three Senate bills under the committee's
consideration established an independent agency, which had already been rejected by the House. More
important, the Senate legislative history emphasized that only the Department of Agriculture "strongly
opposed" the creation of the new agency, and that the "overwhelming weight of the testimony" was in
H.R. 13113, SEN. REP. No. 1131, 93d Cong., 2d Sess. 21 (1974). Given the disparity in witness
testimony taken across the chambers, this statement in the Senate report strongly suggests that the
difference in the Senate's witness list from that of the House was a deliberate instance of witness
stacking.
delegation or from the senators they replaced, or from how they voted as representatives.\footnote{233}{See Bernard Grofman et al., *House Members Who Become Senators: Learning from a 'Natural Experiment' in Representation*, 20 LEGIS. STUD. Q. 513 (1995).} House members do rely more on campaign contributions from interest groups than senators,\footnote{234}{See WRIGHT, supra note 8, at 131-33; SABATO, supra note 32, at 77.} but the empirical research on the impact of campaign contributions upon voting, which provides only mixed evidence of any significant effect, does not indicate any differences in effect across office held.\footnote{235}{For reviews of the literature see SABATO, supra note 32, at 135; WRIGHT, supra note 8, at 141-44; and Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89, 91-97 (1995).} The institutional explanation of the cross-chamber difference is, therefore, problematic.

A better explanation for the policy difference on agency structure between the Senate and House bills is ideological differences across the chambers. As indicated in Table 16, using Poole and Rosenthal first dimension scores that have been adjusted to create a common space across the two chambers as the measure of legislator ideology,\footnote{236}{The ideological scores used to undertake this analysis are not the same d-nominate scores used in the vote regressions because those scores are separately estimated for each chamber and hence not comparable. They are, instead, specially estimated nominate scores that adjust the legislators' coordinates into a common space across the chambers using an alternating least squares regression technique. See KEITH T. POOLE, *RECOVERING A BASIC SPACE FROM A SET OF ISSUE SCALES* (Carnegie-Mellon University, Graduate School of Industrial Administration Working Paper No. 44-82-83, 1996). These common space scores are derived from w-nominate estimates, a static estimation procedure that estimates scores for a single Congress, in contrast to d-nominate, which uses the first 99 Congresses. POOLE & ROSENTHAL, supra note 62, at 249. The common space w-nominate scores are highly correlated (.91) with the d-nominate scores.} in the 93d Congress the median voter in the Senate was significantly more liberal, hence more supportive of expanding government, than the median House voter. Poole finds similarly that the Senate was more liberal than the House throughout the 1970s using a different nonparametric rank-ordering measure.\footnote{237}{KEITH T. POOLE, *CHANGING MINDS? NOT IN CONGRESS!* 10 (Carnegie-Mellon University, Graduate School of Industrial Administration Working Paper No. 1997-22, 1997).} The difference is not a function of the size of the majority party, as the Democrats were 57% of the House and 58% of the Senate.

The difference in ideological preferences across the chambers provides a more compelling explanation for the divergence in chamber bills than the other institutional explanation. The committees chose the proposal most consonant with the preference of their chamber's majority—the more liberal chamber (the Senate) was presented with the more liberal provision regarding the structure of the futures regulator (an independent agency).\footnote{238}{The Senate committee’s action may also be explained by a logroll: If the more liberal committee members more intensely supported an independent agency than the more conservative members opposed it, this could produce a bill that included an independent agency in exchange for other provisions of greater concern to the conservative committee members (an untestable proposition given the available data).} The committees were only marginally more conservative than their chambers, and
they were not significantly different ideologically from each other. Thus, their behavior is consistent with the theory of committees as information-gatherers for the majority, rather than as self-selected advocates of policies divergent from the majority's preference. They proposed the agency structure that best accorded with the ideological preferences of their chambers.

In addition to ideological differences, the weight accorded to institutional prerogatives and, correspondingly, the antagonism felt toward the Nixon Administration, is likely to have varied across the chambers. Senators tend to be more jealous guardians of congressional authority as against the executive branch than representatives. There are good theoretical reasons for such a difference. Individual senators exert greater influence over public policymaking than individual representatives, given institutional differences in chamber decisionmaking, such as the filibuster. Senators are also able to exert greater influence on independent agencies than members of the House through their constitutional power over appointments. More immediate evidence of this hypothesis from the 93d Congress is the symbolic action of the subcommittee of the Senate Appropriations Committee with jurisdiction over the Department of Agriculture: It refused to hold hearings on the fiscal year 1974 budget in protest against the Administration's termination of several agricultural programs in 1973.

Reinforcing a difference across the chambers in commitment to protecting institutional prerogatives against the executive was the timing of the two chambers' actions. The policy struggles between Congress and the Nixon Administration were culminating in the initiation of impeachment proceedings when the Senate began considering the House bill. Thus, institutional considerations, as well as anti-Administration sentiment, worked together with the ideological difference between Senate and House to increase support for an independent agency proposal.

239. Neither committee is an outlier under Krehbiel's tests for a committee's representativeness, discussed in note 61, supra. As Table 16 indicates, the committee D-nominate(1) score medians and means are not significantly different from those of the chambers. In addition, the committee D-nominate(1) score variances are not significantly different from those of the chambers. This finding of committee representativeness is consistent with the finding in McCubbins and Cox, supra note 41, at 206-13 tbls. 28 and 29, that the party contingents on the House Agriculture Committee in the 93d Congress were representative of their parties. It bears repeating that the ideological measure used here is not specific to farm policy but rather a general left-right ideological measure, while political scientists, when developing hypotheses concerning the representativeness of committee preferences, have in mind preferences specific to the committees' jurisdiction. Because the key piece of the legislation in question entails a general ideological, as opposed to farm-specific, issue concerning institutional organization, the indicia of preference outliers relevant to the vote, in my opinion, are the first dimension d-nominate scores.

240. See 29 Cong. Q. Almanac 134 (1973). I would like to thank Ian Kahn, Yale College class of 1996, for bringing this fact to my attention in his excellent research for me on appropriations committee hearings in the 1970s.
F. The Conference Committee's Reconciliation

The House effort at retaining the agency in the Department of Agriculture ultimately failed. The Conference Committee that was convened after the Senate enacted its bill agreed to the Senate substitute, with an additional, albeit largely cosmetic, compromise provision creating a liaison officer in the Department and a liaison office, staffed by the Commission and located in the Department, to facilitate the transmission of information between the two entities.241 The House adopted the Conference Committee bill without discussion of the change in the regulatory agency's structure by a vote of 375 to 4 (55 not voting). Given the chamber vote on the Sisk amendment, it is difficult to maintain that the House members saw no significant difference between their original formulation of an entity with part-time commissioners inside the Department of Agriculture and the Senate's CFTC, as the liaison offices would not appear to diminish significantly the CFTC's independence from the Department.242 The legislative record does not, however, indicate why the House conferees ceded to the Senate conferees on the establishment of an independent agency.

The House conferees' capitulation to the Senate version was not a function of the conferees being unrepresentative of their chamber: A majority of the House conferees, all of whom were agriculture committee members, as is the usual composition of such committees, had voted against the Sisk amendment. While the assurance of agriculture committee jurisdiction over the CFTC may have assuaged some industry and committee members' concerns over the new agency enough to permit the Senate version to be adopted without opposition, the jurisdictional issue had been aired in the House prior to the vote on the Sisk amendment. It is possible that the compromise addendum was perceived as offering some valuable benefits for constituents. The liaison office could provide an early warning of CFTC proposals to private parties such as the exchanges, which had long-standing ties to the Department. These parties could then alert the congressional committees in the mode of fire alarm oversight. While perhaps of symbolic value, it is improbable that any such benefits were real. But it must be noted that independent of the revised bill's substantive content, institutionally the conference committee outcome is not exceptional: The Senate wins more frequently than the House in conference (60%), and the second chamber to consider the bill (the Senate in our context) is also more likely to win in

241. The duty of the Department to provide space for a Commission representative was eliminated in 1977. JOHNSON & HAZEN, supra note 119, at 223.
242. In presenting the conference bill to the Senate, Senators Talmadge and Clark engaged in a colloquy for the record to indicate that the liaison offices would have solely an informational role and no impact on the Commission's independence. See 120 CONG. REC. 34,998 (1974).
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conference (70%). In addition, most conference reports are adopted, and they typically come up for consideration with privileged status, without the opportunity for amendment.

It is also possible that a simple logrolling story explains the House's concession. Other provisions may have been of greater concern to the futures industry, and correspondingly to the House conferees, than the independence of the futures regulator from the Department of Agriculture. In fact, the Conference Committee had to resolve many conflicting provisions in the two bills besides the CFTC's structure. But a logrolling explanation is not persuasive. The proposals most vigorously opposed by exchange witnesses during the hearings—government setting of margins and prohibition of dual trading—were not included in either the House or Senate bill. More important, of twenty-two differences between the two bills identified by the Conference Committee, only two were resolved in favor of the House version: a provision allowing the formation of voluntary futures associations to regulate brokers and deletion of a Senate provision requiring commodity trading advisors to provide risk disclosure statements before advising a person to buy or sell a futures contract. It is inconceivable that either of these provisions would be so critical to the exchanges or other opponents of an independent commission as to motivate a compromise on the agency's structure. Thus, if logrolling took place, it most probably occurred during the Senate committee's deliberations, and the House conferees went along with that preexisting deal, rather than actively crafted it.


244. For example, of 2,495 conference reports from 1947 to 1982, only 56 were either rejected or recommitted to the committee. Id. at 252.

245. Issues resolved in favor of the Senate bill included elimination of an economic justification for contract designation; a requirement to accept U.S. Warehouse Act receipts for delivery; a requirement for daily trading reports; regulation of leverage contracts (bullion options); disciplinary procedures for exchange members by the CFTC; the Senate's narrower emergency language in place of the House's broad scope for Commission direction of exchange activities; the Senate's higher dollar ceiling for arbitration claims and its longer response period for contract markets to Commission questions on contract delivery points; the Senate's exclusivity provisions; and compromises based on Senate refinements of House provisions on arbitrations, antitrust considerations, the definition of hedging, insider trading provisions, and CFTC powers to issue injunctions and to approve exchange rules and regulations. See CONF. REP. NO. 1383, 93d Cong., 2d Sess. 33-42 (1974).

246. Of all of the issues that had to be reconciled in conference enumerated in note 245, supra, only two were mentioned as determinative issues by one of the key futures market participants twenty years later, the exclusivity provision and the elimination of an economic justification for new contract approval, both of which were resolved in the Senate's favor. See MELAMED, supra note 69, at 217 (stating he told committee counsel at the start of the House hearings that the Merc could support legislation if, among other items, it provided that the new agency had exclusive jurisdiction and new contracts would not be subject to an economic justification for approval). The Senate version of these issues was the version Melamed preferred. Melamed does not discuss the debate over the agency's structure, nor list it as a condition for Merc support of the legislation, implying that he supported an independent agency from the start (although the Merc testified against an independent agency). It is therefore quite possible that the futures industry traded off agency independence for a favorable resolution of other issues in the Senate drafting negotiations.
A complementary explanation for the Conference Committee's adoption of the Senate substitute bill over the House bill is that the political environment had decisively shifted when the Conference Committee undertook its work. The independent agency proposal gave Congress equal, if not greater, control over regulatory policy, than the Administration. This meant Democratic-party control, for as the majority party, the Democrats would control the agenda of the committee overseeing the agency. The Conference Report came before the House in October 1974, with a Republican party severely crippled following Nixon's resignation. While the Democrats could aspire to regaining control of the executive branch given recent political events, they had controlled Congress for all but a few years since the 1930s and they surely had little concern over losing control of the legislature. There was accordingly an upside return for Democrats with virtually no downside in creating an independent regulatory commission. Given a demoralized opposition party, this may have encouraged the House Democratic conferees who had originally opposed an independent agency to accede to the Senate's agency structure.

Two other provisions in the CFTC Act support the interpretation that diminishing the executive branch's control over the futures regulator explains the Conference Committee's resolution of the regulatory structure issue. First, the new agency was given the power to initiate an action for injunctive relief in federal court without going through the Justice Department. Such authority frees an agency from executive branch oversight and permits it to establish its own litigation agenda. This authority had also been given to the SEC and the Federal Trade Commission (FTC). Proponents of the provision maintained that it would avoid "partisan political pressures" that occurred when the Justice Department had a "veto" over litigation, referring to the FTC's having been "hamstrung" in its efforts to enforce its authorizing statute by the Justice Department. As with the independent agency provision, a proviso for direct injunctive powers was not contained in the House bill but was included in the Senate bill and adopted by the Conference Committee. The House bill had simply permitted the new agency to seek an injunction through the Justice Department.

247. This structure—indeed, independent litigating authority—may in practice not adequately guarantee an agency's independence from the executive despite Congress' intentions, if Congress does not vigilantly police its creation. See Neal Devins, Political Will and the Unitary Executive: What Makes an Independent Agency Independent?, 15 CARDOZO L. REV. 273 (1993) (discussing how Justice Department, with White House backing, was able to exert control over Equal Employment Opportunity Commission).

248. The FTC had only recently received such authority. See 1974 Sen. Hearings, supra note 183, at 209 (statement of Rep. Smith).

249. Id.

250. Because the direct injunctive power provision was adopted late in the legislative process, there is very little attention directed to it in the legislative record. The Department of Agriculture testified in support of the House provision at the Senate hearing, and was not invited to comment on whether the
The second provision providing Congress with greater control over the agency was a “sunset” provision, which, by authorizing the agency for only a limited number of years, required its periodic reconsideration through a reauthorization process. An agency subject to periodic congressional review concerning the justification for its existence is thought to be more responsive to the policy concerns of members of Congress than one not undergoing such scrutiny. The sunset provision was added to the House bill by amendment on the floor toward the end of the legislative deliberations; the committee members managing the bill agreed to the amendment without discussion, and the House then approved it without debate or a recorded vote.\footnote{251}

It is important to conclude by noting that the congressional objective of asserting greater control over the futures regulator that led to the creation of the CFTC was not an isolated event. A number of legislative reforms throughout the 1970s were directed at strengthening congressional oversight of agencies. The rationale for this activity has been identified as a reaction to divided government and, in particular, Nixon’s challenge of Congress “in a clear and open way” by “impounding funds, harass[ing] civil servants in programs favored by congressional committees and prosecut[ing] the Vietnam War as he saw fit.”\footnote{252} The most convincing explanation of the dispersed regulatory control of financial markets is, then, that it is the legacy of congressional efforts to assert institutional prerogatives in the context of divided government, in conjunction with the historical fortuity that futures trading regulation was within the agriculture committees’ jurisdiction.

IV. The Battle over Financial Futures Regulation: 1975-92

From its creation, the CFTC’s exclusive jurisdiction over futures markets was challenged by other agencies with jurisdiction over the underlying financial instruments or market participants. Despite repeated efforts, the agency’s jurisdiction has not, however, been significantly altered. The federal banking regulators obtained the exemption of bank derivatives business from CFTC jurisdiction in the CFTC’s authorizing statute, in a provision known as the “Treasury amendment” because it was added to the bill at the Treasury Department’s request.\footnote{253} The SEC’s position, in contrast, was left ambiguous by the statute’s combination of a grant to the CFTC of exclusive jurisdiction

agency would support direct authority to sue for an injunction as well. See id. at 229 (statement of Richard Feltner, Asst. Secretary for Marketing & Consumer Services, Dep’t of Agriculture).

