Expansion of National Bank Powers: Regulatory and Judicial Precedent under the National Bank Act, Glass-Steagall Act, and Bank Holding Company Act

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Inflation and high market interest rates have revolutionized the financial industry in the United States. In response to rapidly changing financial needs of customers, the services offered by financial institutions have become increasingly diversified, rendering the differences among the various institutions less pronounced. Competition for financial assets has intensified among commercial banks, savings and loan associations, and credit unions, and between those institutions and nondepository institutions.  


2. Financial institutions are private corporations that purchase loans, debt securities, and related financial assets. They are subdivided into (1) depository institutions, including commercial banks, savings and loan associations, mutual savings banks, and credit unions, and (2) nondepository institutions, including mutual funds, money market mutual funds, life and property insurance companies, and pension funds. Depository institutions obtain funds from the receipt of money deposits. Nondepository institutions, in contrast, obtain funds from premiums, investment earnings, and other nondeposit sources. See P. Rose & D. Fraser, Financial Institutions 132, 274-77, 314-15, 325-26, 403 (1980); House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., A Reference Guide to Banking and Finance 19 (Comm. Print 1981) [hereinafter cited as A Reference Guide to Banking and Finance].


5. Credit unions are cooperative organizations that pool deposits and make loans to their members. Federally chartered credit unions are regulated by the National Credit...
pository financial investment firms. As market pressures continue to push financial institutions into a more competitive environment, Congress must grapple with federal statutes and regulations that impede the efficient flow of capital.

Commercial banks dominate the financial industry in terms of the amount of financial assets they hold, but the upheaval in the financial marketplace threatens that dominance from two sides. One threat comes from other depository institutions, including savings and loans and credit unions. In recent years these "thrift" institutions have been armed by Congress with statutory powers that closely resemble the powers once exclusively enjoyed by commercial banks. A second and more serious competitive threat comes from nondepository investment firms.

During periods of inflation and high market interest rates these firms benefit as bank customers transfer their cash and savings from low-interest checking and savings accounts to high yield short-term investment funds. Although federal and state securities laws apply to investment funds, these funds are not subject to banking laws that require specified amounts of reserves and interest rate ceilings on deposits.

In light of these trends, commercial bank directors and shareholders desire an overhaul of bank regulation. Although most commercial banks would probably prefer to confine the thrifts to their traditional activities,
and to extend the restrictive bank regulations to investment funds, Congress seems unwilling to endorse that approach. Instead the trend in Congress and the federal bank agencies has been to emphasize bank deregulation as a means of promoting a fair and efficient allocation of capital resources. Deregulation encompasses two objectives, the elimination of interest ceilings on deposit accounts and the expansion of bank powers to enhance service competition. The first objective has been reached in part with the passage of title II of the Depository Institutions Deregulation and Monetary Control Act of 1980. Progress toward meeting the second objective, however, has been much slower.

This Comment examines the latter objective of bank deregulation with respect to national banks. Part I of this Comment examines the National Bank Act of 1864, which governs the operations and powers of national banks and restricts their activities to the traditional business of banking. Part II examines the Glass-Steagall Act of 1933, which separates commercial banking from investment banking and prevents national banks from engaging in most investment activities. Part III examines the Bank Holding Company Act of 1956, which permits banks operating in the holding company format to engage in specified nonbanking activities that are closely related to banking and are performed through a nonbank subsidiary of the bank holding company.

I. The National Bank Act of 1864

The National Bank Act can be traced to the Civil War. An antagonism towards banks, largely because of the turbulent political and economic history of banking during the first half of the nineteenth century had culminated in the abandonment of federal banking laws. Federal involvement in banking reemerged primarily because of the need for

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12. See Liberation of the Bank Industry May Be Thwarted This Year by Fractured Finance Lobbies, 40 CONG. Q. WEEKLY REP. 187, 190 (1982).


14. The 50 state banking laws are too numerous to analyze in the detail required. Nevertheless, the discussion in this Comment of the Glass-Steagall Act (Part II) applies equally to state bank members of the Federal Reserve System, and the analysis of the Bank Holding Company Act (Part III) applies to state banks operating in the bank holding company format whether or not the bank affiliate is a member of the Federal Reserve System.


sound and uniform money to finance the North’s war effort. Unlike prior attempts to establish a single central bank, the National Bank Act authorized private individuals to form “national banking associations” pursuant to federal charters issued by the Office of the Comptroller of the Currency.

Today the Act remains the governing foundation for national bank activities. Acting in accordance with the Comptroller’s supervision, national banks are organized for the purpose of “carrying on the business of banking.” Although the Act does not expressly define the business of banking, it enumerates permissible activities traditionally connected to banking, including the power to discount and negotiate promissory notes, drafts, and bills of exchange, the power to loan money, and the power to receive deposits. In addition, the Act grants corporate powers relating to the general management and operation of banks as business concerns and expressly prohibits or limits certain activities. These latter provisions include a restriction on the holding of real estate and a prohibition on loaning more than ten percent of the bank’s capital and surplus to any individual, partnership, or corporation.

Finally, the Act requires national banks to defer to state law on such matters as the propriety of branch banking and the charging of maximum interest rates on certain types of loans. In addition to the express powers, the Act permits the directors of national banks “to exercise all such incidental powers as shall be necessary to carry on the business of banking.” When banks seek to engage in activities not expressly enumerated in one Act, they frequently rely upon the incidental powers clause to justify the activity.

