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The ABCs of Banking Law

Industry Structure, the Dual Banking System, and Regulatory Themes

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Center for Banking and Finance



Study of Legal and Policy Issues Related to Banking

- *North Carolina Banking Institute Journal*

Advance the Teaching of Banking and Finance

- *Regulation of Bank Financial Service Activities* (6th edition 2022)

Sponsor Conferences for Industry Professionals

- 2025 Banking Institute, March 27–28
- 2025 Preludes to the Banking Institute
 - AI and Bank Operations and Supervision, January 29
 - Fraud in Financial Services: New Technology and Mitigating Liability, February 19

Director Development Initiative (DDI)



<https://ddi.law.unc.edu/>

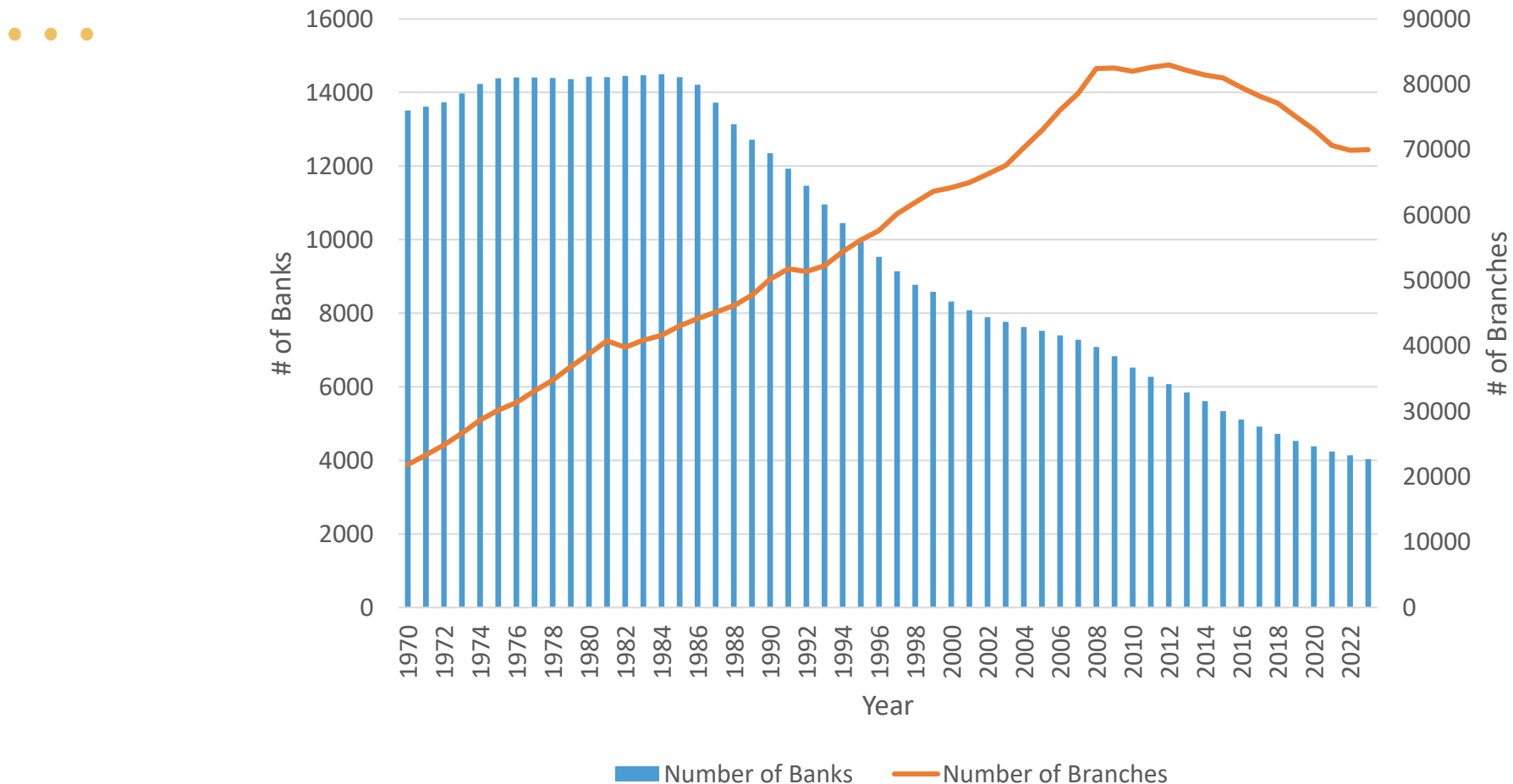
- Database for potential diverse directors
 - 1244 registrants; 535 of whom list banking and/or financial services industry experience
 - 2024 – Provided names in 53 board seat searches
- Educational Programming
 - Free, virtual, monthly short programs
 - Annual DDI Board Boot Camp, May 21–22, Chapel Hill, NC (waiting list)
- 2024 Census of Top 50 NC Public Companies Board Diversity
 - 29.7% of board members female; 19.9% people of color