251. See 120 CONG. REC. 10,766-67 (1974). There is no other reference, let alone discussion, of such an institutional feature anywhere in the legislative record.


over all futures on all commodities with a preservation of the SEC’s existing jurisdiction (which at the time consisted of regulation of only one type of derivative security, stock options). This remains the status quo: Banking regulators have successfully retained their jurisdiction and preserved banks’ markets’ exemption from CFTC regulation, while the SEC has failed in its efforts to expand its jurisdiction significantly at the CFTC’s expense.

A. The SEC’s Initial Efforts at Shifting the Jurisdictional Balance

Shortly after the creation of the CFTC, the futures exchanges introduced new products that revolutionized financial management: Futures contracts whose underlying assets were financial instruments. In 1975, a financial futures contract on Ginnie Mae pass-through certificates began trading on the CBOT. The SEC, which regulated the underlying certificates (because they were securities), opposed the initiation of the trading in the contract. In fact, it opposed the CFTC’s exclusive jurisdictional grant over futures from early on, fearing that it would lose its authority over securities transactions. The Ginnie Mae contracts ultimately failed, but financial futures have been extraordinarily successful products, a success which is at the root of the interagency jurisdictional battle.

Although the SEC was not a witness at any of the hearings on the CEA reform in the 1970s, the House bill contained a provision preserving SEC jurisdiction. The language of this “savings” provision was altered in the Senate bill. The SEC attempted to persuade the Conference Committee either to eliminate the exclusive jurisdiction provision or to rewrite the savings clause to adopt the language of the House bill, in order to ensure it would prevail over the CFTC in overlapping or contested jurisdictional areas. This effort failed; the conferees refused to amend the bill any further. This outcome was consistent with the other reconciliation decisions, which retained the Senate’s version on virtually all contested issues. It was also in accord with the views of the futures exchanges, which did not want SEC jurisdiction over the financial derivatives that they planned to market. The SEC was only able to obtain a statement on the Senate floor, at the time of the adoption of the conference report, of legislative intent to preserve the SEC’s

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254. The market for financial futures exploded in the late 1970s in response to increased volatility in exchange and interest rates following the demise of the Bretton Woods system of fixed exchange rates in the early 1970s and a shift in Federal Reserve monetary policy from interest rate levels to money supply in 1979. See Roberta Romano, A Thumbnail Sketch of Derivative Securities Regulation, 55 Md. L. Rev. 1, 8, 12 (1996).

255. The SEC sent a letter to the CBOT objecting to the trading as illegal under the securities laws, met with the exchange and the CFTC to express its view, and memorialized its position in writing to the CFTC. J. JOHNSON & HAZEN, supra note 119, at 265-66.

256. See MELAMED, supra note 69, at 217.
The Political Dynamics of Derivative Securities Regulation

The SEC persisted in seeking statutory revision of the CFTC’s jurisdiction. At a hearing before the Senate Banking Committee, the SEC’s oversight committee, held four months after the CFTC Act’s passage, the SEC Chairman urged a statutory amendment to the federal securities laws delimiting the CFTC’s jurisdiction. He had previously expressed this position in writing to the House oversight committee. Although the committees were sympathetic to the SEC’s position, they did not have jurisdiction over the subject (the CFTC’s authority), and nothing came of the SEC’s initial attempt to reverse the exclusive jurisdictional grant to the CFTC.

But the SEC had repeated opportunities to resubmit the jurisdictional issue to Congress because of the CFTC’s status as a sunset agency. When the CFTC came up for its first reauthorization in 1978, the SEC launched what one CFTC chairman has called a “vigorous campaign to wrest jurisdiction from the Commission over futures contracts in at least some types of securities.” The General Accounting Office (GAO) and the Office of Management and Budget (OMB) supported the SEC’s efforts. The GAO had reversed its position during the course of the reauthorization to recommend transferring jurisdiction to the SEC, and the OMB adopted a similar stance.

257. Senator Talmadge, Chairman of the Senate Agriculture Committee and the bill’s floor manager, stated for the record that the exclusivity provision was not intended to preempt the SEC’s jurisdiction “over securities, including stock options, traded on any national securities exchange or any other U.S. securities market,” nor was it intended to supersede the SEC’s jurisdiction over investment contracts “except to the extent that jurisdiction is granted to the CFTC with respect to contracts for future delivery or options relating ... to tangible commodities, or which are effected on a contract market.” 120 Cong. Rec. 34,997 (1974) (statement of Sen. Talmadge). The exclusive jurisdiction provision had been added to ensure that there would be no regulatory gaps, as had occurred in the metals options scandal leading to the 1974 expansion of CEA jurisdiction. See text and accompanying note 196, supra.


259. See id. at 209. The SEC Chairman was responding to a November 1974 letter from Representative Harley Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, inquiring whether the newly enacted CFTC Act would adversely affect the SEC’s jurisdiction.

260. 2 JOHNSON & HAZEN, supra note 119, at 250.

261. See id. at 267-68.

262. See S. Rep. No. 850, 95th Congress, 2d Sess. 19 (1978). In 1974, the GAO had rejected the alternative of having the SEC, rather than a new independent agency, regulate futures. See 1974 Sen. Hearings, supra note 183, at 572 (statement of Henry Eschwege, Director, Resources and Economic Development Div., GAO). The OMB endorsed the GAO’s proposal and offered further suggestions. It recommended transferring the CFTC’s authority over registered securities to the SEC; establishing concurrent authority for the CFTC and SEC over unregistered securities; providing the Treasury Department with the right of final approval over futures on government securities and authority to suspend trading and revoke designated contract markets for such instruments; and abolishing the CFTC and reorganizing it into a subcabinet level agency headed by a single executive, which would give the President greater control over the agency. Agriculture, Rural Development, and Related Agencies Appropriations for Fiscal Year 1979, Hearings on H.R. 13125 Before a Subcomm. of Sen. Comm. on
One explanation for the GAO’s change in position is that the SEC was considered a tough regulator whereas the CFTC was deemed ineffective. The CFTC had, in fact, received an extremely critical review by the GAO and House Appropriations Committee investigators. \(^{263}\) The SEC was certainly a more visible agency: As Table 2 indicates, there was over five times more coverage of the SEC than the CFTC in the popular press during the 1970s. Whether the level of media coverage factored into the GAO’s analysis and affected the perception of relative enforcement skills is unknown. The GAO’s shift was apparently precipitated by an SEC memorandum to the GAO concerning the jurisdictional issue. \(^{264}\)

The agriculture committees were not about to cede jurisdiction to another committee’s agency. The 1978 effort at altering the allocation of jurisdiction resulted only in adoption of a requirement that the CFTC “maintain communications” with the SEC. \(^{265}\) It was not until the SEC’s regulated constituents (stock exchanges and securities firms) undertook intensive political activity and obtained the Bush Administration’s support in the wake of the stock market crash of 1987 that the SEC was able to make any inroads in the legislative process. But even with additional political support, the SEC failed to obtain jurisdiction over equity futures. In the late 1980s, there were also powerful countervailing forces concerned with the CFTC’s jurisdiction: money-center banks, who were dealers in highly profitable over-the-counter financial derivatives, and their federal regulators. The banking sector did not want to see the allocation of jurisdiction between the SEC and CFTC recrafted without ensuring the continuation of its exemption from regulation.

**B. Jurisdictional Controversies in the 1980s**

With the SEC’s repeated failure in the late 1970s to redraw the CEA’s jurisdictional provisions and the successful reauthorization of the CFTC in 1978, the forum of the interagency jurisdictional conflict shifted. The SEC changed tactics and began to permit its regulated entities to experiment in new financial products, rather than simply seek to prevent CFTC regulated entities from trading instruments pegged to securities. In short, in order to avoid losing financial market share, the SEC began to compete with the

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\(^{263}\) See, e.g., Reauthorization of the Commodities Futures Trading Commission: Hearings Before the Subcomm. on Agriculture Research and Gen. Legislation of Sen. Comm. on Agriculture, Nutrition and Forestry, 95th Cong., 2d Sess. 10 (1978) [hereinafter 1978 Reauth. Hearings] (statement of Sen. Leahy). Not all legislators considered the CFTC an ineffective regulator. Senator Helms, for example, maintained that the CFTC was overregulating and proposed its abolition. See id. at 213.

\(^{264}\) See 1978 Reauth. Hearings, supra note 263, at 228 (statement of John V. Rainbolt II, Vice Chairman, CFTC).

\(^{265}\) 2 JOHNSON & HAZEN, supra note 119, at 270.
CFTC by recognizing new products traded on stock exchanges that competed with futures, a strategy of expanding its jurisdictional scope rather than simply attempting to decrease that of the CFTC. This striking behavioral change is consistent with the SEC acting as a Niskanen-type bureaucracy, an agency whose goal is to expand the scope of its authority and thereby maximize its budget.266

In 1981 the SEC granted the right to trade options on Ginnie Mae certificates to one of its regulated exchanges, the CBOE. The CBOT, which traded Ginnie Mae futures and was thus a designated contract market under the CFTC, successfully sued the SEC to prevent the options’ trading, on the ground that the agency’s action was a violation of the CFTC’s exclusive jurisdiction.267 Thereafter, the CFTC and SEC reached an agreement, known as the Shad-Johnson accord after the agencies’ chairmen, which allocated options on securities to the SEC, all futures and options on futures to the CFTC, and options on foreign currency to the regulator of the exchange on which the specific option traded.268

The Shad-Johnson accord was codified by Congress as part of the CFTC’s second reauthorization in 1982.269 In addition to the jurisdictional allocation, the amendments to the CEA codifying the accord prohibited futures on individual stocks and non-exempted (non-U.S. government) bonds, required consultation between the CFTC and the SEC on the approval of stock index futures contracts, and gave the SEC veto power over stock index futures and options on such futures which are not broadly-based or otherwise susceptible to manipulation. The CFTC reached an accord with the SEC, despite the CBOT’s court victory, in all likelihood to preempt political pressure by the SEC that could obstruct its impending reauthorization process, as well as to provide greater certainty to market participants concerning the applicable regulatory regime.

The accord proved to be a short-lived jurisdictional truce as new products emerged such as hybrid securities that were not covered by the agreement because they were neither securities nor futures nor options (the instruments specifically allocated by the accord) but a complex combination of those instruments. The problem was squarely presented with the SEC’s approval in 1989 of equity index participation units (IPs), a hybrid security with both

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266. See WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).
267. Board of Trade v. SEC, 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982).
stock and futures characteristics, that was offered for trading by several stock exchanges. This SEC action was litigated by the Merc, which traded stock index futures. The federal court once again ruled against the SEC, emphasizing the plain language of the CEA, that exclusive means exclusive.270

To work, the 1982 accord had presumed that a determination would be made concerning whether or not a particular product was a futures contract or a security, and thereby allocated to the appropriate authority. Rapid innovation in financial products, undoubtedly related to competition across financial markets—stock exchanges developed IPs as a means of attracting the lucrative institutional business trading stock index futures rather than the underlying securities—rendered the accord inoperable, as products fit into neither category and raised once again the definitional stakes of the CEA’s exclusivity clause. The timing of the introduction of IPs coincided with the CFTC’s third reauthorization, and the court’s ruling preventing security exchanges from trading IPs was cited by proponents of transferring jurisdiction over equity derivatives to the SEC as evidence of the exigency of statutory reform.

The court’s decision on IPs doomed the product because there are very real and potentially costly differences associated with the restriction of a product’s registration to a specific regulator. In particular, there are marked differences in regulatory regime. The differences include market structure (e.g., the CEA, in contrast to the securities laws, requires open-outcry auction markets), broker regulations (e.g., the antifraud provisions of the Securities Exchange Act are construed to contain an investment suitability requirement in contrast to the CEA), and trading practices (e.g., insider trading is only prohibited under the securities laws). The IPs decision therefore became the backdrop to the legislative debate over the agencies’ respective jurisdictions in the 1990s, as the SEC, stock exchanges and their congressional supporters contended that the exclusivity provision hindered financial product innovation.271

271. E.g., The CFTC/SEC Jurisdiction and Margin, Joint Hearings Before the Sen. Subcomm. on Securities and the Comm. on Banking Housing, and Urban Affairs, 101st Cong., 2d Sess. 246 (1990) (statement of James R. Jones, chairman, American Stock Exchange); Issues Related to the Jurisdiction of the Commodity Futures Trading Commission and the Securities and Exchange Commission, Hearing Before the Sen. Comm. on Agriculture, Nutrition and Forestry, 101st Cong., 2d Sess. 58 (1990) [hereinafter Jurisdiction Issues Hearing] (statement of Richard C. Breeden, Chairman, SEC). It should be noted that in Kane’s model of regulatory competition, exclusive jurisdictions can ironically result in increased innovation, as sectors engage in what he refers to as structural arbitrage, creation of new products to avoid the high-cost regulatory jurisdictions. Edward J. Kane, De Jure Interstate Banking: Why Only Now?, 28 J. MONEY, CREDIT & BANKING 141 (1996). Kane’s model differs from the approach in this Article in how it understands the interaction between public awareness of an issue and legislative behavior. Because Kane models legislators and regulators as deliberately providing the public with “disinformation” concerning regulatory policies, issue salience is endogenous in his model. This Article’s analysis, however, considers the salience of an issue as exogenous from the standpoint of legislators.
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Following the court decision on IPs, the CFTC made a conciliatory offer to designate the stock exchanges as contract markets for IPs without having to comply with the regulations that differed between futures and securities exchanges, action that would reduce significantly the costs of the stock exchanges' compliance with the CEA exclusivity provision. No doubt, the CFTC's offer was motivated by concern that the securities industry would seek the repeal of the exclusivity provision in its forthcoming reauthorization process.

The stock exchanges rejected the CFTC's offer because of a further institutional difference of economic import. They wanted IPs to be subject to the securities and not the futures regulatory regime in order to be able to market IPs through the more numerous registered securities brokers instead of the far fewer registered futures commission merchants. They may also have been betting that they would fare even better in Congress (although as it turned out they did not).

In addition to the hybrid securities debate, there was a further important factor contributing to the demand for redefining the jurisdictional boundary between the CFTC and SEC by the 1990s. The stock market crash of October 19, 1987, when the Dow Jones Industrial average fell over 500 points (almost 23%), the largest one-day decline in the stock market's history,272 was also invoked by proponents of jurisdictional reform. The SEC and the New York Stock Exchange (NYSE) contended that trading in stock index futures and dispersed regulatory authority contributed to the crash because futures had lower margin requirements than securities and because the government's ability to manage market crises was rendered more difficult by the need to coordinate the actions of multiple regulators.273

The crash also introduced an important player on the SEC's side in the legislative debate, the Bush Administration, which sought government control over stock index futures margins and SEC jurisdiction over equity-based futures in reaction to the crash. This strengthened the banking and commerce committees' leverage in delaying the agriculture committees' CFTC reauthorization bill from 1989 to 1992.