A. Early Efforts to Construe the Meaning of the “Business of Banking”

Shortly after the passage of the National Bank Act, the meaning of the incidental powers clause and the “business of banking” became the subject

21. Id. § 24(Seventh) (Supp. IV 1980).
22. Id. § 24(Seventh) (Supp. IV 1980).
24. Id. § 84 (1976).
25. Id. § 36.
27. Id. § 24(Seventh) (Supp. IV 1980); see infra text accompanying note 48.
of litigation. Although most of the cases arose in the context of the debtor-creditor relationship between national banks and their customers, the early judicial gloss on the clause emphasized basic policy considerations that remain important today. In 1875 the United States Supreme Court in *First National Bank v. National Exchange Bank*[^28] ruled that a national bank's acceptance of railroad stock to settle a debt was incidental to the power to incur liabilities and thus was within the incidental powers clause of the National Bank Act.[^29] The Court's opinion emphasized that a bank's incidental powers include the power to conduct its legitimate banking operations "safely and prudently" and that the ability to compromise a debt properly serves that end.[^30]

In 1913 the Supreme Court in *Clement National Bank v. Vermont*[^31] concluded that a national bank's agreement to serve as an agent for a state in the collection of a tax on savings deposits was incidental to the bank's power to receive deposits.[^32] The Court followed the policy of promoting safe and prudent banking as a guideline in delineating the scope of the incidental powers clause. The Court did not, however, expand the gloss enunciated in *National Exchange Bank*.

The Supreme Court in 1927 ruled on the propriety of a national bank's purchase and sale of real estate mortgages and other debts. In *First National Bank v. City of Hartford*[^33] the Court upheld these activities under the incidental powers clause on grounds that national banks have the express power with certain limitations to loan money on real estate mortgages.[^34] Unlike the earlier cases, however, the Court impliedly considered the prevalence of the activity as a factor in determining its legality. The Court noted that one-third of national bank investments in 1924 consisted of various government and corporate bonds similar to mortgage investments.[^35]

Although these and other cases signalled a liberal judicial approach to the incidental powers clause,[^36] the widespread failure of banks preceding the Depression brought a dramatic change of attitude. Over one thousand banks failed during the last three months of 1931,[^37] and bankers were blamed in part for those failures.[^38] In 1934 the Supreme Court in *Texas &

[^28]: 92 U.S. 122 (1875).
[^29]: *Id.* at 127.
[^30]: *Id.*
[^31]: 231 U.S. 120 (1913).
[^32]: *Id.* at 139-40.
[^33]: 273 U.S. 548 (1927).
[^34]: *Id.* at 560.
[^35]: *Id.*
[^36]: Compare *Miller v. King*, 233 U.S. 505, 510-11 (1912) (national bank may collect a judgment on behalf of a depositor as an incidental power) and *Wyman v. Wallace*, 201 U.S. 230, 243 (1906) (national banks may borrow money as an incidental power) with *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656-59 (1924) (national banks may not establish branches as an incidental power if state law prohibits branches).
[^37]: See R. Robertson, supra note 19, at 121.
[^38]: *Id.* at 118; see *Investment Co. Inst. v. Camp*, 401 U.S. 617, 630-31 (1971).
Pacific Railway v. Pottorff\(^{39}\) echoed the need for bank regulation to promote a safe and sound banking system.

In Pottorff a corporate depositor, after losing its savings in a failed bank, claimed that it held secured creditor status against the bank’s assets pursuant to an agreement in which the bank had pledged a part of its assets to secure the depositor’s account. The bank’s receiver argued that the bank had no power to pledge assets to secure private deposits, and the Supreme Court agreed.\(^{40}\) Although the depositor contended that the bank’s pledge was an incidental power implied from the power to receive deposits, the Court ruled that a pledge of assets was not “necessary” to the power to receive deposits.\(^{41}\) Moreover, the fact that the activity was “convenient” to the performance of an express power, according to the Court, did not necessarily imply that it was within the incidental powers clause.\(^{42}\) To buttress this result the Court noted that few banks engaged in the practice of pledging assets to secure private deposits,\(^{43}\) and concluded that “the immediate safety of unsecured creditors depends on the bank remaining open and solvent; the pledge [of assets agreement] reduces the fund of quick assets available to meet unusual demands without any assurance that the deposit will be used to replenish this fund.”\(^{44}\)

**B. The Clash Between Comptroller Saxon and the Judiciary**

Following World War II competition among financial institutions intensified largely as a result of the rise of nonbank financial intermediaries. To meet this competitive challenge, national banks desired to enlarge the scope of their customer services, but the National Bank Act seemed a formidable obstacle. Beginning in 1961, however, national banks found an ally in the Comptroller’s office with the appointment of James J. Saxon.\(^{45}\) Comptroller Saxon supported the expansion of bank powers to improve the competitive position of national banks,\(^{46}\) and in a series of rulings he authorized national banks to engage in the insurance business, courier services, the travel agency business, the personal property leasing business, and the data processing business. None of these activities was expressly

\(^{39}\) 291 U.S. 245 (1934).

\(^{40}\) Id. at 252-53.

\(^{41}\) Id. at 254.