Depository Institutions (as of 12/31/24)

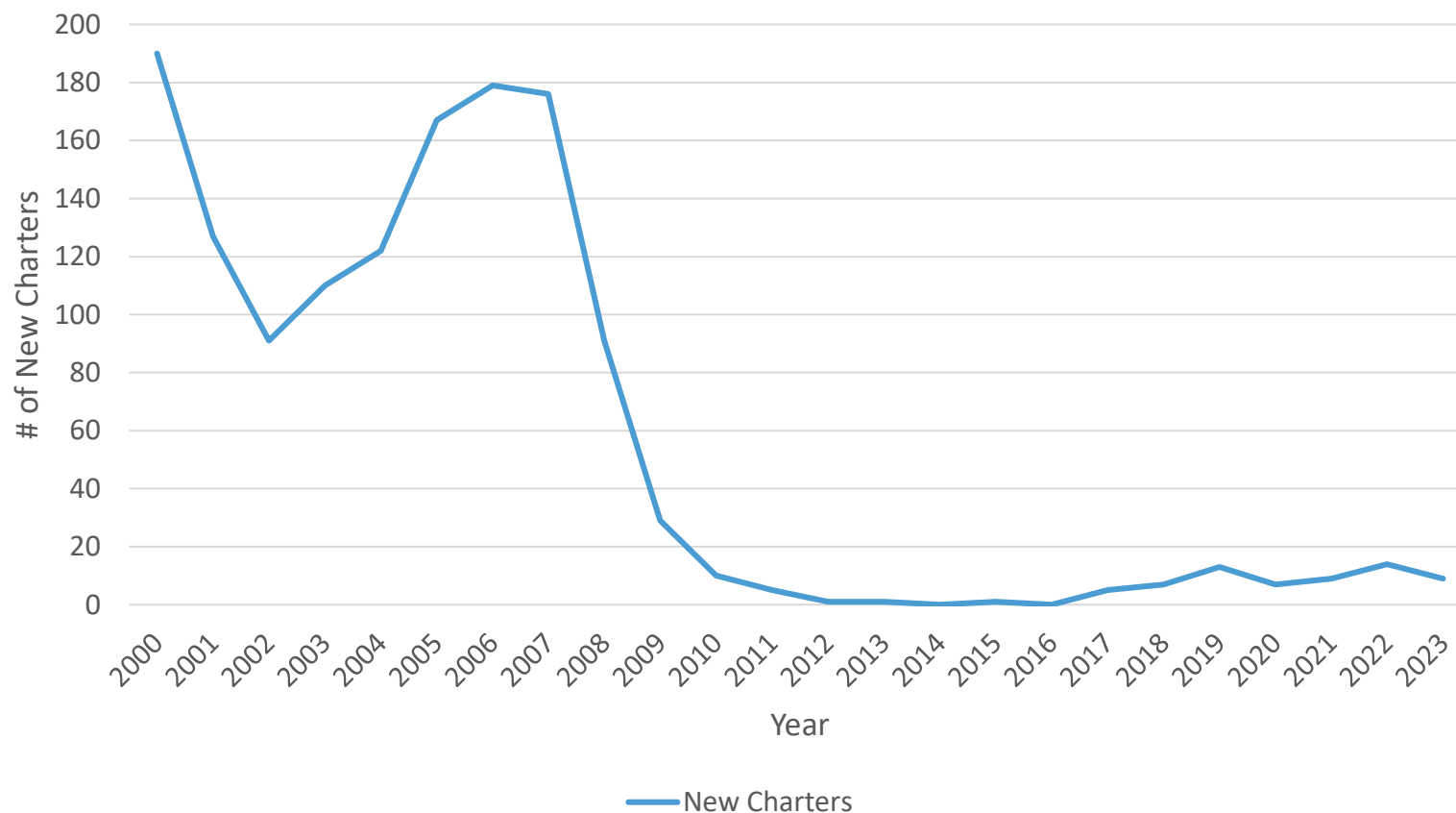


	Number	Total Assets in millions
TOTAL BANKS	3,941	22,894,000
TOTAL SAVINGS	546	1,204,000
TOTAL CU*	4,499	2,311,000