Given the political history of interagency conflict, the blame accorded the futures markets and the decentralized regulatory regime for the stock market crash by the securities industry ought to be approached with healthy skepticism, and many distinguished scholars have questioned such

272. Robert J. Mackay, Introduction, in AFTER THE CRASH, LINKAGES BETWEEN STOCKS AND FUTURES I (Robert J. Mackay ed., 1988). This drop was preceded by a 10% decline over the prior three trading days, and rivaled the stock market crash of 1929, when the two-day drop on October 28 and 29 was 24%. See id.

contentions, as did the futures exchanges and CFTC. Higher margins on
futures contracts were in the self-interest of the stock exchanges, whatever
effect they conceivably would have on preventing stock market crashes,
because they would increase the cost of trading in futures markets compared
to stock markets, and thus improve the stock exchanges’ deteriorating
competitive position for institutional traders, who could more cheaply
transact in securities by trading derivatives. The jurisdictional stakes had
changed dramatically by 1990. The financial futures markets now not only
dominated the traditional agricultural futures markets, but, more
importantly, stock index futures, given low trading costs, dominated stock
trading.

Complicating the lobbying efforts of the SEC’s supporters was the
concern of the banking community, which was a new participant in the
CFTC’s reauthorization process. In 1987, the CFTC initiated an investigation
of Chase Manhattan Bank’s activities in commodity-based swap contracts
and proposed to regulate the hybrid instruments market, suggesting that
hybrids and commodity swaps might be unauthorized (non-exchange-traded)
futures contracts. These actions caused considerable consternation within
the banking community. Because swap contracts are an extremely lucrative
segment of the largest money-center banks’ activities (although commodity
swaps are a very small part of that swap business) and small banks use
interest-rate swaps as a risk management tool, banking regulators were
disturbed by the CFTC’s proposal to intervene in any swap market. Thus,
banks and their regulators were drawn into the jurisdictional controversy to


275. See, e.g., DON M. CHANCE, AN INTRODUCTION TO DERIVATIVES 236 fig. 7.1 (3d ed. 1995).

276. SEC STUDY, supra note 273, at 3-1 (daily contract trading volume in Standard and Poor’s (S&P) 500 index futures represented equivalent of more than double the daily trading volume on the NYSE in Sept. 1987). Although stock index futures trading volume declined significantly after the 1987 market crash, it is still one of the most actively traded contracts in the world. DAVID A. DUBOFSKY, OPTIONS AND FINANCIAL FUTURES: VALUATION AND USES 411 (1992). For a discussion of how investors use futures contracts instead of the underlying securities see Romano, supra note 254, at 31-35.


278. It also resulted in the commodity-swap business moving overseas. See Bair, supra note 277, at 700.

279. The over-the-counter market of unregulated derivative products has experienced explosive growth since 1980. See GENERAL ACCOUNTING OFFICE, FINANCIAL DERIVATIVES: ACTIONS NEEDED TO PROTECT THE FINANCIAL SYSTEM 36 (1994).
ensure enactment of an explicit exemption for swaps during the reauthorization process.

Finally, a series of scandals made the CFTC more vulnerable to a jurisdictional attack than in its previous two reauthorizations. A sting operation on the floor of the exchanges uncovered questionable trading practices and resulted in numerous criminal indictments in 1989. In addition, in response to an alleged manipulation of the soybean futures markets, the CBOT (with the CFTC's approval) took action against an institutional trader suspected of seeking to corner the market. This caused many farmers, who were hedgers on the same side of the market as that trader, to lose money. On top of these difficulties for the agency, there was a second stock market break in October 1989, which reignited the securities industry complaints over the discrepant margins on stock index futures and the underlying stocks.

C. The New Dynamics of the Reauthorization Process in the 1990s

The trading scandals, in conjunction with the second stock market crash, weighed heavily in legislators' evaluations of the CFTC because, in contrast to the metal options scandal in the 1970s, they involved the federal regulatory agency's domain. To put it mildly, the CFTC's supporters had a public relations problem. Public interest in futures products (as reflected in the Readers' Guide volumes tracked in Table 2) peaked in the early 1980s, just prior to the stock market crash. Media coverage of futures exchanges peaked even earlier, in the mid-1970s, at the time the CFTC was established. Thus, when Congress turned to consider the reauthorizing legislation, futures trading was no longer at its highest salience as an issue. But in contrast to the reportage in prior years, all of the articles on futures exchanges indexed in the Guide in the years following the crash were critical of the exchanges.

The dramatic increase in the economic importance of financial derivatives and the politics of scandal altered the political environment, because the organized opposition to the CFTC's exclusive jurisdiction (the SEC and its supporters) were operating in a context in which the public was receiving only negative information. Although the Senate Banking and House Commerce Committees (hereafter jointly referred to as banking committees) with jurisdiction over the SEC were not involved in the 1974 legislation creating the CFTC, they now became active participants in the CFTC's reauthorization. They intervened in the process, holding their own hearings in


281. Consistent with the tenor of the articles indexed by the Readers' Guide, Melamed recounts that the Chicago newspapers ran articles on the sting operation on the front page for two weeks, as well as stories about legendary traders who cornered the Chicago markets in the distant past. See MELAMED, supra note 69, at 392.
their oversight capacity of the SEC, in an attempt to tie the progress of the CFTC’s reauthorization to a reconsideration of its jurisdiction. Because securities markets were now directly implicated in CFTC regulatory issues given the stock market crash and the development of financial derivatives, the banking committees’ claims of jurisdictional interest had a plausibility that would have been questionable had they acted as aggressively in the 1970s.

1. The Administration’s Involvement in the Reauthorization Process

The banking committees relied heavily on Administration officials’ testimony to advance the SEC’s position and to challenge the agriculture committees’ refusal to revise the jurisdictional status quo. In addition, Administration supporters in the Senate not on the banking committee, as well as committee members, engaged in sharp procedural maneuvers to prevent the movement of legislation at odds with the Administration’s position, placing holds on bills.

The key official advancing the Administration’s position was the Secretary of the Treasury, Nicholas Brady, a former Wall Street investment banker who had led the Presidential Task Force on the 1987 stock market crash. The Task Force had issued a report recommending a jurisdictional transfer of equity-based derivatives from the CFTC to the SEC. But the Task Force’s recommendation had been ignored by the Reagan Administration. As Treasury Secretary under Bush, Brady was now in a position to have the proposal implemented. A skeptical characterization of the Task Force’s recommendation, given the inchoate nature of the empirical analysis underlying the report’s extensive recommendations, is that it conveniently furthered the financial interest of the Secretary’s former associates in the securities industry by raising the cost of trading in futures markets, but a sociologist of knowledge might more generously note that his view was informed by his life experiences.

The Treasury Secretary was not the only spokesman for regulatory change, although he was the most influential. Another force with ties to the Administration advocating the jurisdictional transfer was the SEC Chairman, Richard Breeden, who actively sought control over stock index futures. In addition, the Federal Reserve Board Chairman, Alan Greenspan, shifted his position from opposition to support of government supervision over stock index futures margins, although he stopped short of endorsing an equity product jurisdictional transfer, or the more radical reform hinted at in the Brady report, consolidation of the CFTC into the SEC. Finally, the

282. BRADY COMMISSION REPORT, supra note 2.
284. See Jurisdiction Issues Hearing, supra note 271, at 139-40 (statement of Alan Greenspan, Chairman, Board of Governors, Federal Reserve System). It is not clear to what extent this change was
continued independence of the bank swap market from CFTC supervision, a separate jurisdictional issue, was of concern to other Administration officials, the chairmen of the federal banking agencies, in addition to the Fed chairman.285

The banking regulators’ activity dovetailed with the SEC supporters’ goal, delay of the CFTC’s reauthorization. The array of government officials raising concerns over the CFTC’s jurisdiction was, therefore, substantial. Consequently, in contrast to earlier reauthorizations, the agriculture committees had to address the jurisdictional issue.

2. The Reauthorization Hearings

The agriculture committees held three hearings on the CFTC’S reauthorization from 1989 to 1991, broaching a number of regulatory issues, including jurisdiction over equity-based futures and their margins. There were also five separate hearings held specifically on the jurisdictional issue in the banking and agriculture committees from 1990 to 1991. The difference between the banking and agriculture committees’ approaches is indicated in Table 17, which summarizes the witnesses’ positions at the five hearings on the jurisdictional issue.

The banking committees heard a far greater number of witnesses testifying in support of removing jurisdiction from the CFTC to the SEC than did the agriculture committees. Many of those witnesses did not even appear before the agriculture committees. While the agriculture committees heard testimony from witnesses supporting the SEC’s claims, they still solicited testimony from far more opponents of a reallocation of jurisdiction than did the banking committees.

These data illustrate the use of venue selection to promote specific policies and are consistent with the view of political scientists who emphasize the rhetorical function of hearings, in which committees tilt witness lists toward their desired policy outcomes rather than those who stress the informational role of hearings. The banking and agriculture committees had due to lobbying by Treasury Secretary Brady. The Chairman gave as the reason for his switch the Merc’s raising margins as the market dropped during the October 1989 stock market break, an explanation that is not particularly convincing. See SEC/CFTC Jurisdictional Issues: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 268 (1990) [hereinafter SEC/CFTC Jurisdiction Hearing] (statement of Alan Greenspan). While the Federal Reserve Board explicitly did not want the responsibility for supervising futures margins as the Brady report had recommended, the Board was split over which agency should exercise that authority, the CFTC or the SEC; Greenspan’s preference was the SEC. See id.

285. The CFTC had withdrawn its 1987 proposal on commodity swaps and issued a release detailing a safe-harbor for most swap contracts from CEA regulation, CFTC, Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,694 (1989), in the face of the “firestorm of criticism precipitated” by its earlier actions, see Bair, supra note 277, at 700. This action did not, however, appease the banks and the treatment of swaps was a significant issue in the reauthorization, despite the greater publicity surrounding the controversy with the SEC over equity derivatives.
well-developed points of view on the jurisdictional issue from the outset, and were attempting to promote their views through the hearing process, views consonant with the preferences of the market participants associated with their jurisdictions (the securities and futures industries, respectively).

Another notable pattern in the witnesses' positions is the farm groups' alliance with the exchanges. Farm groups were solidly united with the exchanges against the proposed jurisdictional transfer (see Table 17). This is in contrast to the agreement of only some farm groups with the exchanges on the creation of an independent agency in the 1970s and to their opposing positions on the question of market regulation in the 1920s and 1930s. This behavior suggests that the exchanges' intense support of the CFTC cannot be explained by a simple regulatory capture explanation, an explanation also rejected for their position in the 1970s debate over the structure of the futures regulator. If the exchanges had successfully captured the agency, it is questionable whether farm organizations would have vigorously supported the CFTC against attempts to carve financial futures from its jurisdiction. But as a comparison of Tables 17 and 18 makes clear, the farm groups and exchanges were still at odds over other regulatory issues debated in the 1990s, such as restricting dual trading.

SEC supporters may have been correct when they maintained that a transfer of jurisdiction would not adversely affect agricultural interests and might benefit producers by focusing the CFTC's attention on their market, but the farm groups saw it differently. They adamantly supported the regulatory status quo, contending that subjecting futures exchanges to different regulatory regimes for different products would result in "regulatory chaos." Their concern over the jurisdiction of financial futures is somewhat puzzling. The farm groups may have feared that futures exchanges whose most lucrative products were regulated by the SEC would pay increasingly less attention to their agricultural sectors, and the liquidity of the producers' hedging market would decline. Or they may have feared that, with a more circumscribed jurisdictional sphere, the CFTC's budget would be cut, resulting in either an increase in transaction fees, which would make agricultural futures trading more costly, or a decline in agency resources, which might affect the integrity of their markets. The American Farm Bureau, for instance, noted the small size of the agricultural futures market and expressed the concern that a jurisdictional transfer would "dilute" the CFTC's expertise and "threaten the long-term availability of an essential agricultural risk management tool."}

The validity of the farm groups' perception of the inadequacy of a CFTC


287. Id. at 174-75 (Letter to Rep. Tauke from Dean R. Kleckner, President, American Farm Bureau Federation).
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without jurisdiction over equity-based futures is unclear. It is altogether possible that, despite the concerns expressed in the record regarding a retrenched agency, the farm organizations' support for the CFTC's retention of jurisdiction over equity futures was part of a logroll with the exchanges, or members of the Agriculture Committee, on some other matter. But whatever the farm groups' motivation, their support of the CFTC's jurisdiction is itself a remarkable testament to how far futures markets have evolved since the 1920s, when farmers sought to shut the markets down.

3. Maneuvering in the Senate Protracting the Reauthorization

The competing interests in the dispute over jurisdiction of financial derivatives—the securities, futures and banking industries—led to a legislative process replete with intricate parliamentary maneuvering and a two-year hold on the CFTC's reauthorization. The House unanimously passed a reauthorization bill in September 1989 in the wake of the sting operation scandal and sent the bill on to the Senate. A different reauthorization bill was approved by the Senate Agriculture Committee and brought to the floor in October 1989. Neither bill addressed the jurisdictional issue. As uncommitted senators' votes shifted, opponents and proponents of transferring equity-based futures to the SEC used their senatorial prerogatives to prevent a vote on the bill on the floor through June 1990.288

In an effort to break the impasse, a subset of the Senate agriculture and banking committees negotiated a compromise proposal in the summer of 1990. This compromise transferred jurisdiction over hybrid instruments (and any futures-like instrument a securities exchange wished to market) from the CFTC to the SEC, required the CFTC to exempt swaps from its jurisdiction, gave the Federal Reserve Board the authority to set margins for stock index futures, and mandated intermarket coordination by the CFTC and SEC on a variety of issues.289

Neither the futures nor securities exchanges found the compromise satisfactory.290 As a result, the senators who had agreed to the compromise

288. See 136 CONG. REC. S9,185 (1990) (statement of Sen. Leahy) (vote stalled for seven months because senators put holds on the bill). The opponents of transferring jurisdiction to the SEC put parliamentary holds on the bill from November 1989 to June 1990, when it became apparent that they had enough votes to defeat the Administration's amendment to transfer stock index futures contracts to the SEC. See 136 CONG. REC. S17,036 (1990) (statement of Sen. Dodd). At that point, the Administration's supporters imposed their own holds on the legislation to regroup and gain time to rebuild the support for their position. See id.


could not obtain the unanimous consent necessary to proceed to a vote on their agreement, or on a reauthorization bill with only a one-year extension to permit consideration of the jurisdictional issue, or on the Administration’s jurisdictional proposal which was cast as an amendment to the reauthorization bill. Opponents of a jurisdictional transfer refused to debate the reauthorization bill with the Administration’s amendment while supporters of the transfer refused to debate the bill without it. In short, there was a stalemate. The reauthorization legislation therefore died without reaching a Senate floor vote. The Agriculture Committee Chairman, Senator Leahy, attributed the stalemate to the Administration, and in particular, Treasury Secretary Brady, who insisted that the jurisdictional issue be tied to the reauthorization bill.291

Reauthorization legislation was reintroduced in the succeeding Congress in early 1991. In March, the House once again passed a reauthorization bill without altering the CFTC’s jurisdiction, as it had in the prior Congress.292 The Senate compromise of October 1990 was incorporated in a revised bill introduced in the Senate in January 1991. But by the time the bill came to the floor in April as a substitute amendment to the House-enacted bill, the Agriculture Committee had replaced the 1990 compromise with a new provision, supported by the Administration, that had been negotiated by the CFTC and the Treasury Department.