\(^{42}\) Id. at 255 n.7. The argument presented to the Court was that the word “necessary” in the incidental powers clause should be construed broadly by analogy to the Court’s construction of the “necessary and proper” clause of the Constitution in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the constitutionality of the Bank of the United States). The Court in Pottorff rejected that argument on the grounds that the incidental powers clause is part of a statute rather than the Constitution. 291 U.S. at 259. The same argument was raised and rejected again in Arnold Tours, Inc. v. Camp, 472 F.2d 427, 430-31 (1st Cir. 1972).

\(^{43}\) 291 U.S. at 254.

\(^{44}\) Id. at 256.

\(^{45}\) See R. Robertson, supra note 19, at 158.

\(^{46}\) Id. at 161-62; see also Saxon, Bank Expansion and Economic Growth: A New Perspective, 8 Antitrust Bull. 597 (1963).
authorized under the Act, but each was claimed to be authorized from an
expansive reading of the incidental powers clause.

A number of commentators during the 1960s supported a broad con-
struction of the incidental powers clause, which is one of several clauses
separated by semicolons in the first sentence of section 24, paragraph 7 of
the Act:

[A national bank] shall have power

Seventh. To exercise by its directors or duly authorized officers or
agents, subject to law, all such incidental powers as shall be necessary
to carry on the business of banking; by discounting and negotiating
promissory notes, drafts, bills of exchange, and other evidences of
debt; by receiving deposits; by buying and selling exchange, coin, and
bullion; by loaning money on personal security; and by obtaining, is-
suing, and circulating notes according to the provisions of this
chapter.48

One supporter of broad construction noted that "[i]t is an established prin-
ciple of statutory construction that every clause separated by a semicolon
is of co-ordinate value, and that therefor each clause must be read sepa-
rately in the sense that each clause must be given its own separate value
and effect."49 Accordingly, the incidental powers clause was said to be
independently capable of justifying bank activities not expressly enumer-
ated in the Act.

Nonbank competitors, however, viewed the broad reading of the inci-
dental powers clause as contrary to the congressional intent to restrict
banks to traditional banking activities. They argued that the incidental
powers clause could not be read independently from the remaining clauses
in section 24, paragraph 7; instead, in their opinion the remaining clauses
served to restrict the scope of incidental powers to activities incidental to
express powers.50 Notwithstanding the statutory construction arguments,
nonbank competitors turned to Congress to urge that section 24 be
amended to preclude Saxon's broad view of the range of permissible bank
powers.51 That effort failed, however, and the nonbank competitors

47. See Huck, What is the Banking Business?, 21 BUS. LAW. 537 (1966); Beatty, What
Are the Legal Limits to the Expansion of National Bank Services?, 86 BANKING L.J. 3 (1969);
Harfield, Sermon on Genesis 17:20, Exodus 1:10 (A Proposal for Testing the Propriety of Exp-
49. Huck, supra note 47, at 539.
50. Id. at 538-39; see To Prohibit Banks From Performing Certain Nonbanking Services:
Hearings on H.R. 112, 117, and H.R. 10520 Before the Subcomm. on Bank Supervision and
Ins. of the House Comm. on Banking and Currency, 89th Cong., 2d Sess. 10-12 (1966) [here-
inafter cited as 1966 Hearings] (legal opinion of Legislative Reference Service of the Library
of Congress countering Ralph Huck's statutory construction of the incidental powers
clause). But see Harfield, supra note 47, at 576 (arguing that the incidental powers clause
expands upon the express powers granted in the subsequent clauses of the seventh paragraph
of § 24, and the express powers in the first six paragraphs of § 24). See supra note 22 and
infra text accompanying note 66.
51. See generally 1966 Hearings, supra note 50; Legislation to Prohibit Banks From Per-
forming Certain Nonbanking Services and From Engaging in the Business of Personal Property
turned to the judiciary for relief.\textsuperscript{52}

**Insurance Activities.** The first case to challenge Saxon's rulings under the National Bank Act was *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*\textsuperscript{53} That case involved a challenge to Saxon's ruling permitting national banks to act as insurance agents whenever such insurance is incidental to a banking transaction.\textsuperscript{54} The plaintiff insurance agents argued that the ruling was contrary to section 92 of the Act, which provides in part:

[National banks] located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which such bank is located . . . \textsuperscript{55}

The agents argued that section 92 impliedly prohibited national banks from engaging in insurance activities in towns with more than five thousand people.\textsuperscript{56} The Comptroller, in contrast, contended that although section 92 permits insurance activities in locations with less than five thousand people, nothing in the Act prohibits such activities in locations with more than five thousand people; hence his ruling merely legitimized a power implied in the Act and authorized pursuant to the incidental powers clause.
In *Georgia Association* the federal district court held for the insurance agents, and the Fifth Circuit affirmed,\(^\text{57}\) relying extensively on the legislative history of section 92. The appellate court concluded that without section 92, national banks would have no power to act as insurance agents in any community.\(^\text{58}\) The court found support for that conclusion in Comptroller policy prior to Saxon's tenure,\(^\text{59}\) noting that even Saxon had impliedly recognized the tenuous merits of reliance upon the incidental powers clause to support insurance activities prior to the promulgation of the ruling.\(^\text{60}\) The Fifth Circuit also concluded that the incidental powers clause could not confer powers greater than those conferred in other sections of the National Bank Act,\(^\text{61}\) but did not elaborate on the substantive content of the incidental powers clause because the decision was reached solely upon a construction of section 92.\(^\text{62}\)