Number of Commercial Banks and Branches



Number of New Charters



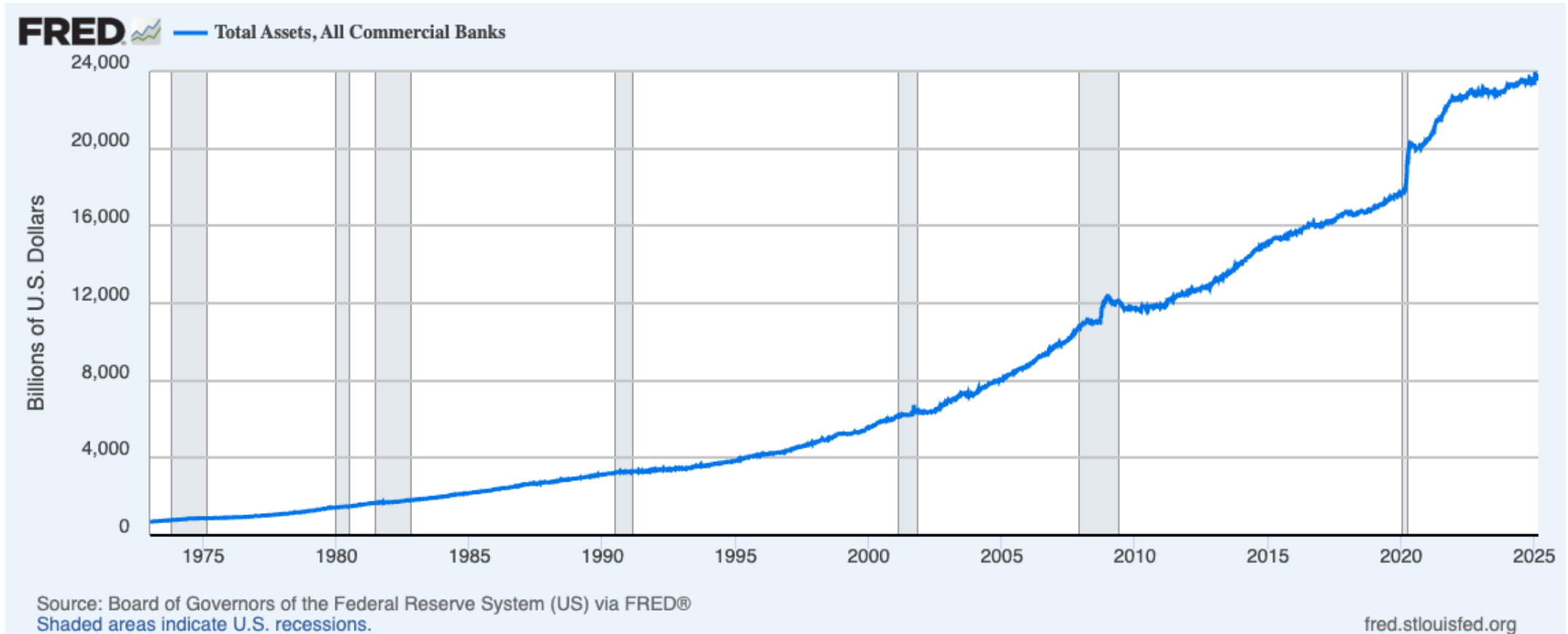
Large Commercial Banks



Nat'l Rank	Bank Name	Charter	Consol Assets	Domestic Branches	Foreign Branches
1	JPMORGAN CHASE BK NA	NAT	3.459 T	4,970	32
2	BANK OF AMER NA	NAT	2.589 T	3,669	21
3	WELLS FARGO BK NA	NAT	1.705 T	4,227	10
4	CITIBANK NA	NAT	1.697 T	649	110
5	U S BK NA	NAT	663 B	2,201	1
6	GOLDMAN SACHS BK	SMB	558 B	2	2
7	PNC BK NA	NAT	556 B	2,308	1
8	TRUIST BK	SNM	523 B	1,928	0
9	CAPITAL ONE NA	NAT	487 B	257	1
10	T D BK NA	NAT	373 B	1,134	0

Asset Size of FDIC Insured Institutions

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<https://fred.stlouisfed.org/series/TLACBW027SBOG#>

Holding Company Assets (as of 9/30/24)



Rank	Institution Name	Location	Total Assets
1	JPMORGAN CHASE & CO.	NEW YORK, NY	\$4,210,048,000
2	BANK OF AMERICA CORPORATION	CHARLOTTE, NC	\$3,324,293,000
3	CITIGROUP INC.	NEW YORK, NY	\$2,430,663,000
4	WELLS FARGO & COMPANY	SAN FRANCISCO, CA	\$1,922,125,000
5	GOLDMAN SACHS GROUP, INC., THE	NEW YORK, NY	\$1,728,080,000
6	MORGAN STANLEY	NEW YORK, NY	\$1,258,027,000
7	U.S. BANCORP	MINNEAPOLIS, MN	\$686,469,000
8	PNC FINANCIAL SERVICES GROUP, INC., THE	PITTSBURGH, PA	\$565,085,257
9	TD GROUP US HOLDINGS LLC	WILMINGTON, DE	\$560,480,560
10	TRUIST FINANCIAL CORPORATION	CHARLOTTE, NC	\$523,434,000

Dual Banking System (as of 12/31/24)



Number

FDIC – Insured Commercial Banks	3,941
National (OCC)	750
State nonmember (FDIC)	2,486
State member (FRB)*	705
FDIC – Insured Savings Institutions	546
Federal (OCC)	237
State (FDIC)	309

Charter Choice – National or State



- Powers
- Preemption
- Knowledge or Sophistication of Regulator