The new compromise maintained the CFTC’s exclusive jurisdiction, but provided it with exemptive power to exclude classes of instruments from its jurisdiction and required it to exercise that authority for swap contracts.293 It also excluded IPs from the CFTC’s jurisdiction, by adopting a 50% “predominant purpose” test for whether a hybrid security would come under the CFTC’s jurisdiction. Finally, the Administration’s compromise gave authority to set stock index futures margins to the Federal Reserve Board. This agreement, when all is said and done, essentially recodified the 1974 jurisdictional arrangements: It maintained the CFTC’s exclusive jurisdiction over futures contracts as the CFTC retained authority over equity-based futures and was in charge of implementing the 50% test for hybrids, and it exempted banks’ swap activities, just as the interbank foreign exchange forward market had earlier been exempted by the Treasury amendment.

Angered by the exclusion of the SEC from the compromise negotiations, members of the banking committee sought to delay consideration of the

291. Id.
292. The vote to suspend the rules and pass the bill was approved by 395 to 27 (10 not voting and 1 “present”). See 137 Cong. Rec. H1,386-387 (1991). SEC supporters attempted to amend the bill and transfer jurisdiction over stock index futures but did not succeed. See id. at H1,350-52. Because of the small number of opposing votes (less than 10%), the vote to suspend the rules is not analyzed.
revised bill. They objected to the bill's 50% test, which retained more financial instruments under the CFTC's jurisdiction than the original 1990 compromise, even though, when compared to existing law (which treated an instrument as a futures contract even if the futures component was a minimal proportion of the total value), it had the potential to limit the CFTC's jurisdiction and expand that of the SEC.

The Senate Majority Leader, Senator Mitchell, however, supported the Agriculture Committee, and with the Administration's official opposition withdrawn with the compromise, the bill was released for chamber consideration. Although the SEC still opposed the legislation, it did not have sufficient clout on Capitol Hill to stop the bill, in contrast to the situation when the Administration, in the person of the Treasury Secretary, opposed legislative action.

When the floor debate on the bill commenced, members of the agriculture committee urged a quick vote on the legislation and attacked the banking committee members' opposition as an unjustified "turf battle." The Administration's support for the bill lent credence to their contention that the SEC's position was a function of an unwarranted attempt to expand its jurisdiction, forcing banking committee members to deny that they were engaged in a turf dispute.

Banking committee members instead maintained that their committee, and not the Agriculture Committee, had the appropriate expertise to oversee financial futures, and characterized the CFTC's exclusive jurisdiction as an obstacle to financial product innovation. They further sought farm state senators' support by contending that the farm groups' opposition to the transfer of jurisdiction was misguided because it would not affect their markets.

The Banking Committee's principal strategy, however, was to offer a counterproposal to the Administration's compromise provision, referred to as the Bond-Wirth amendment, after the senators who sponsored it. The amendment allocated jurisdiction over hybrid securities to the regulator (CFTC or SEC) chosen by the security's issuer or developer. It also excluded swaps from the CEA, in order to garner the support of the banking community (which had participated in the shaping of the Administration's

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295. The Banking Committee was able to delay the bill's consideration for only a few days, to attend the funeral of Senator Heinz (who had been an active participant in the 1990 negotiations) and to hold a hearing on the new compromise provisions.
296. See, e.g., 137 CONG. REC. S4,440 (1991) (statement of Sen. Heflin) ("turf fight" is the cause of the delay and all that is at stake); id. at S4,438-39 (statement of Sen. Dixon) (identifying SEC Chairman as source of "turf war").
D. The Vote on the Bond-Wirth Market Competition Amendment

The supporters of the Bond-Wirth amendment labeled it a market-oriented competition proposal, in contrast to its opponents, who pejoratively labeled it a “pick your regulator” proposal. Although product marketers could, in effect, pick their regulator under existing arrangements by judiciously tailoring the instrument to the product criteria of the desired regime, the Bond-Wirth amendment would eliminate transaction costs and litigation risk by substituting a check-off-the-regulator-box approach.

1. The Amendment’s Strategy: Expanding the Issue-Space to Alter the Status Quo

The proposal to permit an explicit choice of multiple market regulators was an attempt to expand the dimensionality of the issue before the chamber from the single dimension of the CFTC’s exclusive jurisdiction to regulate futures markets, to the multiple dimensions of market competitiveness and product innovation, in addition to the degree of government regulation of futures markets. The object of this strategy was to unravel the winning coalition that supported the status quo of exclusive CFTC jurisdiction by fragmenting its support. The hope was that conservative farm state senators who otherwise supported the status quo might, for instance, vote for a deregulatory market competition proposal, while the separate swap exemption might make market-oriented bank supporters willing to upset the CEA status quo. This issue-dimension-transforming strategy did not succeed, however: The amendment was defeated by a vote of 65 to 33.300

CFTC supporters were not fooled by the Bond-Wirth strategy. They understood the amendment for what it was, a stratagem to increase the SEC’s regulatory authority over new products, rather than a mechanism to introduce greater competition into, and deregulation of, financial markets.301 As they noted, the banking committee was not suggesting the same optional

299. See Agriculture, Rural Development, and Related Agencies Appropriations for 1992, Hearings Before a Subcomm. of the House Comm. on Appropriations (Part 6), 102d Cong., 1st Sess. 36 (1991) (statement of Wendy Gramm, Chairman, CFTC) (stating that members of swap industry trade group were active participants in negotiations). The trade group’s position on the proposals is somewhat ambiguous. Senators Bond and Wirth introduced a letter from the International Swap Dealers Association (ISDA) expressing a preference for their amendment over the Administration compromise, because it provided a clear exclusion from CFTC regulation as opposed to a discretionary exemption. See 137 CONG. REC. S4,603 (1991). Senator Leahy, however, introduced a letter from ISDA stating that the Administration compromise was a “significant improvement” over existing law and “acceptable” to the organization. Id. at S4,597.

301. Senator Heflin, however, criticized the amendment as an extreme “deregulatory” provision given the “pick your regulator” approach. See 137 CONG. REC. S4,441 (1991).
regulatory regime for all financial instruments such as traditional securities registered with the SEC, but only for those subject to the CFTC’s jurisdiction. 302 They further noted that the banking committee had not adopted such an optional strategy in its 1988 proposal regarding banks’ securities activities, but rather, proposed retaining SEC as well as banking-regulator authority over bank subsidiaries that would engage in securities activities. 303 Thus, the amendment was perceived by its opponents as a transparent ploy to broaden the SEC’s jurisdiction.

Because the CFTC’s supporters saw through the strategy, they did not vote “sincerely” on the amendment with regard to their preferences for deregulation. Instead, they voted strategically, against the amendment, in order not to jeopardize their preferred outcome, the status quo in futures market regulation. Accordingly, the amendment failed to split the winning coalition and was defeated.

It can also be plausibly contended that the Bond-Wirth amendment failed because it did not truly expand the issue-space of financial derivative regulation, which was the only way to upset the status quo. In this interpretation, the amendment essentially involved the single outstanding dimension in the historical disputes over futures regulation—the degree of government intervention in the marketplace—because the impetus behind effecting a transfer of jurisdiction to the SEC was to place at least some financial derivatives under a regulator perceived to be more intrusive than the CFTC. This is an alternative explanation for why senators typically associated with a market-oriented ideology (for example, Senator Phil Gramm) did not support the amendment. 304 By failing to introduce a new dimension into the debate, the amendment predictably failed to marshal enough votes to alter the dispersed allocation of authority over financial markets.

The interpretation that the amendment failed because it did not expand the dimensionality of the issue-space is less persuasive than the explanation that strategic voting caused its defeat because the perception that the Bond-Wirth amendment would increase government intervention in markets (as opposed to enhance the SEC’s position at the expense of the CFTC by deregulating the market) seems unjustified. Although stock exchanges would opt to register their derivative products with the SEC under the Bond-Wirth amendment, it was perceived as a transparent attempt to expand the SEC’s jurisdiction.

304. It must also be noted that Senator Gramm might have had another concern, which could have affected his views regardless of the dimensionality of the issue: his wife was the Chairman of the CFTC. As a prominent Republican, in charge of the party’s Senate reelection campaign, Senator Gramm’s support for the CFTC’s compromise with the Treasury Department (and perhaps the knowledge that his wife was chairman of the agency) may have influenced other senators’ votes as well. But Senator Gramm’s effectiveness in supporting the CFTC’s effort to fend off the SEC’s encroachment on its jurisdiction would probably not have been sufficient to counter Administration opposition, had the CFTC not reached an agreement with the Treasury Department on the matters most important to it: swap market independence and government review of futures margins.
regime given their position on IPs, if the SEC was too zealous a regulator compared to the CFTC, then most new products would still be registered with the CFTC. By leaving the regulatory choice to the market participants, the Bond-Wirth amendment could be predicted to have little impact on the scope of financial market regulation.

It should be noted that a “pick your regulator” approach could very well not promote product innovation from the perspective of regulators’ incentives. There is a pattern to the successful retention of regulatory authority over specific product markets since the establishment of the CFTC in 1974, a pattern that appears to be bound up in economic as well as political explanations. The first movers in financial product innovations tend to retain the largest market shares, and the first movers’ regulators have maintained jurisdiction over the product in question. CFTC-regulated exchanges created equity index futures and these products were not transferred to the SEC despite strenuous efforts to do so; an SEC-regulated exchange introduced stock options, and they have remained in the SEC’s jurisdiction notwithstanding their greater resemblance to futures than securities; and banks were the innovators in swap contracts, and the swap market has remained unregulated by either the CFTC or the SEC.

This pattern of regulators’ retention of jurisdiction over product innovations suggests that regulators who facilitate product innovation are rewarded: They retain jurisdiction over products created on their watch. Hence, regulators operating in such a competitive regulatory environment will encourage innovation (as illustrated by the SEC’s shifting policy toward product innovation from the 1970s to the 1980s), because doing so increases the scope of the agency’s operations, and hence maximizes its budget. As Edward Kane has observed, agencies that establish more expensive regulatory regimes will lose market share, as firms seek out less costly regimes for new products that are substitutes for the products regulated by the high-cost agencies. This pattern of regulatory competition that fostered financial product innovation would not persist in the optional regulatory setting of the Bond-Wirth amendment, however, because first-mover advantages would be greatly reduced with the elimination of exclusive jurisdictional lines.

2. Analysis of the Vote on the Amendment

An analysis of the vote on the Bond-Wirth amendment tracks the narrative of events concerning the failed strategy of expansion of the

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306. See NISKANEN, supra note 266.
dimensionality of the issue space. The cross-tabulations of the vote by party and by region are not significant (although as in the 1936 vote, there are too few cells with high enough expected frequencies for a valid statistical test of the region and vote cross-tabulation), and such a table is therefore omitted for this vote. Descriptive statistics for the regression variables are reported in Table 19.

In contrast to the prior statistical analyses of congressional votes, an important new constituent variable is now available to explain the 1991 Senate vote—campaign contributions from the political action committees (PACs) of commodity exchanges and the securities industry (FutContrib and SecContrib, respectively).\footnote{Another legacy of the Nixon era was federal election and campaign financing reform, which created the Federal Election Commission (FEC) and eventually resulted in the emergence of political action committees in the campaign contribution process due to restrictions on corporate and individual giving. See Sabato, supra note 32, at 5-10. Campaign contributions must be reported to the FEC, and these reports are available to the public. Contributions from the commodities and securities industries to Senate campaigns were obtained from the reports filed by the PACs of commodity exchanges, securities firms, and stock exchanges, available on the Mead-Lexis network which included PACs of the CBOT, Merc, New York Mercantile Exchange, NYSE, Pacific Stock Exchange, Securities Industry Association, and a number of securities brokers and investment banks.}

Interest group campaign contributions are an additional means of ferreting out a senator’s reelection constituency from more imprecise state-wide based constituent variables beyond the house d-nominate score proxy but they are typically expended beyond the group’s geographical base and thus better viewed as an additional proxy beyond the exchange and farm population variables for the influence of special interests on voting.\footnote{As discussed in note 236 supra, the estimation procedure that Poole and Rosenthal used for the 102d Congress is w-nominate, but because there is no significant interpretative difference between d-nominate and w-nominate scores, I continue to refer to the 1991 scores as d-nominate scores for textual consistency. As in the other vote regressions, the general electorate constituency variables are not significant when entered directly into the vote regressions, but they do have significant explanatory power for the d-nominate scores’ decomposition regressions. The adjusted R²’s for the first and second dimension decompositions are, respectively, .8853 and .4820. For the first dimension, the significant regressors are the house d-nominate score, party, South and 1988 Democratic presidential vote; for the second dimension they are party and 1988 Democratic presidential vote. The results of the first dimension regression (the score associated with ideology) are especially encouraging, given the large proportion of variance explained and the significance of the proxy for reelection constituents as well as some state-wide constituent variables.}

Several models, whose results are reported in Table 20, were estimated using the campaign contribution data. In Models 1 and 2, the PAC contributions received in a senator’s election campaign (1988 or 1990) are entered directly into the vote regression.\footnote{Because the CFTC reauthorization controversy had not been on the agenda during the 1985-86 federal election cycle, I do not use any campaign data for the third of the Senate elected in 1986 and who were, correspondingly, up for reelection in 1992. Some senators report no PAC contributions in election cycles when they are not up for office while others report contributions in all cycles; in the latter cases, the receipts tend to be substantially larger in the cycles when the senators are up for reelection. Given these discrepancies, restricting the contribution data to senators standing for election (which are the senators elected in the 1987-88 and 1989-90 election cycles) is the most appropriate approach, as these are the most accurate for cross-sectional comparative purposes, even though this reduces the}
endogeneity of campaign contributions, through a two-stage estimation process. The first stage predicts contributions using a censored regression model and the fitted values from this regression are then used as the contribution regressors in the second stage regressions on the votes. Models 7 and 8, which omit the campaign contribution variables, are included solely for comparative purposes with the earlier vote regressions when such data were not available, and demonstrate the impact of the campaign contribution variables upon model specification. These models will not be discussed in the text.

The voting on the amendment is consistent with the interpretation of the Bond-Wirth proposal as an unsuccessful effort at issue-dimensionality expansion. As Table 20 indicates, the significant explanatory variables of voting on the amendment are interest group variables and membership on the banking committee, and not the ideology variables (although none of the regressors are significant in every model). The insignificance of the number of observations available for the regressions. Senators up in the 1987-88 cycle are included because the jurisdictional issue was raised following the 1987 stock market crash in the Brady Report and the CFTC's 1989 reauthorization date was known to all the participants. The ratio of yes to no votes in the sample consisting of senators elected in 1988 and 1990 is about the same as in the population of voting senators, 38 nays to 20 yeas in the election subset compared to 65 nays to 33 yeas in the population. Hence, the election subset will provide an accurate sample for explaining the population vote.