**Courier Services.** The policy of "competitive equality"\(^\text{63}\) between state and national banks has also resulted in litigation concerning limitations on the permissible powers of national banks. In *First National Bank v. Dickinson*\(^\text{64}\) the United States Supreme Court addressed a Comptroller ruling that permitted a national bank to establish a receptacle at a shopping center for night deposits of money and cash,\(^\text{65}\) which were to be removed each day and sent by an armored car messenger to the bank. A regional counsel for the Comptroller's office approved a conforming bank messenger service for a national bank in Florida as an incident to its banking business,\(^\text{66}\) but the state comptroller protested that the plan was in violation of Florida's prohibition on branch banking.\(^\text{67}\) The national bank brought suit for declaratory relief and an injunction against the state comptroller. The federal district court held for the bank,\(^\text{68}\) but on appeal, the Fifth Circuit reversed,\(^\text{69}\) ruling that section 36 of the National Bank

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58. 399 F.2d at 1013; see also Dresser v. Traders' Nat'l Bank, 165 Mass. 120, 42 N.E. 567 (1896) (holding ultra vires a contract where national bank sought to act as subagent on an insurance contract), cited by the court at 399 F.2d at 1014.
59. 399 F.2d at 1016.
60. *Id.* at 1012.
61. *Id.* at 1013.
62. *Id.* The *expressio unius est exclusio alterius* rule was also applied to § 92 in Guaranty Mortgage Co. v. Z.I.D. Assocs., Inc., 506 F. Supp. 101, 104-05 (S.D.N.Y. 1980), to prohibit a national bank's attempt to broker loans for the construction and permanent financing of a hotel project. *Id.* National banks are not entirely prohibited from offering insurance to their customers. In Independent Bankers Ass'n v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), the court recognized in a dictum that national banks may provide credit life insurance as a permissible incidental power because "[i]t is now commonplace and essential where ordinary loans on personal security are involved." *Id.* at 1170.
64. 400 F.2d 548 (5th Cir. 1968), aff'd, 396 U.S. 122 (1969).
65. See 396 U.S. at 126 n.2 (setting out the Comptroller's ruling).
66. *Id.* at 126.
67. *Id.* at 129.
68. 400 F.2d at 552.
69. *Id.* at 558.
Act makes state law determinative of what constitutes a branch bank and a legally permissible branch banking practice. The Fifth Circuit determined that under Florida law the installation of the receptacle was an unlawful form of branch banking.

The Supreme Court affirmed, noting that although Congress has absolute authority over national banks, the National Bank Act itself defers to state law on the propriety of branching. While ruling that federal law must determine what constitutes a branch, the Court agreed with the Fifth Circuit that the receptacles "received" deposits, and thus were branches within section 36. Neither the Fifth Circuit nor the Supreme Court discussed the branching issue in the context of the incidental powers clause, thus impliedly affirming the 1924 opinion in First National Bank v. Missouri, which held that the clause did not confer on national banks the power to open branches in contravention of state law.

Travel Agency Activities. The first Comptroller ruling to obtain a direct construction of the incidental powers clause, and as a consequence to develop a prospective standard under the clause, was Arnold Tours, Inc. v. Camp. In that case forty-two travel agencies brought suit to invalidate a Comptroller ruling that authorized national banks to engage in the travel agency business. Because the National Bank Act contained no express provision on the subject of travel agency operations, the question presented to the courts focused on whether the incidental powers clause

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70. Id. at 556; see 12 U.S.C. § 36(f) (1976).
71. 400 F.2d at 557-58.
72. 396 U.S. at 138.
73. Id. at 133.
74. Id.
75. Id. at 137. Justice Douglas and Justice Stewart in separate dissents argued that the decision on whether the receptacles constitute a branch should be deferred to the federal Comptroller of the Currency. Id. at 140, 141.
76. 263 U.S. 640 (1924).
77. Id. at 659. The Court in First National Bank v. Missouri concluded: The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of [the incidental powers clause]. Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly an incidental power can avail neither to create powers which, if expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted. Id. The Court's holding formed the substance for § 36 of the National Bank Act, 12 U.S.C. § 36 (1976) (requiring national banks to abide by state branching laws).
79. 472 F.2d at 428. The Comptroller's ruling was codified at 12 C.F.R. § 7.7475 (1972) (rescinded 1975). The Comptroller had permitted travel agency services to some extent as early as 1959. 472 F.2d at 434.
itself could justify the operation of travel agencies by national banks. The
First Circuit affirmed the federal district court's ruling that travel agency
services were not authorized as an incidental power to the business of
banking. The appellate court dispensed with the argument that "great
weight" should be accorded to the Comptroller's interpretation of the inci-
dental powers clause by emphasizing the judiciary's responsibility in
construing statutes. Furthermore, the court criticized the Comptroller
for adopting the ruling without an accompanying written rationale.

Voicing the need "[to keep] the Comptroller from being 'a free-wheel-
ing' agency," the First Circuit established a two-part standard to deter-
mine the legality of an activity under the incidental powers clause. First,
as a minimum threshold requirement, the exercise of the power must be
"convenient or useful" to traditional bank activities. Secondly, the activity
must be "directly related" to the performance of one or more express
powers granted pursuant to the National Bank Act. The court justified
this standard as one impliedly adopted by the Supreme Court in earlier
opinions construing the incidental powers clause.