- Accessibility of Regulator
- Examination Costs; Fees

Evolution of Preemption of State Laws by the NBA Before Dodd-Frank

- Barnett Bank (S. Ct. 1996): states may regulate national banks where “doing so does not prevent or significantly interfere with the national bank’s exercise of its powers”
- 12 C.F.R. § 7.4009 (2004): “state laws that obstruct, impair, or condition a national bank’s ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks”

Evolution of Preemption of State Laws by the NBA After Dodd-Frank

- Dodd-Frank Act § 1044 (2010), 12 U.S.C. § 25b: state consumer financial laws will be preempted if: “in accordance with the legal standard for preemption in the decision [in Barnett Bank], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers”
- Revised OCC regulations (2011): state laws apply to national banks “to the extent consistent with the decision of [Barnett Bank]”
- “obstruct, impair, or condition” language deleted
- OCC stated that to the extent a preemption precedent is exclusively reliant on that language, the validity of the precedent needs to be reexamined to see if it is consistent with Barnett Bank

Evolution of Preemption of State Laws by the NBA After Dodd-Frank

- *Cantero v. Bank of America, N.A.* (S. Ct. 2024), remanding to the 2nd Circuit to apply a test of whether the facts are “akin to” prior cases finding preemption or not finding preemption.
 - 2nd Circuit initially held that the NBA preempted a NY state law mandating that banks pay at least 2% interest on mortgage escrow accounts.
 - *Kivett v. Flagstar Bank, FSB* (9th Cir. 2024), Ninth Circuit on remand from S. Ct. post-*Cantero* found similar CA statute NOT preempted, ignoring “akin to” analysis.