311 A single equation estimation (models 1 and 2) is inadequate because groups may contribute to senators based on how they voted in the past as well as to influence their vote in the future. There may thus be unobserved correlations across the two variables that bias a single-equation estimator. The two-stage tobit maximum likelihood estimation used here, which resolves the difficulty, is analogous to a simultaneous equation two-stage conditional maximum likelihood estimation. See Lung-Fei Lee, Simultaneous Equations Models with Discrete and Censored Dependent Variables, in STRUCTURAL ANALYSIS OF DISCRETE DATA WITH ECONOMETRIC APPLICATIONS 346 (Charles F. Manski & Daniel McFadden eds., 1981). The tobit model of the first-stage is typically used to analyze censored regression problems (the problem posed for estimation when there are observations about which we have no information, that is, for some senators, no campaign contributions are observed). See G. S. Maddala, Limited-Dependent and Qualitative Variables in Econometrics 3-6 (1983). Because the proofs of the efficiency of this two-stage estimation technique use Probit models, I use the Probit model for all of the 1991 vote regressions instead of the Logit, which uses a cumulative normal, as opposed to logistic, distribution function. Id. at 22-23.

312 The explanatory variables in the regression of campaign contributions from commodity exchanges are agriculture committee membership, commodity exchange in the state, the d-nominate scores, party, and as the variables identifying the equation, incumbency status at the time of the election (Incumb, 1 = incumbent, 0 = challenger or open seat) and total PAC contributions received in the election cycle (TotPAC); those for the regression of campaign contributions from the securities industry are the same except banking committee membership (BankCom) and stock exchange in the state (StockEx) replace the agriculture committee and commodity exchange variables. The criterion for an identifying variable is that it does not affect the vote on the Bond-Wirth amendment. Total PAC receipts for the senatorial campaigns in 1987-88 and 1989-90 were obtained from the ALMANAC OF FEDERAL PACS 577-649 (1992). The choices of identifying variables follow the approaches in Keith Krehbiel, Committee Power, Leadership, and the Median Voter: Evidence from the Smoking Ban, 12 J.L., ECON., AND ORG. 234 (1996); Henry W. Chappell, Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model, 64 REV. ECON. AND STAT. 77 (1982); and Thomas Stratmann, What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes, 57 So. Econ. J. 606 (1991). For a further discussion of additional regressions using other identifying variables, see Romano, supra note 67.

313 One puzzling result is that the fitted component of the second dimension d-nominate score is significantly positive in several of the models. This is unusual because Poole and Rosenthal find that the
ideology variables is important because it indicates that members were not fooled by the introduction of additional dimensions in the debate concerning deregulation and market competitiveness. Such dimensions would normally have resulted in a significant ideological voting component (as was true, for instance, in the 1921 House vote).

Instead, the coalition supporting the status quo (farmers and futures exchanges) was united: Senators whose states had a higher percentage of farmers were more likely to vote against the amendment, as were members who received contributions from commodity exchanges. Those voting for the amendment represented a different set of constituents: Namely, senators receiving contributions from securities exchanges, a variable correlated with the presence of a stock exchange in the senator's state, were more likely to vote for the amendment.

The contribution variables, significant when directly entered into the regressions, are not significant in the tobit estimations (compare Models 1-4). This is most likely due to multicollinearity, which is a common problem with two-stage models. For example, the correlation between the fitted component of the securities contribution variable and the stock exchange variable is .53, and it is .17 with the banking committee membership variable. In contrast to the other variables, the coefficients on these variables decrease substantially in the tobit formulations (compare Models 1 and 3). If the model is run excluding the committee variables from the vote equation, then the fitted contribution variables are both significant (Models 5 and 6). There is no such effect if the model is run excluding the exchange variables instead of the committee variables (not shown).

But there is an alternative interpretation of the insignificance of the contribution variables in the tobit models, that campaign contributions do not affect congressional voting. From this perspective, the difference between Models 1 and 3 is substantive: Failure to model contributions' endogeneity in a voting model will overstate the impact of contributions.

In contrast to the 1921, 1936 and 1974 votes, an institutional variable second dimension d-nominate score, which is related to racial rather than rural issues in the post-World War II period, has become increasingly insignificant since the late 1970s as race became fused with the economic issue of redistribution associated with the (ideological) first dimension score. POOLE & ROSENTHAL, supra note 62, at 110-11. Given the concurrent significance of the farm population variable in the predicted (negative) direction, the second dimension is clearly parceling out some effect other than a legislator's farm state connection. It is, perhaps, indicating the occurrence of a complicated logroll. But I have no satisfactory explanation for this result.

314. See MAJIDALI, supra note 311, at 252.

315. Although I include the committee membership variables in both stages because the vote directly implicated committee influence, other analyses using the two-stage estimation technique omit committee membership variables from the probit vote regressions, using them solely as instruments in the tobit contribution regressions. This is presumably done because committee membership is not expected to explain floor votes, due to either the reciprocity norm or committee representativeness. Both Chappell and Stratmann, for instance, use committee membership only as a tobit instrument but neither discusses why such a choice was made. See Chappell, supra note 312; Stratmann, supra note 312.
was significant in the 1991 Senate vote in the non-tobit models: Banking committee members were more likely to vote for the amendment. (Its insignificance in the tobit models, as already noted, is probably due to multicollinearity.) This result lends credence to the model because the amendment originated with the banking committee and would have expanded its jurisdiction over financial products, benefiting its constituents (the SEC and stock exchanges).

The constituent connection for the banking committee members is apparent in the data: Securities industry contributions, presence of a stock exchange, and membership on the banking committee are positively correlated. Moreover, a test of the joint significance of these variables (banking committee membership, stock exchange presence, and securities industry contributions) indicates their importance as predictors of votes. A likelihood ratio test comparing Model 3 and a model excluding those three variables produces a chi-square of 8.15, which is significant at 5%. The result is not a function of ideological differences across the banking and agriculture committees because the committees' median d-nominate scores are not significantly different from each other, nor from the chamber. 316

Agriculture committee membership is not significant in any of the regressions (nor is the likelihood ratio test excluding agriculture committee membership, presence of a futures exchange and futures exchanges contributions). This is also a predictable result, given the reciprocity norm, which provides an institutional explanation for the amendment’s defeat. The reciprocity norm predicts that members who are on neither the banking nor agriculture committee will share the agriculture committee members' interest in not having well-established jurisdictional authority undermined in a power-grab by another committee. The insignificance of the agriculture committee variable is also consistent with the information-gathering, majority-control view of committees, which maintains that committee preferences on substantive policy will be representative of the chamber majority. But this explanation does not mesh as well with the narrative of the expanded-dimensionality strategy as does the reciprocity explanation.

The conclusion concerning the strength of the institutional component in the vote on the Bond-Wirth amendment is reinforced by the insignificance of the ideology variable (the first dimension d-nominate score, whether decomposed or not) across all of the models. Senators voting on the amendment were not concerned about the deregulatory issues raised by the amendment’s sponsors. An alternative explanation to the institutional explanation for the insignificance of the personal ideology variables in the

316. The respective D-nominate(1) medians are -.4525 for the Banking Committee, -.186 for the Agriculture Committee, and -.364 for members of neither committee; the chi-square statistics are, respectively, across the committees, 0.02, across the Banking Committee and chamber, 0.004, and across the Agriculture Committee and chamber, 0.3. The D-nominate(1) means are also not significantly different.
1991 regression in contrast to the other regressions is the presence of the
contribution variable. Given the absence of contribution data for the earlier
Congresses, it is possible that the significance of the residuals from the d-
nominate score decomposition is picking up the flow of campaign money (an
omitted constituent variable), rather than the effect of a legislator’s personal
ideology on voting behavior.

Examination of same-state senators’ match rates, as was undertaken for
the 1936 Senate vote on the CEA, sheds further light on the interpretation of
the insignificance of the ideology variables. There were fourteen pairs of
disagreeing senators of the forty-eight pairs voting on the Bond-Wirth
amendment. As indicated in Table 21, the constituent model is a better
predictor of the vote pairs than the ideological model. This result is
compatible with the institutional explanation (that senators saw through the
amendment’s coalition-splitting strategy and therefore did not vote their
preferences), for it strengthens the constituent-based interpretation of the vote
that underpins the institutional explanation. Namely, banking committee
members’ jurisdictional interest meshed with that of their securities industry
constituents.

E. Aftermath of the Bond-Wirth Amendment

Following the defeat of the Bond-Wirth amendment, the two senators
made a final attempt to salvage the failed 1990 compromise by offering an
amendment on intermarket coordination between the CFTC and SEC. The
proposal required the agencies’ adoption of numerous coordinating rules
within a fixed time period, including establishment of circuit breakers,
prohibition of front-running, and cross-margining of accounts (the subjects of
the intermarket provision contained in the original compromise proposal).

The debate on this amendment was more limited than the debate on the
market competition amendment. Agriculture committee members opposed the
intermarket coordination amendment, claiming it was just a continuation of
the turf war motivating the other amendment. On a motion of Senator Leahy,
the Agriculture Committee Chairman, the Senate voted 57 to 41 to table the
amendment. As was true of the other Bond-Wirth amendment vote, the vote
on the intermarket coordination amendment was not partisan, with a
majority of each party supporting the motion to table.

An analysis of the vote on the intermarket coordination amendment
indicates a somewhat different dynamic from the vote on the market

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317. See 137 CONG. REC. S4,708 (1991). Of the senators voting on different sides of the two
amendments, three supporters of the Bond-Wirth amendment (one of whom was a banking committee
member) shifted to vote to table the intermarket coordination amendment, while eleven opponents of the
Bond-Wirth amendment (one of whom was a banking committee member) voted against the motion to
table. In an effort to explain the change in vote, probit regressions on the choice of switching votes were
run duplicating Models 3 and 4 of Table 20; in both models, none of the regressors were significant and
the goodness of fit was poor (.14 and .13, respectively).
competition amendment. Constituent interests and ideology matter but banking committee membership does not. Given the limited importance the senators accorded this amendment, the regression results are not shown (the models estimated were identical to those reported in Table 20 for the Bond-Wirth amendment) and the analysis will be brief. The constituent ideology variables (the fitted components of both d-nominate scores) are significant (more liberal senators were more likely to vote against the motion to table, as were senators from less urban states), as is the farm population variable (farm-state senators were more likely to vote for the motion). The campaign contribution variables are again significant when the committee variables are omitted, or when they are entered directly as an exogenous variable. But the banking committee membership variable is not significant, and neither is the likelihood ratio test of the exclusion of the banking committee and securities-related constituent variables from the Model 3 regression.

The difference in results between the two 1991 votes is a function of the intermarket coordination amendment's more straightforward language, as well as the fact that it did not contain any substantive change in the CFTC's jurisdiction. The latter tactic made the amendment less threatening not only to regulatory arrangements, but also to institutional prerogatives (the protection of committee jurisdiction), considerations which trumped ideology in the first Bond-Wirth amendment vote. The former tactic made votes consistent with a senator's ideology: A vote for the intermarket amendment was a vote to increase market regulation, while a vote for the market competition amendment, even if it would arguably have the same effect, was explicitly a vote for deregulation. It would therefore not be necessary, as would have been true of a vote for the first Bond-Wirth amendment, to explain to constituents in an election campaign that a vote in favor of deregulation was actually a strategic device to increase regulation. It is also highly probable that with the decisive victory on the first amendment, the floor manager knew he had enough votes to defeat the second measure and did not seek to persuade marginal senators to vote against the amendment.

Shortly after the defeat of the intermarket coordination amendment, with the approval of some technical amendments, the bill was adopted with the Administration compromise intact by a vote of 90 to 8; three of the opponents were banking committee members. The Senate thereafter sent its version of the CFTC reauthorization to the House with a request for a conference. In October, the House agreed to the request. The conferees met the following month and recessed. Almost one year later, in the summer of 1992, the Conference Committee reconvened to negotiate the differences between the

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318. This is in keeping with the same-state senator match rate tests for this vote (not shown): Paralleling the results for the other votes, the constituent model outperforms the ideology model, with a correct prediction rate of 88% (93% adjusting for pairs consisting of senators from different parties) compared to 73%.
chambers, and in October 1992 it reported out a bill, which was approved by both chambers. The margin provision was retained, but the specific swap and IPs provisions were eliminated in favor of a provision providing the CFTC with broad exemptive authority for products traded in institutional markets, with an understanding, expressed in the legislative history, directing the CFTC to "use its new exemptive powers" for swaps and hybrid instruments.\footnote{Futures Trading Practices Act of 1992, H. REP. No. 978, 102d Cong., 2d Sess. (1992) (Conference report to accompany H.R.707). The exemptive authority is contained in § 502 of the Futures Trading Practices Act of 1992, codified at 7 U.S.C. § 6(c).}

The revised exemptive authority provision further prohibited the use of the exemptive authority for products covered by the Shad-Johnson accord, and permitted boards of trade to apply for exemptions under the provision in order to "promote fair competition." This latter clause was a result of lobbying by the futures exchanges, who feared that they would be at a competitive disadvantage to off-exchange markets that received exemptions. Their lobbying contributed to the delay of the reauthorization legislation in the Conference Committee.

The CFTC promptly followed the Conference Committee's instructions and exempted swaps.\footnote{See CFTC, Exemption for Certain Swap Agreements, 58 Fed. Reg. 5,587 (1993) (17 CFR Pt. 35).} It acted equally promptly on hybrid instruments, but in exempting these instruments, it resurrected the 50% test as the standard for an exemption.\footnote{See CFTC, Regulation of Hybrid Instruments, 58 Fed. Reg. 5,580 (1993) (17 CFR Pt. 34).} The futures exchanges then petitioned for an exemption from most of the requirements of the CEA for the trading of certain futures and options contracts.\footnote{See CFTC, Notices, Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,414 (1993) (notice of CBOT and Merc petitions for exemption).} In denying most of the exchanges' petition and providing only a limited and temporary (three year) exemption, the CFTC rejected the exchanges' claim that compliance with the CEA had rendered them uncompetitive in global markets.\footnote{See CFTC, Section 4(c) Contract Market Transactions; Swap Agreements, 59 Fed. Reg. 54,139, 54,142 (1994) (17 CFR Pt. 35 and 36) (Proposed Rule), finalized in CFTC, Section 4(c) Contract Market Transactions, 60 Fed. Reg. 51,323 (1995) (17 CFR Pt. 36) (Final Rule).} The CFTC further differentiated the swap and hybrid exemptions from the exchanges' petition, in part, for arising "out of a need specifically recognized by Congress to enhance the legal certainty as to the regulatory status of those instruments."\footnote{Id.} This response is a fitting conclusion to the 1989 reauthorization process, for it demonstrates the success of the 1974 Democratic strategy to create an agency responsive to Congress' will. The CFTC did precisely what Congress told it to do: It exempted no more and no less than the products Congress had specifically mentioned. At the same time, the CFTC's response reveals the stability of a regulatory status quo, by underscoring that one participant in a winning coalition (the futures exchanges) cannot effect a change in the status quo.
F. Prognosis on the Winning Political Coalition's Stability

Whether the tripartite winning coalition of farmers, futures exchanges and banks will continue to cohere in the future is somewhat more problematic than its staying power from 1974 through 1992, for it is problematic whether the exemptive authority granted the CFTC in the 1992 reauthorization will serve as it was intended, to preserve the regulatory status quo. Although the 1992 legislation maintained the existing jurisdictional allocation across agencies, the competitive position of the commodity exchanges has been eroding with the globalization of derivatives markets and the expansion of the unregulated over-the-counter derivative markets in which banks are major players. For example, the U.S. share of global futures trading was 40% in 1995, compared to 78% in 1988, and the over-the-counter forward, swap and options markets dominate in value the exchange-traded futures and options markets. These developments have strained the coalition created by the 1974 legislation, as the commodity exchanges jealously eye their unregulated bank competitors, and have criticized the CFTC, with increasing vigor, as an impediment to their domestic and international competitiveness.