Applying the standard to travel agency operations, the court examined
the extent to which national banks were engaging in the travel agency
business. Finding that only 122 of 4,700 national banks had travel agency

80. 472 F.2d at 438.
81. 338 F. Supp. at 724.
82. 472 F.2d at 435 (citing Zuber v. Allen, 396 U.S. 168, 193 (1969) ("The Court may
not . . . abdicate its ultimate responsibility to construe the language employed by Con-
gress"), and Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387 (8th Cir. 1966) (uphold-
ing right of judicial review of Comptroller's rulings)).
83. 472 F.2d at 435.
84. Id. at 436.
85. Id. at 435 n.12 (citing Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387 (8th
(Douglas, J., dissenting).
86. 472 F.2d at 432.
87. Id. at 435 n.12 (citing Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387 (8th
(Douglas, J., dissenting).
88. Id. at 431-32 (citing Franklin Nat'l Bank v. New York, 347 U.S. 373, 375-77 (1954)
(advertising of "savings" accounts directly related to express power to receive time and sav-
ings deposits and pay interest thereon); Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 49
(1940) (operation of safe deposit business directly related to express power to accept depos-
its); First Nat'l Bank v. City of Hartford, 273 U.S. 548, 559-60 (1927) (sale of mortgages
directly related to power to loan money and to discount and negotiate other evidences of
debt); Clement Nat'l Bank v. Vermont, 231 U.S. 120, 139-40 (1913) (incidental power to pay
taxes on behalf of depositors is directly related to express power to receive deposits); Miller
v. King, 223 U.S. 505, 510-11 (1912) (collection of judgment is not unconnected with the
banking business); Wyman v. Wallace, 201 U.S. 230, 243 (1906) (national banks have inci-
dental power to borrow money); Auten v. United States Nat'l Bank, 174 U.S. 125, 141-42
(1899) (relationship between incidental power to borrow and creation of debtor-creditor re-
lationship); First Nat'l Bank v. National Exchange Bank, 92 U.S. 122, 127-28 (1875) (power
to acquire stock in settlement of a claim is related to legitimate banking transaction);
Merchants' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 648-49 (1870) (Court found the
certification of checks to be directly related to the express power to discount and negotiate
bills of exchange)).
operations,\textsuperscript{89} the court concluded that this evidence did not persuasively demonstrate that travel agency operations were convenient or useful to normal banking functions.\textsuperscript{90} Even if the court had found a larger number of participating banks, the result would have most likely been the same because no express power in the National Bank Act authorizes the operation of travel agencies. Thus, the second prong of the standard, requiring a direct relation between the service and an express power under the Act, would not have been satisfied. Although the court found the Comptroller's ruling invalid,\textsuperscript{91} it did suggest that banks may provide traveller's banking services, including the operation of something less than a "full-scale" travel agency.\textsuperscript{92}

At least one national bank attempted to capitalize on a broad reading of \textit{Arnold Tours, Inc.} by establishing a "travel club," which it claimed was less than a full-scale travel agency. Nonetheless, in \textit{American Society of Travel-Agents, Inc. v. Bank of America National Trust & Savings Association},\textsuperscript{93} a federal district court enjoined the bank from initiating its club.\textsuperscript{94} The court in this case used the \textit{Arnold Tours, Inc.} test, but interpreted it to require courts to ascertain whether the risks involved were the "kinds of risks Congress intended to prevent [a national bank] from taking."\textsuperscript{95} The court viewed the National Bank Act as a statute through which Congress intended "to shelter banking institutions from at least some of the forces of the market which might undermine public confidence in banks and ultimately threaten their existence."\textsuperscript{96} The court adopted this language from \textit{Investment Company Institute v. Camp},\textsuperscript{97} although that case involved the statutory construction of the Glass-Steagall Act rather than the incidental powers clause.\textsuperscript{98} It is not apparent from \textit{Arnold Tours, Inc.} whether the First Circuit intended the courts to use a risk analysis to determine the propriety of an activity that is convenient or useful to an express banking power; thus this case might be viewed as a departure from the two-part standard announced in \textit{Arnold Tours, Inc.}

\textbf{Personal Property Leasing.} In 1977 the Ninth Circuit considered a challenge to a Comptroller ruling that permitted national banks to engage in personal property leasing.\textsuperscript{99} In \textit{M & M Leasing Corp. v. Seattle First Na-
various auto leasing companies brought suit to enjoin a national bank from engaging in authorized vehicle leasing activities. The Ninth Circuit followed the Arnold Tours, Inc. test, and, in a rare victory for the Comptroller, upheld personal property leasing under certain circumstances as a power incidental to banking. The court first noted the importance of personal property leasing activities as evidenced by a survey indicating that over one thousand national banks had been engaging in such activities. Having satisfied the convenient and useful portion of the Arnold Tours, Inc. standard with this evidence, the court next concluded that the leasing activities were directly related to the express power of a bank to loan money, because the leasing transaction in effect constituted a loan of money secured by the leased property.

The Comptroller’s success in M & M Leasing Corp. was also accompanied by language in the opinion that noted that the National Bank Act “did not freeze the practices of national banks in their nineteenth century forms,” and should “permit the use of new ways of conducting the very old business of banking.” Notwithstanding this language favorable to the Comptroller, the court refused to permit banks to engage in the short-term car rental business or to become self-financing automobile dealers. Further, the court limited bank offerings of personal property leasing services to those that did not impose financial risks more burdensome than the risks associated with ordinary loans. After narrowing the Comptroller’s ruling in this manner, the court chastised the Comptroller for failing to “confine leasing within the channels of the ‘business of banking.’”