Fintechs



A nonbank using technology to provide financial services or products to customers in new ways

- Deconstruction of banking into its separate pieces
- Reconstructing those pieces within the tech sphere, rather than the financial institutions sphere

Potential ways for fintech to position itself

- Deconstruct and provide one or more products or services (subject to state licensing requirements and CFPB rules and oversight)
- Partner with a bank (OCC and FDIC risk management required for 3rd party services)
- Become a bank

Attraction of Bank Charter for Fintechs

- Raise funds at risk-free rates via federal deposit insurance
- Bank exportation of interest rates
- Access to payments system
- Access to discount window
- Preemption of state law if a national/federal bank charter
- For ILCs, not be subject to BHCA activity limits

Bank Charter Options for Fintechs



OCC's Special Purpose National Bank

- No charters granted yet
- May not accept deposits (Is this a necessary predicate of banking? Other SPNB's – trust banks and banker's banks authorized by Congress)
- Federal preemption
- Bank interest rate exportation
- *Lacewell v. OCC* (2d Cir. 2021) (NYDFS lacked standing)
- Language from the FRA (every NB must have *deposit* insurance) and BHCA (bank is an “insured bank” or accepts “deposits” and makes commercial loans)

Bank Charter Options for Fintechs cont.



OCC Full-Service Charter

- Varo Money; SoFi Bank

Industrial Loan Company/Industrial Bank

- Handful of states (Utah is prominent)
- Not a “bank” under BHCA – no activity limits elsewhere in the holding company structure
- But bank advantage of interest rate exportation and access to payments system
- FDIC approved insurance applications in March 2020 for Square Bank and NelnetBank
- 2021 FDIC rule requires FDIC oversight of companies controlling an ILC
- 2024 Proposed rule to amend not finalized

Bank Charter Options for Fintechs (cont.)



Wyoming Special Purpose Depository Institution

- Not required to have FDIC insurance or federal prudential regulator
- Not a “bank” under BHCA
- Bank advantages of interest rate exportation and access to payments system
- September 2020 charter to Kraken – qualified custodian for cryptocurrency or other digital assets

Fintechs versus Banking as a Service (BaaS)

- Fintech companies use digital solutions to improve financial services (that may be delivered by banks or by fintech – the bank is buying the service from the fintech)
- BaaS allows nonbank businesses to provide financial services using traditional bank technology and regulatory framework (the bank is selling service to the fintech)
- Both are often referred to as bank-fintech partnerships

Statutory and Regulatory Themes

- Concerns about mixing banking and commerce
- Limited entry
- Dual chartering and regulatory arbitrage
- Restrictions on geographic expansion
- Concerns about concentration of economic power
- Safety and soundness regulation
- Runnability – deposits repayable on demand funding longer-term loans
- Legacy (Grandfather) provisions

Predicates for Most Major Banking Legislation

- Reaction to major financial calamity
 - What's in store to respond to SVB and Signature failures and stress on other banks?
- Reaction to attempt to avoid regulatory or statutory restrictions by
 - Affirming new activity and permitting to go forward without regulatory fetters, or
 - Reaffirming the existing restrictions

2024 Election and the Regulatory Outlook



- Trump Administration – Rollback of Dodd–Frank Act through lobbying, litigation, legislating (SIFIs moved from \$50B in assets to \$250B in assets)
- Biden Administration
 - Agency heads – personnel is policy
 - Legislation difficult with divided Congress
 - Priorities: Climate change, diversity and inclusion, crypto regulation, consumer issues, CRA, bank mergers and response to SVB and Signature failures



Regulatory Outlook



Less stability than in the past

- For many years, few political policy fights in financial services regulation
- After the 2008 financial crisis, financial services regulation has become highly partisan
 - Personnel selected to run the agencies are acting in a more partisan manner
 - Congress using tools like the Congressional Review Act
 - Supreme Court limiting agency action through the 2022 “major questions” doctrine
- Big policy swings results in
 - Lack of stability and certainty
 - Increased costs associated with changing policy positions

QUESTIONS?



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