The competitive disadvantage of the futures exchanges may well force a reconsideration of the regulatory regime, by whichever forum whose attention the exchanges succeed in attracting. In the current political climate, this is more likely to be the Republican-controlled Congress than the CFTC, whose chairperson, Brooksley Born, is not committed to market deregulation. To the extent that the CFTC is not responsive to the exchanges' concerns over regulatory burdens, the exchanges' support for the regime of multiple regulators will evaporate. Jack Sandner, the chairman of the Merc, for example, out of concern over unregulated competitors with lower costs, has already gone so far as to propose revamping the regulatory apparatus. He has recommended the creation of one cabinet department combining all financial market regulators, which would be organized into regulatory subdivisions along functional lines (separate divisions for investment securities markets and risk-shifting markets) and would regulate all market participants uniformly. In addition, the exchanges have been lobbying Congress to overrule the CFTC's limited exemption for institutional markets by legislating a broad professional markets exemption, with some initial success—the

326. See General Accounting Office, supra note 279, at 36.
The Political Dynamics of Derivative Securities Regulation

introduction of bills, with bipartisan support, containing such a provision.\textsuperscript{329} The seriousness of the threat to the CFTC's existence which is contained in Sandner's proposal is, however, more apparent than real. It would be costly for the futures exchanges to abandon the CFTC, rather than intensify their efforts at applying political pressure on the CFTC to adapt its policies to a more deregulatory approach. This is because elimination of the agency would sever the exchanges' connection to the agriculture committees at least with respect to financial futures, requiring them to develop from scratch relations with a new set of legislators. This is no doubt one explanation for the exchanges' support of bills to create an exemption for professional markets rather than a new regulatory entity along the lines envisioned by Sandner. The more probable outcome of efforts at reorganizing futures regulation is an even greater dispersion of financial market regulation, that shifts institutional markets from the CFTC's aegis to a less-regulated status similar to the banks' markets, rather than a shift to a unitary regulator.

There is another important factor that renders it extremely improbable that institutional reform will entail greater market regulation, as has been the goal of those who advocate expanding the SEC's jurisdiction over futures. Competition from foreign markets is a powerful constraint on domestic regulatory choices, as the CFTC itself found out to its dismay in its aborted foray into commodity swap regulation and the Chase Manhattan Bank investigation fiasco. Any attempt to impose a new and enhanced regulatory regime would, therefore, have to be transnational in scope (a difficult and problematic proposition) to be successful.

Besides the diminished competitiveness of the futures exchanges, there is a second, albeit quite different, development in the environment that could conceivably produce an alteration in the regulatory landscape, as it could fundamentally affect the winning coalition without increasing issue salience beyond Capitol Hill. Namely, the prospective termination of federal farm subsidies may revive farmers' antagonism to futures markets should a severe farm recession occur.

Farming has, however, changed dramatically since the 1920s and 1930s, as derivative products are far more integrated into the producer side of the agricultural business than before.\textsuperscript{330} Moreover, the sharp decline in


\textsuperscript{330} A recent example of derivatives usage by farmers are forward contracts known as "hedge to arrive" contracts, that provide farmers with guaranteed prices over multiple years, with values pegged to comparable CBOT futures contracts. In the wake of a surge in wheat prices, wheat farmers and elevators lost substantial sums on the contracts, and the Senate Agriculture Committee held an oversight hearing to review what the CFTC was doing in response to the situation. See Ellyn Ferguson, \textit{Hedge-to-arrive futures contracts could ruin farmers, panel told}, GANNETT NEWS SERV., May 15, 1996, available in LEXIS, NEWS library, CURNWS file. The day after the hearing, the CFTC issued guidelines for the hedge-to-arrive contracts, without determining whether the contracts were futures contracts subject to the agency's jurisdiction, or unregulated forward contracts. See CFTC Staff Issues Policy Statement; Senate AG Considers Implications, 28 Sec. Reg. & Law Rep. (BNA) 642 (May 17, 1996).
agricultural compared to financial futures markets suggests that even widespread distress in the agricultural sector would pose a potential issue of only selective intervention on the agricultural side of the contract markets and would not implicate the balance of authority across agencies. Thus, as with the futures exchanges' changing environment of intense global and off-exchange market competition, termination of the New Deal's farm income maintenance programs also does not point toward a new regulatory equilibrium that would establish the SEC, or any other entity, as a unitary financial market regulator.

Although a break-up of the winning coalition of farmers, futures exchanges and banks could open the way to a reconfiguration of the current regulatory structure, it is a safe bet to conclude that, whatever regulatory structure would be adopted if the exchanges ceased to support the CFTC, banks' activities would not wind up under the jurisdiction of nonbank regulators. The banks have three factors on their side, compared to the futures exchanges: a different congressional connection (the banking committees), which is unaffected by the status of the CFTC; a regulatory connection that consists of far more powerful actors than either the CFTC or SEC—the Federal Reserve Board and Treasury Department—given their role in the regulation of monetary policy; and a key taxpayer connection—the federal deposit insurance fund—the protection of which has led bank regulators and Congress to ensure that the banks' more profitable (albeit "nonbanking") activities remain unburdened.

Conclusion

Federal regulation of futures markets was initiated in 1921 as a political response to the most severe farm recession the United States had experienced to that time. Farmers and their supporters in Congress attributed declining farm prices to futures trading rather than post-World War I changes in supply and demand for their products. They gained the support of non-farm state legislators by packaging their economic interest in raising commodity prices with moralistic rhetoric concerning the evils of gambling. The legislation's opponents represented districts with futures exchanges or were Northeastern legislators, who, mirroring the constituents they represented, were ideological conservatives (proponents of free markets).

The concerns that motivated the legislation's supporters had little to do with market perfection, as opposed to rent-seeking, the transfer of wealth from the marketing middlemen who created the exchanges to farmers. The economic premise of the farmers' proposal was wrong—restricting futures trading would not raise commodity prices. But the lobbying over the regulation of futures exchanges was in actuality a second-best solution to the
farm groups' favored policy for raising farm income without implementing a price support system: The government's promotion of national farm cooperatives as an alternative marketing and distribution system to the existing network of which the futures markets were a part.

The 1921 futures legislation and other laws facilitating cooperatives' organization did not dramatically shift the marketing system toward one dominated by cooperatives and with the worsening depression of the 1930s, the farmers' political agitation against futures exchanges continued. Farmers' demands to prohibit futures trading ended only with the implementation of a farm subsidy program in the second New Deal's Agricultural Adjustment Act, which provided farmers with what they had always desired but were forced to seek indirectly through futures regulation and the cooperative movement, guaranteed incomes.

Because the subsidy payments were paid to individual farmers, the New Deal program was the death knell for the cooperative movement as a political force, and the political actor most interested in closing down exchanges was removed from the stage. As a consequence, there was no significant federal legislation involving futures markets from the 1930s until 1974, when farmers' concerns were not the impetus for reform, but rather, inflation and spiraling food prices, along with a scandal in unregulated precious metals options, focused congressional attention on the futures markets.

The 1974 legislation created today's regulatory structure, an independent agency with exclusive jurisdiction over futures contracts, the CFTC, whose activities are overseen by the agriculture committees. Although futures exchanges and many farm organizations advocated continuation of the futures regulator within the Department of Agriculture (the organizational arrangement introduced in 1921), their position did not carry the day because of legislators' institutional concerns. An independent agency strengthened congressional control over public policy, and in particular, that of the Democratic majority, against the Republican Administration. In fact, the politics of the 1974 vote on an independent agency structure differs from that of all other votes on futures legislation: Not only was it the only party-line vote but also, legislators' economic (constituents') interests do not explain their votes. The United States' distinctive regulatory regime, in short, originated in an attempt to leverage congressional influence in an era of divided government. The creation of an independent regulatory commission overseeing futures trading was only one of numerous such efforts during the 1970s.

Futures on fixed income securities were introduced soon after the establishment of the CFTC. These instruments revolutionized financial management, and set in motion a protracted jurisdictional struggle between the SEC and the CFTC, as the SEC sought to prohibit the trading of financial futures or to bring such products under its own regulatory ambit. Its lack of
success is not surprising. Because the SEC and CFTC are overseen by different congressional committees, shifting jurisdiction over product markets from the CFTC to the SEC would remove those markets from the agriculture committees' oversight authority, upsetting the established ties between committee members and their constituents.

The agencies' jurisdictional controversy came to the top of the legislative agenda during the CFTC's 1989 reauthorization, which commenced in the aftermath of a series of industry scandals and the 1987 stock market crash, and was not resolved until 1992. The delay was caused by the effort of the SEC and its political allies to transfer to it jurisdiction of equity-based futures. In the late 1980s, the securities industry became an active lobbyist for the jurisdictional transfer because the rapid growth of financial futures markets impacted negatively on stock exchanges (institutional trading had shifted to derivative markets).

Additional support for delaying the CFTC's reauthorization came from the banking industry, which sought to ensure that its extensive over-the-counter derivatives business would remain unregulated, as it was under the terms of the 1974 legislation. When the reauthorization legislation was finally enacted in 1992, the status quo established in 1974 was essentially unaffected: All financial futures remained with the CFTC and the banks' markets remained unregulated.

The key institutional arrangement of Congress, the committee system, protected the regulatory status quo of multiple government regulators of financial markets. It was supported by the preferences for the maintenance of the status quo of the coalition of constituents who were involved in the initiation of federal regulation of futures markets in the 1920s, farmers and futures exchanges, and those brought in by the regulatory pattern established in the 1974 organizational reform, the banks. The committees preserving the system are not, however, runaway committees. The ideological preferences of the members of the committees with jurisdiction over the futures markets' regulatory regime are representative of those of the chamber majorities.

The striking feature of the outcome of the battles in the political history of the regulation of derivative securities is then, that, despite the massive growth and change in futures markets (in instruments traded and market participants) since 1974 and the considerable efforts after the 1987 stock market crash by the SEC and its constituents to shift regulatory control, the original regulatory structure has remained remarkably intact. The exemption for the swap market, whose major players are banks, follows the original 1974 jurisdictional arrangement, in which banks' off-exchange forward contract activities were excluded from the CFTC's jurisdiction. The SEC has retained jurisdiction over stock options which it had obtained by historical accident: Exchange-traded equity options were created prior to the establishment of the CFTC, and thus the SEC was the only conceivable regulator with which the
option exchange could register. But the SEC's authority has not been expanded to stock index futures. The CFTC has maintained exclusive jurisdiction over futures contracts and obtained its preferred position on hybrid securities, that it would cede to the SEC only those instruments whose securities component comprised more than 50% of the instrument's value, with the determination of the components' value made by the CFTC.

The allocation of jurisdictional authority has produced a form of regulatory competition that has fostered financial product innovation, even though that was surely not an intended consequence of the legislation. The process by which innovation has arisen occurs in two stages. First, market participants create new products, often with an eye to lowering regulatory costs by crafting them to avoid coming under the more expensive regulatory regime; second, regulators concerned about the vibrancy of their regulated firms, if only in order to increase their regulatory market share, seek to protect their firms' product innovations from the challenges of other regulatory agencies and firms.

Regulators whose firms have successfully innovated (as opposed to simply imitated) have retained jurisdiction over the new products and thereby expanded market share. By being rewarded with the jurisdiction over their regulated firms' new products, regulators are provided with incentives to be accommodating to their firms' efforts at innovation. Remarkably, the industrial organization of Congress—the committee system, which is a principal reason for the maintenance of the multiple regulator regime—has fortuitously facilitated financial product innovation.
Table 1. 1921-22 Congressional Witnesses  
(5 hearings before agriculture committees)

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<tr>
<th>Witness type</th>
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<tr>
<td>Individual farmer</td>
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</tr>
<tr>
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<td>State government officials</td>
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<td><strong>Total testifying</strong></td>
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<td><strong>94</strong></td>
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The Political Dynamics of Derivative Securities Regulation

Table 2. Periodical Coverage, 1900-94.

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<td>148 (25)</td>
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<td>114 (13)</td>
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<td>cross-ref</td>
<td>cross-ref</td>
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<td>CFTC</td>
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<td>76 (15)</td>
<td>124 (21)</td>
<td>40 (4)</td>
<td>99 (10)</td>
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Notes:
Commod Exch. = entries under Commodity Exchanges, Individual Commodity Exchange and futures-related entries under Grain Trade;
Stock Exch. = entries under Stock Exchanges and Wall Street;
Agriculture = entries under Agriculture-economic aspects, Agriculture-relief (through v.19 when entries under this subheading cease), Agriculture-laws & legislation (through v.40 when entries under this subheading cease) and Farmers-political activities;
Futures Products = entries under commodity futures, interest rate futures, stock index futures and swaps;
CFTC = entries under the federal agency regulating futures, with heading changing over time, from Grain Futures Administration to Commodity Futures Trading Commission;
SEC = entries under Securities and Exchange Commission;
All foreign country or international subheading and individual foreign future exchanges entries under the topics are excluded;
"." indicates no such entry heading in volume;
"cross-ref" indicates entry cross references other entries only, indexing no articles;
(entry counts on a per year basis in parentheses).

Source: Readers' Guide to Periodical Literature (vols. 1-54)
Table 2. Periodical Coverage, 1900-94 (continued).

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Notes:
Commod Exch. = entries under Commodity Exchanges, Individual Commodity Exchange and futures-related entries under Grain Trade;
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(entry counts on a per year basis in parentheses).

Source: Readers' Guide to Periodical Literature (vols. 1-54)
Table 3. Vote on Future Trading Act of 1921 by Party and Region.

<table>
<thead>
<tr>
<th>Region</th>
<th>Democrats</th>
<th>Republicans</th>
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<td>Northeast</td>
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Note: The region code is as follows:
Northeast = Del., N.J., N.Y., Pa.;
East North Central = Ill., Ind., Mich., Oh., Wis.;
West North Central = Ia., Ks., Minn., Mo., Neb., N.D., S.D.;
South = Ala., Ark., Fla., Ga., La., Miss., N.C., S.C., Tenn., Tex., Va.;
Border = Ky., Md., Okla., W.Va.;
West = Ariz., Cal., Colo., Id., Mont., Nev., N.M., Ore., Ut., Wash., Wyo.
Table 4. Descriptive Statistics for 1921 House Vote Regression Variables (n=312).