Data Processing Activities. While the Ninth Circuit implied that a more expansive approach to the incidental powers clause might be forthcoming, the M & M Leasing Corp. case apparently did not result in a reversal of the judicial trend against the Comptroller’s rulings. In 1979 the Ninth Circuit considered another incidental powers case, and in a cursory opinion, held invalid a Comptroller ruling that permitted national banks to use data processing equipment for the purpose of providing a wide range of data processing services to the general public. In National Retailers Corp. v. Valley National Bank a private data processing corporation sought to

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101. 563 F.2d at 1379.
102. Id. at 1380.
103. Id. at 1382.
104. Id.
105. Id.
106. Id. at 1383.
107. Id.
enjoin a national bank from offering a "Retail Information Service" to the public. The Retail Information Service used electronic data processing equipment to process applications for loans and other bank-related activities, and to offer publicly data processing services not related to bank functions. To avoid the procedural trap that snared the Comptroller in its prior rulings, the Comptroller carefully promulgated the data processing ruling by complying with appropriate notice-and-comment procedures. Still, the "wide latitude" of data processing activities permitted under the ruling persuaded the district court that the services were not convenient or useful to the performance of an express power under the National Bank Act. The district court noted that the bank's Retail Information Service would be properly incidental to the business of banking only if it were limited to the processing of loans, accounts receivable, or other traditional bank functions. The Ninth Circuit affirmed the conclusion and rationale of the district court without qualification.

Valley National Bank notwithstanding, the data processing controversy is by no means resolved. Subsequent to the decision, the Comptroller refused to withdraw its data processing ruling or to narrow its scope. On the day following the Valley National Bank decision, the New Jersey Superior Court in Infocomp Corp. v. Somerset Trust Co. upheld the power of New Jersey state banks to engage in a broad range of data processing activities, including the preparation of real property tax assessment records, tax accounting records, water and sewer assessments, and other services for municipal governments. Thus, in New Jersey at least, state banks are permitted to offer publicly nonbank related data processing services, while national banks located in that state are prohibited from so doing. In light of the importance of computer technology and the ability of banks to offer data processing services, future cases construing the incidental powers clause will likely focus on data processing.

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113. Id. at 315.
114. 604 F.2d at 32-34.
115. The data processing ruling was challenged again in Association of Data Processing Serv. Orgs., Inc. v. Citibank, N.A., 508 F. Supp. 91 (S.D.N.Y. 1980), but the proceedings were stayed pending a Federal Reserve Board decision on whether to approve the transfer of the allegedly nonbanking data processing activities of the defendant bank to a nonbank subsidiary of the bank's holding company. Id. at 93.
117. Id. at 560-61. The Infocomp Corp. opinion, however, may be distinguished from the Valley Nat'l Bank case in that the New Jersey statutes expressly permit broad powers for state banks. Id. at 560-61. See N.J. STAT. ANN. §§ 17:9A-1 to -25.5 (West Supp. 1981-1982). Nonetheless, the decision does suggest a movement away from the "competitive equality" policy between state and national banks, because only state banks in New Jersey may engage in these activities. See supra note 63.
II. THE GLASS-STEAGALL ACT OF 1933

Prior to 1927 the federal banking statutes were silent on whether national banks could engage in the investment banking business, including the buying, selling, and underwriting of securities. Following the passage of the National Bank Act, many banks entered the investment banking business, but two early Supreme Court cases temporarily ended the practice. Thereafter, national banks circumvented the restrictions on their securities activities by performing those activities through a securities affiliate of the parent bank. That practice was legitimized in 1927 with the passage of the McFadden Act, but the 1929 stock market crash and the subsequent nationwide string of bank failures revived concerns over whether commercial banks should be permitted to engage in the risky investment banking business. Congress responded with the passage of the Omnibus Banking Act of 1933, which included four sections designed to separate commercial banking from investment banking. These four sections today are recognized under the popular name of the Glass-Steagall Act.

The purpose of the Glass-Steagall Act was to restore public confidence in the financial stability of the commercial banking industry and to maintain the soundness of commercial banks by preventing them from dealing in securities. At the time, the separation of commercial banking from investment banking was considered necessary because bank speculation in weak securities allegedly played a significant role in causing the Depression. Although that rationale for Glass-Steagall is heavily criticized today, the provisions of the Act effectively restrict national bank activities

120. Logan County Nat'l Bank v. Townsend, 139 U.S. 67 (1891) (bank has no power to hold municipal bonds); California Bank v. Kennedy, 167 U.S. 362 (1897) (purchase or underwriting of stock not authorized under the National Bank Act).
125. See Clark & Saunders, Judicial Interpretation of Glass-Steagall: The Need for Legislative Action, 97 Banking L.J. 721, 725 (1980) (purpose was to restore public confidence in banking, maintain economic stability, prevent conflicts of interest); Karmel, Glass-Steagall: Some Critical Reflections, 97 Banking L.J. 631, 637 (1980) (purpose was to protect against banking abuses, not to protect investment bankers from competition); Plotkin, supra note 124, at 407 (purpose was to protect commercial banks and investors).
127. See Rogowski, supra note 119, at 158-59 (no empirical evidence on alleged violations of fiduciary responsibilities was uncovered). See generally Clark & Saunders, Glass-Steagall Revised: The Impact on Banks, Capital Markets, and the Small Investor, 97 Banking L.J. 811 (1980); Karmel, supra note 125.
in most of the lucrative areas of the securities business.

The four sections of the Act are codified among the provisions of the National Bank Act. Section 16 of Glass-Steagall prohibits national banks from purchasing corporate equity securities, restricts the total amount of debt securities that can be held by a bank for its own account, and prohibits the underwriting and dealing in securities with the exception of U.S. Treasury obligations and general obligations of states, municipalities, and other specified agencies.128 Section 20 of the Act prohibits national banks from affiliating with securities companies.129 Section 21, which has been described as the "heart of Glass-Steagall,"130 provides that a crime is committed when a person engages simultaneously in the banking and securities businesses, except to the extent permitted in section 16.131 Finally, section 32 prohibits interlocking directorates or other relationships between national banks and securities companies.132

Notwithstanding the intent of Glass-Steagall to separate the commercial and investment banking businesses, the exceptions have provided numerous opportunities for national banks to erode that objective. Some investment activities, including dividend reinvestment plans, voluntary investment plans, and individual management services, appear to be clearly permissible activities.133 The legality of other activities, however, has been greatly disputed. During the period when Comptroller Saxon was attempting by regulation to expand the powers of national banks under the incidental powers clause of the National Bank Act, he was also issuing rulings authorizing an expansive reading of the Glass-Steagall Act. Those rulings were eventually challenged in the courts.134

A. Revenue Bond Underwriting

Saxon's first encounter with the courts over Glass-Steagall involved the legality of his 1963 ruling permitting national banks to underwrite municipal and other governmental revenue bonds.135 A number of investment banking firms challenged the ruling in Baker, Watts & Co. v. Saxon,136 arguing that the exception permitting commercial banks to underwrite general obligation bonds of states and municipalities could not be broadened to include the underwriting of revenue bonds. Prior to 1963 the

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130. See Plotkin, supra note 124, at 407-09.
132. Id. § 78 (1976).
133. See Clark & Saunders, supra note 125, at 721-22.
134. The first Supreme Court case to construe Glass-Steagall was Board of Governors of Fed. Reserve Sys. v. Agnew, 329 U.S. 441 (1947) (illegal interlocking directorate found).
135. The Comptroller's regulation is codified at 12 C.F.R. § 1.3(e) (1963).
Comptroller’s office had taken the investment firms’ position, considering “general obligations” to mean only those obligations supported by the taxing power of the issuing state or municipality. Revenue bonds, in contrast, were identified by the fact that they were supported by tolls or other user fees. Saxon’s ruling reversed prior Comptroller policy, and by removing the distinction he permitted national banks to underwrite all government securities, including revenue bonds.

In *Baker, Watts & Co.* the federal district court held the ruling invalid, reasoning that Congress had intended to correct the “evils and abuses” that led to Glass-Steagall by compelling “commercial banks to return and confine themselves to their classic time-honored functions.” On appeal, the District of Columbia Circuit affirmed, concluding that the 1933 congressional debate on the Glass-Steagall Act, the prior administrative distinction between general obligations and revenue bonds, and the accepted trade meaning of general obligations did not justify Comptroller Saxon’s broad construction of the Act. The court conceded that revenue bonds were a novel form of financing during the Depression when Glass-Steagall was passed, but concluded that Congress had intended to limit bank underwriting activities to securities with “unquestioned financial integrity,” of which revenue bonds presumably were not.

**B. Collective Investment Funds**

In 1963 Comptroller Saxon issued a ruling permitting national banks to operate collective investment funds. Those funds closely resembled “open-end mutual funds” because they involved the collective investment of securities with the bank acting as a managing agent for the investments. A group of open-end investment companies challenged the Comptroller’s ruling, arguing that such activities violated the Glass-Steagall Act. In *Investment Company Institute v. Camp* the federal district court held the ruling invalid, but the District of Columbia Circuit reversed, concluding that the collective investment fund did not violate federal banking laws. The circuit court noted:

A commingled managing agency account is a descendant of the individual managing agency account and the common trust fund, fitting

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137. 261 F. Supp. at 250.
138. *Id.*
139. *Id.* at 251.
140. *Id.* at 247.
141. *Id.* at 249.
142. 392 F.2d at 497.
143. *Id.* at 499, 502-04.
144. 392 F.2d at 499. See generally Rogowski, *supra* note 119.
148. 420 F.2d at 91.
149. *Id.*
within the traditional authority of banks to manage other people's money in a fiduciary capacity sanctioned by the Federal Reserve Act. Where the fiduciary tie between the bank and multiple principals is looser, the Comptroller's regulations and the securities laws will take up the slack.\footnote{150}

On further appeal, however, the United States Supreme Court upheld the district court's opinion,\footnote{151} reasoning that even though a national bank may pool trust assets, act as a managing agent for individual customers, or purchase stock for its customers, the combination of these services constituted an investment fund activity proscribed by Glass-Steagall.\footnote{152}