<table>
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<tr>
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<th>Maximum</th>
<th>Minimum</th>
<th>Std. Dev.</th>
</tr>
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The Political Dynamics of Derivative Securities Regulation

Table 5. Logit Regressions of 1921 House Vote on Future Trading Act (n=312).

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<th>Variable</th>
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<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
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<td>-2.6030*</td>
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<td>-2.5744*</td>
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</table>

Regression model: \( \text{Prob}(\text{vote} = 1) = 1/(1 + e^{-\beta_1}) \); standard errors in parentheses below coefficients; * = t-statistic significant at .05 or less; goodness-of-fit measured by log likelihood ratio index in parentheses below log likelihood.
Table 6. Bills Introduced to Regulate or Prohibit Futures Trading, by Congress, 1901-96.

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<th>No. Bills</th>
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<td>58th</td>
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<td>61st</td>
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<tr>
<td>62nd</td>
<td>44</td>
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<td>65th</td>
<td>22</td>
<td>89th</td>
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<td>66th</td>
<td>15</td>
<td>90th</td>
<td>7</td>
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<td>67th</td>
<td>21</td>
<td>91st</td>
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<tr>
<td>69th</td>
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<td>93rd</td>
<td>16</td>
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<td>70th</td>
<td>18</td>
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<td>72nd</td>
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<td>73rd</td>
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<td>75th</td>
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<td>99th</td>
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<td>76th</td>
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<td>101st</td>
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<td>103rd</td>
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<tr>
<td>80th</td>
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<td>104th</td>
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</table>

Major Enactments:
a Futures Trading Act of 1921;
b Commodity Exchange Act of 1936;
c Commodity Futures Trading Commission Act of 1974;
The Political Dynamics of Derivative Securities Regulation.

Table 7. 1932-36 Congressional Witnesses
(4 hearings before agriculture committees).

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</table>

Note: In this table, grain trade includes cotton trade and brokerage firms.
Table 8. Vote on Commodity Exchange Act of 1936 by Party and Region.

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<th>Other</th>
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Note: The region code is as follows:
Northeast = Del., N.J., N.Y., Pa.;
East North Central = Ill., Ind., Mich., Oh., Wis.;
West North Central = Ia., Ks., Minn., Mo., Neb., N.D., S.D.;
South = Ala., Ark., Fla., Ga., La., Miss., N.C., S.C., Tenn., Tex., Va.;
Border = Ky., Md., Okla., W.Va.;
West = Ariz., Cal., Colo., Id., Mont., Nev., N.M., Ore., Ut., Wash., Wyo.
Table 9. Descriptive Statistics for 1936 Senate Vote Regression Variables (n=78).

<table>
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<th>Maximum</th>
<th>Minimum</th>
<th>Std. Dev.</th>
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Table 10. Logit Regressions of 1936 Senate Vote on Commodity Exchange Act (n=78).  

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<tr>
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<th>Model 3</th>
<th>Model 4</th>
<th>Model 5</th>
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<td>5.6509 (4.9749)</td>
<td>2.6280 (2.2336)</td>
<td>-2.3630 (1.1417)</td>
<td>4.1429 (4.1320)</td>
<td>2.1193 (19.283)</td>
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<tr>
<td>AllEx</td>
<td>-8.5220 (44.563)</td>
<td>-8.0567 (52.219)</td>
<td>-9.4929 (105.52)</td>
<td>-9.6369 (72.409)</td>
<td>-3.4257 (3.7855)</td>
</tr>
<tr>
<td>FarmPop</td>
<td>-5834 (15.165)</td>
<td>-1.2171 (7.4826)</td>
<td>14.528* (5.7707)</td>
<td>14.018 (8.3624)</td>
<td>6.2678 (18.424)</td>
</tr>
<tr>
<td>WheatAcr</td>
<td>9.109 (11.516)</td>
<td>10.550 (7.0114)</td>
<td>5.3451 (5.1442)</td>
<td>7.3840 (7.9691)</td>
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</tr>
<tr>
<td>CottonAcr</td>
<td>11889 (128519)</td>
<td>18333.7 (150551)</td>
<td>21410.6 (304108)</td>
<td>19529.9 (208672)</td>
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</tr>
<tr>
<td>AgCom</td>
<td>-3.3225 (7.1403)</td>
<td>-1.6263 (5.4542)</td>
<td>-3.603 (1.6589)</td>
<td>-2.3686 (4.2414)</td>
<td>-1.0267 (5.2626)</td>
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<td>Party</td>
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<td></td>
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<td>-3.7391 (12.225)</td>
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</tr>
<tr>
<td>South</td>
<td></td>
<td></td>
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<td>-18.104 (11.847)</td>
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</tr>
<tr>
<td>D-nominate(2)</td>
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<td></td>
<td>-12.977* (5.7871)</td>
<td>-9.0885 (6.1107)</td>
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</tr>
<tr>
<td>Pred(1)</td>
<td>-10.979 (6.5419)</td>
<td>-6.2218* (2.8390)</td>
<td>-2.3802 (1.4470)</td>
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<td></td>
</tr>
<tr>
<td>Res(1)</td>
<td>-18.437 (11.649)</td>
<td>-8.9563* (4.0444)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(2)</td>
<td>-33.690 (19.084)</td>
<td>-21.181* (10.152)</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Res(2)</td>
<td>-8.7844 (5.3049)</td>
<td></td>
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<td></td>
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<tr>
<td>PctBlack</td>
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<td>-18.080 (34.561)</td>
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<td></td>
</tr>
<tr>
<td>PctIllit</td>
<td></td>
<td></td>
<td>-24909.1 (720524)</td>
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<td>8.9484 (27.598)</td>
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</tr>
<tr>
<td>HouseD(1)</td>
<td></td>
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<td>5.8125 (17.584)</td>
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<td></td>
</tr>
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<td>HouseD(2)</td>
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<td></td>
<td>18.996 (23.441)</td>
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<tr>
<td>% Correctly Predicted</td>
<td>96.154</td>
<td>91.026</td>
<td>91.026</td>
<td>96.154</td>
<td>94.872</td>
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<tr>
<td>Log Likelihood</td>
<td>-6.2136 (0.8525)</td>
<td>-14.199 (0.6630)</td>
<td>-14.437 (0.6574)</td>
<td>-7.662 (0.8182)</td>
<td>-6.4451 (0.8470)</td>
</tr>
</tbody>
</table>

Regression model: $\text{Prob(}vote = 1) = 1/(1 + e^{W'})$; std. errors in parentheses; * = t-statistic significant at .05 or less; goodness-of-fit measured by log likelihood ratio index in parentheses below log likelihood.
### Table 11. Match Rates for Voting Senators, Paired by State, on the CEA.

<table>
<thead>
<tr>
<th>Model</th>
<th>Match Rate</th>
<th>Improvement over expected match rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expected Match rate:</td>
<td>.64</td>
<td></td>
</tr>
<tr>
<td>Observed Match rate:</td>
<td>.89</td>
<td>.25</td>
</tr>
<tr>
<td>Constituent Model:</td>
<td>.95</td>
<td>.31</td>
</tr>
<tr>
<td>Political Party Model:</td>
<td>.96</td>
<td>.32</td>
</tr>
<tr>
<td>Ideology Model:</td>
<td>.84</td>
<td>.20</td>
</tr>
</tbody>
</table>

(4 disagreeing pairs of 37 voting pairs)

**Notes:**
The expected match rate is $p^2 + (1-p)^2$, where $p$ is the observed probability of a yes vote on the roll-call; the observed match rate is the ratio of matched pairs to total pairs; the constituent model is the proportion of classification successes where matched pairs count as 2 successes and disagreeing pairs as 1 success and 1 error; the political party model adjusts the constituent model's number of successes by counting disagreeing pairs where the senators are from different political parties as 2 successes; the ideology model is the proportion of classification successes when senators are ordered by the first dimension of the d-nominate score and the cutoff is chosen that minimizes classification error.

**References:** Keith Krehbiel, *Constituency Characteristics and Legislative Preferences*, 76 PUBLIC CHOICE 21 (1993); Keith Poole and Howard Rosenthal, *Are Legislators Ideologues or the Agents of Constituents?*, 40 EUR. ECON. REV. 707 (1996).
Table 12. 1973-74 Congressional Witnesses
(3 hearings before agriculture committees).

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<td>2</td>
<td>5</td>
<td>1</td>
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<tr>
<td>Grain organization</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Boards of Trade</td>
<td>0</td>
<td>12</td>
<td>3</td>
<td>1</td>
<td>3</td>
<td>2</td>
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<tr>
<td>Futures industry</td>
<td>2</td>
<td>2</td>
<td>6</td>
<td>4</td>
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<td>0</td>
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<tr>
<td>Members of Congress</td>
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<td>0</td>
<td>5</td>
<td>0</td>
<td>0</td>
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<td>Executive branch</td>
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<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>officials</td>
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<td>officials</td>
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<td>Metals industry</td>
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<td>3</td>
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<tr>
<td><strong>Total testifying</strong></td>
<td><strong>16</strong></td>
<td><strong>21</strong></td>
<td><strong>21</strong></td>
<td><strong>26</strong></td>
<td><strong>13</strong></td>
<td><strong>15</strong></td>
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</table>

Testimony "for" indicates support for independent agency outside of Agricultural Department, "against" indicates opposition to independent agency (those testifying for independent agency inside Department are classified as "against," as are Senate witnesses supporting enacted House bill that established new agency in Department) and "no op." indicates no position expressed on the independent agency issue, whether or not the witness was asked about it; three Senate witnesses (one farm and two grain organizations) with conflicting testimony on the issue excluded; includes 12 House and 15 Senate letter-writers.
**Table 13. Vote on Sisk Amendment by Party and Region.**

<table>
<thead>
<tr>
<th>Region</th>
<th>Democrats</th>
<th>Republicans</th>
<th>Total</th>
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<td></td>
<td></td>
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<tr>
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<td>14</td>
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<tr>
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<td>3</td>
<td>3</td>
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<tr>
<td>Not voting</td>
<td>6</td>
<td>2</td>
<td>8</td>
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<tr>
<td>Northeast</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Yes</td>
<td>23</td>
<td>6</td>
<td>29</td>
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<tr>
<td>No</td>
<td>5</td>
<td>24</td>
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<td>22</td>
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<td>4</td>
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<tr>
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<td>4</td>
<td>35</td>
<td>39</td>
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<tr>
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<td>10</td>
<td>18</td>
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<td>West North Central</td>
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<td>3</td>
<td>18</td>
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<tr>
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<td>12</td>
<td>12</td>
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<td>5</td>
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<tr>
<td>South</td>
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<tr>
<td>No</td>
<td>23</td>
<td>29</td>
<td>52</td>
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<td>31</td>
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<td>1</td>
<td>9</td>
</tr>
<tr>
<td>No</td>
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<td>4</td>
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<td>2</td>
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<td>2</td>
<td>34</td>
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<tr>
<td>Not voting</td>
<td>7</td>
<td>5</td>
<td>12</td>
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**Note:**
The region code is as follows:
Northeast = Del., N.J., N.Y., Pa.;
East North Central = Ill., Ind., Mich., Oh., Wis.;
West North Central = Ia., Ks., Minn., Mo., Neb., N.D., S.D.;
South = Ala., Ark., Fla., Ga., La., Miss., N.C., S.C., Tenn., Tex., Va.;
Border = Ky., Md., Okla., W.Va.;
West = Alask., Ariz., Cal., Colo., Ha., Id., Mont., Nev., N.M., Ore., Ut., Wash., Wyo.
Table 14. Descriptive Statistics for 1974 House Vote Regression Variables (n=337).

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<th>Maximum</th>
<th>Minimum</th>
<th>Std. Dev.</th>
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</table>
The Political Dynamics of Derivative Securities Regulation

Table 15. Logit Regressions of 1974 House Vote on Sisk Amendment (n=337).

<table>
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<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
<th>Model 4</th>
</tr>
</thead>
<tbody>
<tr>
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<td>0.4596</td>
</tr>
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<td>(1.1607)</td>
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<td>FarmPop</td>
<td>-0.5548</td>
<td>0.3646</td>
<td>0.9245</td>
<td>5.6703</td>
</tr>
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<td>(3.2895)</td>
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<td>(4.1162)</td>
</tr>
<tr>
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<td>(0.6549)</td>
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<td>1.8134</td>
<td>1.8134</td>
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<td>(0.9204)</td>
<td>(0.9204)</td>
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<td></td>
<td>(0.4840)</td>
<td>(0.6148)</td>
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<tr>
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<td>-7.8624</td>
<td>-7.8624</td>
<td>-7.8624</td>
</tr>
<tr>
<td></td>
<td>(1.4884)</td>
<td>(1.7944)</td>
<td>(1.7944)</td>
<td>(1.7944)</td>
</tr>
<tr>
<td>D-nominate(2)</td>
<td>-1.8229</td>
<td>-0.9602</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.9288)</td>
<td>(2.0129)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(1)</td>
<td>-8.1780</td>
<td>-7.5987</td>
<td>-7.5987</td>
<td>-7.5987</td>
</tr>
<tr>
<td></td>
<td>(0.8742)</td>
<td>(0.8154)</td>
<td>(0.8154)</td>
<td>(0.8154)</td>
</tr>
<tr>
<td>Res(1)</td>
<td>-7.7427</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.7412)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(2)</td>
<td>2.5018</td>
<td>1.3795</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.0866)</td>
<td>(0.9934)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Res(2)</td>
<td>-0.2397</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.9582)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PctBlack</td>
<td></td>
<td>-0.1755</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1.7675)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PctCollege</td>
<td></td>
<td>7.4826</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(6.1187)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PctDemPres</td>
<td></td>
<td>-3.9353</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2.6626)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MedAge</td>
<td></td>
<td>-0.0726</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.0642)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MedIncome</td>
<td></td>
<td>0.0002</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.0002)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>%Correct</td>
<td>84.57</td>
<td>80.119</td>
<td>83.68</td>
<td>84.57</td>
</tr>
<tr>
<td></td>
<td>(46.82)</td>
<td>(38.99)</td>
<td>(47.39)</td>
<td>(50.15)</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-123.89</td>
<td>-142.12</td>
<td>-122.55</td>
<td>-116.12</td>
</tr>
<tr>
<td></td>
<td>(46.82)</td>
<td>(38.99)</td>
<td>(47.39)</td>
<td>(50.15)</td>
</tr>
</tbody>
</table>

Regression model: \( \text{Prob}(\text{vote} = 1) = \frac{1}{1 + e^{X'}} \); std. errors in parentheses; \(^*\) = t-statistic significant at .05 or less; goodness-of-fit measured by log likelihood ratio index in parentheses below log likelihood.
Table 16. 93d Congress Ideology Comparisons across Chambers.

<table>
<thead>
<tr>
<th></th>
<th>Senate (n=100)</th>
<th>House (n=434)</th>
<th>Between chamber test-statistic*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chamber Median</td>
<td>-0.126</td>
<td>-0.01</td>
<td>4.44*</td>
</tr>
<tr>
<td>Agr. Comm. Median</td>
<td>0.169</td>
<td>0.02</td>
<td>1.69</td>
</tr>
<tr>
<td>Non-Comm. Median</td>
<td>-0.156</td>
<td>-0.014</td>
<td>6.79*</td>
</tr>
<tr>
<td>Chamber Mean</td>
<td>-0.093</td>
<td>-0.045</td>
<td>1.33</td>
</tr>
<tr>
<td>Agr. Comm. Mean</td>
<td>0.044</td>
<td>0.03</td>
<td>-0.13</td>
</tr>
<tr>
<td>Non-Comm. Mean</td>
<td>-0.11</td>
<td>-0.05</td>
<td>1.65</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Within chamber test-statistic*</th>
<th>Median</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1.24</td>
<td>-1.58</td>
</tr>
<tr>
<td></td>
<td>.12</td>
<td>-1.67</td>
</tr>
</tbody>
</table>

Notes:
n = number of observations; Agr. Comm. = members of chamber's Agriculture Committee, the committee with jurisdiction over commodity futures regulation (n=13 for Senate, 35 for House); Non-Comm. = chamber members not on Agriculture Committee

* Chi-square test for difference in medians across chambers; t-test for difference in means across chambers

b Chi-square test for difference in medians between committee and non-committee members within chamber; t-test for difference in means between committee and non-committee members within chamber

* Significant at .05.

Ideology scores are first-dimension of Poole and Rosenthal common space w-nominate score estimated for the 93rd Congress

The Political Dynamics of Derivative Securities Regulation

Table 17. 1990-91 Congressional Witnesses
(5 hearings on jurisdictional issues).

<table>
<thead>
<tr>
<th>Witness type*</th>
<th>Banking Comm., # For</th>
<th>Banking Comm., # Against</th>
<th>Agric. Comm., # For</th>
<th>Agric. Comm., # Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farm/grain organization</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Investment managers</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Securities industry</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Stock exchanges</td>
<td>7</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Boards of trade (exchanges)</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Members of Congress</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Executive branch officials</td>
<td>11</td>
<td>5</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Futures industry</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Total testifying</td>
<td>34</td>
<td>14</td>
<td>16</td>
<td>16</td>
</tr>
</tbody>
</table>

* Testimony for indicates support for shifting jurisdiction away from the CFTC to the SEC, testimony against, opposition to the shift of jurisdiction; three witnesses, of which two took no position on the issue and one took a mixed position, are not included in the tally.
Table 18. 1989-91 Congressional Witnesses
(3 hearings before agriculture committees).

<table>
<thead>
<tr>
<th>Witness type</th>
<th>Number For</th>
<th>Number Against</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farm organization</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Grain organization</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Boards of trade (exchanges)</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>Futures industry</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Members of Congress</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Executive branch officials</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total testifying:</strong></td>
<td><strong>13</strong></td>
<td><strong>47</strong></td>
</tr>
</tbody>
</table>

* Testimony for indicates support for increased regulation by the CFTC over futures markets or for shifting jurisdiction away from the CFTC to the SEC; testimony against indicates opposition to increased regulation or shift of jurisdiction; eight witnesses who took mixed positions excluded from tally.
Table 19. Descriptive Statistics for 1991 Senate Vote Regression Variables (n=58).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Maximum</th>
<th>Minimum</th>
<th>Std. Dev.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote</td>
<td>.3448</td>
<td>1</td>
<td>0</td>
<td>.4795</td>
</tr>
<tr>
<td>FarmPop</td>
<td>.4386</td>
<td>.961</td>
<td>.003</td>
<td>.2596</td>
</tr>
<tr>
<td>ComEx</td>
<td>.0862</td>
<td>1</td>
<td>0</td>
<td>.2831</td>
</tr>
<tr>
<td>StockEx</td>
<td>.0172</td>
<td>1</td>
<td>0</td>
<td>.1133</td>
</tr>
<tr>
<td>AgCom</td>
<td>.1379</td>
<td>1</td>
<td>0</td>
<td>.3478</td>
</tr>
<tr>
<td>BankCom</td>
<td>.1552</td>
<td>1</td>
<td>0</td>
<td>.3652</td>
</tr>
<tr>
<td>FutContrib</td>
<td>$2,348</td>
<td>$11,000</td>
<td>0</td>
<td>$3,239</td>
</tr>
<tr>
<td>SecContrib</td>
<td>$6,313</td>
<td>$37,400</td>
<td>0</td>
<td>$8,284</td>
</tr>
<tr>
<td>Party</td>
<td>.6035</td>
<td>1</td>
<td>0</td>
<td>.4935</td>
</tr>
<tr>
<td>South</td>
<td>.2069</td>
<td>1</td>
<td>0</td>
<td>.4086</td>
</tr>
<tr>
<td>D-nominate(1)</td>
<td>-.2577</td>
<td>.933</td>
<td>-.998</td>
<td>.5709</td>
</tr>
<tr>
<td>D-nominate(2)</td>
<td>.0692</td>
<td>.996</td>
<td>-.834</td>
<td>.4007</td>
</tr>
<tr>
<td>PctBlack</td>
<td>.0935</td>
<td>.344</td>
<td>0</td>
<td>.0968</td>
</tr>
<tr>
<td>PctCollege</td>
<td>.1997</td>
<td>.272</td>
<td>.123</td>
<td>.0368</td>
</tr>
<tr>
<td>PctDemPres</td>
<td>.4466</td>
<td>.56</td>
<td>.32</td>
<td>.0578</td>
</tr>
<tr>
<td>MedIncome</td>
<td>$29,927</td>
<td>$40,805</td>
<td>$22,137</td>
<td>$4,861</td>
</tr>
<tr>
<td>Over65</td>
<td>.1245</td>
<td>.183</td>
<td>.041</td>
<td>.0203</td>
</tr>
<tr>
<td>HouseD(1)</td>
<td>-.0634</td>
<td>.657</td>
<td>-.7325</td>
<td>.4432</td>
</tr>
<tr>
<td>HouseD(2)</td>
<td>-.0326</td>
<td>.599</td>
<td>-.6598</td>
<td>.2662</td>
</tr>
<tr>
<td>Incumbent</td>
<td>.7931</td>
<td>1</td>
<td>0</td>
<td>.4086</td>
</tr>
<tr>
<td>TotPAC</td>
<td>$932,465</td>
<td>$2,438,040</td>
<td>0</td>
<td>$453,063</td>
</tr>
<tr>
<td>Election Margin</td>
<td>.2234</td>
<td>.598</td>
<td>-.019</td>
<td>.1709</td>
</tr>
</tbody>
</table>

* This variable has only 45 observations.
# Table 20. Probit Regressions of 1991 Senate Vote on Bond-Wirth Amendment.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3 (Tobit)</th>
<th>Model 4 (Tobit)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-0.6752 (.5621)</td>
<td>.0451 (1.1245)</td>
<td>-0.9541 (.7046)</td>
<td>-0.3054 (1.1106)</td>
</tr>
<tr>
<td>ComEx</td>
<td>-0.7332 (1.0817)</td>
<td>-0.5074 (1.0396)</td>
<td>.0428 (1.0793)</td>
<td>.2252 (.9722)</td>
</tr>
<tr>
<td>FarmPop</td>
<td>-1.7079 (1.2505)</td>
<td>-2.1484* (1.1924)</td>
<td>-1.4817 (1.1643)</td>
<td>-1.8472* (1.0851)</td>
</tr>
<tr>
<td>StockEx</td>
<td>1.4517 (52.78)</td>
<td>1.3097 (57.60)</td>
<td>.0509 (44.60)</td>
<td>-1.268 (48.52)</td>
</tr>
<tr>
<td>AgCom</td>
<td>-2.4581 (15.90)</td>
<td>-2.5491 (15.00)</td>
<td>-2.4782 (14.78)</td>
<td>-2.4712 (13.76)</td>
</tr>
<tr>
<td>BankCom</td>
<td>-4.698* (.7161)</td>
<td>-1.742* (.6952)</td>
<td>.9945 (.6838)</td>
<td>.8925 (.6710)</td>
</tr>
<tr>
<td>FutContrib</td>
<td>-.00014 (.0001)</td>
<td>-.00018* (.00009)</td>
<td>-.0001 (.0001)</td>
<td>-.00017 (.00012)</td>
</tr>
<tr>
<td>SecContrib</td>
<td>.0001* (.00005)</td>
<td>.00012* (.00004)</td>
<td>.0001 (.0001)</td>
<td>.00014* (.00008)</td>
</tr>
<tr>
<td>Party</td>
<td>-1.2988 (2.2130)</td>
<td>-1.2555 (2.3569)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D-nominate(1)</td>
<td>-1.6608 (1.9098)</td>
<td>-1.7650 (2.0762)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D-nominate(2)</td>
<td>1.1158 (1.3303)</td>
<td>.5609 (1.4304)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(1)</td>
<td>-.6380 (.4715)</td>
<td>-.7567 (.4776)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Res(1)</td>
<td>-1.0114 (1.9650)</td>
<td>-0.9144 (1.9402)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(2)</td>
<td>2.4706* (1.1964)</td>
<td>1.7403* (1.0382)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Res(2)</td>
<td>1.3768 (1.4089)</td>
<td>1.0353 (1.6241)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Observations</td>
<td>58</td>
<td>64</td>
<td>58</td>
<td>64</td>
</tr>
<tr>
<td>% Correctly Predicted</td>
<td>87.931</td>
<td>84.375</td>
<td>79.31</td>
<td>82.813</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-19.151 (.4874)</td>
<td>-19.562 (.5170)</td>
<td>-21.514 (.4242)</td>
<td>-22.366 (.4478)</td>
</tr>
</tbody>
</table>

Regression model: \( \text{Probit}(\text{vote}_i = 1) = F(\beta'x_i) = \Phi, \) the normal distribution; log likelihood is given by: \( \log L = \sum y_i \log \Phi(\beta'x_i) + \sum (1 - y_i) \log(1 - \Phi(\beta'x_i)); \) std. errors in parentheses; * = t-statistic significant at .05 or less; goodness-of-fit measured by log likelihood ratio index in parentheses below log likelihood; tobit models estimate contributions in a first-stage tobit (censored) regression and use the fitted values in a second-stage probit regression of votes.
### Table 20. Probit Regressions of 1991 Senate Vote on Bond-Wirth Amendment (continued).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 5 (Tobit)</th>
<th>Model 6 (Tobit)</th>
<th>Model 7</th>
<th>Model 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-1.2820* (.6917)</td>
<td>-0.0278 (.0644)</td>
<td>-0.0167 (.4150)</td>
<td>.4324 (.6178)</td>
</tr>
<tr>
<td>ComEx</td>
<td>.0327 (1.0104)</td>
<td>.2559 (1.9511)</td>
<td>-0.0148 (.6026)</td>
<td>.0200 (.5794)</td>
</tr>
<tr>
<td>FarmPop</td>
<td>-1.3891 (1.0512)</td>
<td>-1.9464* (.9834)</td>
<td>-1.9069* (.9786)</td>
<td>-1.9897* (.9166)</td>
</tr>
<tr>
<td>StockEx</td>
<td>-2.9562 (19.59)</td>
<td>-2.1412 (22.09)</td>
<td>-0.8080 (.6946)</td>
<td>-1.8062 (.6996)</td>
</tr>
<tr>
<td>AgCom</td>
<td></td>
<td></td>
<td>-2.5211 (11.19)</td>
<td>-3.8313 (19.81)</td>
</tr>
<tr>
<td>BankCom</td>
<td></td>
<td></td>
<td>1.1658* (.4187)</td>
<td>1.2397* (.4004)</td>
</tr>
<tr>
<td>FutContrib</td>
<td>-.0003* (.0001)</td>
<td>-.0026* (.0001)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SecContrib</td>
<td>.0002* (.0001)</td>
<td>.0002* (.0001)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Party</td>
<td></td>
<td></td>
<td>-2.2910 (22.226)</td>
<td>-1.1490 (1.1567)</td>
</tr>
<tr>
<td>D-nominate(1)</td>
<td></td>
<td></td>
<td>-2.6803 (1.9557)</td>
<td>-1.4596 (1.0559)</td>
</tr>
<tr>
<td>D-nominate(2)</td>
<td></td>
<td></td>
<td>.0365 (1.3295)</td>
<td>.9799 (6.8705)</td>
</tr>
<tr>
<td>Pred(1)</td>
<td>-.8265 (.4587)</td>
<td>-.4591 (.3548)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Res(1)</td>
<td>-1.6923 (1.7966)</td>
<td>-1.9235 (1.2452)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pred(2)</td>
<td>1.6746* (.9825)</td>
<td>1.8981* (.7706)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Res(2)</td>
<td>.0460 (1.4096)</td>
<td>1.1189 (1.7538)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. Observations</td>
<td>58</td>
<td>64</td>
<td>90</td>
<td>98</td>
</tr>
<tr>
<td>% Correctly Predicted</td>
<td>79.31</td>
<td>87.5</td>
<td>78.889</td>
<td>78.751</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-23.039 (.3834)</td>
<td>-23.924 (.4093)</td>
<td>-34.625 (.4089)</td>
<td>-37.413 (.4024)</td>
</tr>
</tbody>
</table>

**Regression model:** \( \text{Prob}(\text{vote} = 1) = F(\beta'x) = \Phi \), the normal distribution; log likelihood is given by: \( \log L = \sum y_i \log \Phi(\beta'x_i) + (1 - y_i) \log (1 - \Phi(\beta'x_i)) \); std. errors in parentheses; * = t-statistic significant at .05 or less; goodness-of-fit measured by log likelihood ratio index in parentheses below log likelihood; tobit models estimate contributions in a first-stage tobit (censored) regression and use the fitted values in a second-stage probit regression of votes.
**Table 21. Match Rates for Voting Senators, Paired by State on the Bond-Wirth Amendment.**

<table>
<thead>
<tr>
<th>Model</th>
<th>Match Rate</th>
<th>Improvement over expected match rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expected Match rate:</td>
<td>.56</td>
<td></td>
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<tr>
<td>Observed Match rate:</td>
<td>.71</td>
<td>.15</td>
</tr>
<tr>
<td>Constituent Model:</td>
<td>.85</td>
<td>.29</td>
</tr>
<tr>
<td>Political Party Model:</td>
<td>.94</td>
<td>.38</td>
</tr>
<tr>
<td>Ideology Model:</td>
<td>.73</td>
<td>.17</td>
</tr>
</tbody>
</table>

(14 disagreeing pairs of 48 voting pairs)

**Notes:**
The expected match rate is $p^2 + (1-p)^2$, where $p$ is the observed probability of a yes vote on the roll-call; the observed match rate is the ratio of matched pairs to total pairs; the constituent model is the proportion of classification successes where matched pairs count as 2 successes and disagreeing pairs as 1 success and 1 error; the political party model adjusts the constituent model's number of successes by counting disagreeing pairs where the senators are from the different political parties as 2 successes; the ideology model is the proportion of classification successes when senators are ordered by the first dimension of the d-nominate score and the cutoff is chosen that minimizes classification error.

**References:** Keith Krehbiel, *Constituency Characteristics and Legislative Preferences*, 76 PUB CHOICE 21 (1993); Keith Poole and Howard Rosenthal, *Are Legislators Ideologues or the Agents of Constituents?*, 40 EUR. ECON. REV. 707 (1996).