In reaching that result the Court relied heavily on the legislative history of Glass-Steagall and identified "subtle hazards" that Congress sought to avoid by separating commercial banking from the investment banking business.\footnote{153} First, the court noted the "promotional and other pressures" that might afflict banks engaging in investment securities activities if the investments should prove to be unsound.\footnote{154} To prevent a decline in public confidence as a consequence of unwise investments, the Court stated that Congress thought banks would have a "natural temptation to shore up the affiliate through unsound loans or other aid."\footnote{155} Second, the conflict of interest arising in that situation was said to impair the impartiality of the bank's role as a dispenser of credit.\footnote{156} Third, the Court stated that Congress was concerned with the loss of customer goodwill that might result if depositors lost money on investments made in reliance on the bank's financial acumen.\footnote{157} Fourth, there was a fear that speculative investments might be made and the banks might be tempted to make loans for the purpose of enabling their customers to purchase stock recommended by the bank.\footnote{158} Finally, the court recognized an inherent conflict between the investment banker's interest in selling a particular security, and the commercial banker's role in offering disinterested investment advice.\footnote{159} Although the Court conceded the need to "give great weight" to the Comptroller's reasonable construction of Glass-Steagall,\footnote{160} it nonetheless explained that deference was improper in this case because the Comptroller had failed to articulate a specific rationale for the ruling when it had been promulgated.\footnote{161} Thus Investment Company Institute \textit{v. Camp} effectively settled the question of whether banks could engage in collective investment activities in favor of the securities industry.\footnote{162}

\begin{footnotes}
\footnote{150} \textit{Id.}
\footnote{151} 401 U.S. at 639.
\footnote{152} \textit{Id.}
\footnote{153} \textit{Id.} at 630.
\footnote{154} \textit{Id.} at 630-31.
\footnote{155} \textit{Id.} at 631.
\footnote{156} \textit{Id.}
\footnote{157} \textit{Id.}
\footnote{158} \textit{Id.} at 632.
\footnote{159} \textit{Id.} at 633.
\footnote{160} \textit{Id.} at 626-27.
\footnote{161} \textit{Id.} at 627.
\footnote{162} \textit{See also} Board of Governors of Fed. Reserve Sys. \textit{v. Investment Co. Inst.,} 450 U.S.
\end{footnotes}
C. Automatic Investment Services

In 1974 Comptroller James E. Smith issued an opinion letter authorizing a national bank to offer to its customers an automatic stock purchasing service. The service permitted holders of checking accounts to authorize the bank to deduct a certain amount of money automatically on a monthly basis in order to invest those funds in one of twenty-five high quality stocks. The customer would choose the stocks desired without receiving any recommendations from the bank, and the bank would purchase and hold the stock for its customer for a small service charge and a percentage of the brokerage fee.

The New York Stock Exchange and a group of investment companies brought suit to challenge the validity of the automatic investment service under the Glass-Steagall Act. In *New York Stock Exchange, Inc. v. Smith* the federal district court upheld the Comptroller’s authorization, concluding that in contrast to the Comptroller’s ruling held invalid in *Investment Company Institute v. Camp*, “this court has the benefit of a comprehensive and well-reasoned explanation of his ruling.” The court determined that the activity was not invalid because it “substantially avoids the hazards Congress feared when it enacted the Glass-Steagall Act” as well as the secondary hazards identified by the Supreme Court in *Investment Company Institute v. Camp*. That victory for the Comptroller was short-lived, however, because the *Smith* opinion was vacated on appeal in *New York Stock Exchange, Inc. v. Bloom*. In *Bloom* the District of Columbia Circuit held that the Comptroller’s letter approving the automatic investment service amounted to an informal ruling, and hence was “not ripe for review.” At present, the legality of automatic investment services offered by national banks remains unclear.

Although national banks and the Comptroller’s office have not convinced the courts to construe Glass-Steagall broadly, a strong movement in Congress is underway to reverse the result of the Glass-Steagall cases. In particular, legislation is pending that would authorize national banks to underwrite municipal revenue bonds and offer mutual funds as part of the business of banking or as a nonbanking activity pursuant to a bank holding company subsidiary. Many commentators have supported the re-

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46 (1981) (bank holding company subsidiaries may engage in certain investment advisory activities under the Bank Holding Company Act), discussed infra at text accompanying notes 257-74.
164. 404 F. Supp. at 1093.
166. 404 F. Supp. at 1097.
167. *Id.* at 1099.
168. 562 F.2d 736 (D.C. Cir. 1977).
169. *Id.* at 740.
removal of the Glass-Steagall barrier between commercial banking and investment banking on grounds that the barrier unduly restricts competition and inhibits market efficiency.\textsuperscript{171} The securities industry, in contrast, remains adamant in its opposition to legislation expanding commercial bank powers into the securities business. The latter group argues that national banks have unfair competitive advantages over securities firms because of their easy access to capital. Moreover, the many hazards and risks associated with the combination of commercial and investment banking activities, including the hazards identified in \textit{Investment Company Institute v. Camp},\textsuperscript{172} remain formidable obstacles to the expansion of national bank powers under Glass-Steagall.\textsuperscript{173}

III. THE BANK HOLDING COMPANY ACT OF 1956

A bank holding company is a company that controls or is deemed to control one or more banks under the Bank Holding Company Act of 1956.\textsuperscript{174} Today bank holding companies represent the dominant form of banking in the United States, with bank subsidiaries holding 74.1 percent of domestic commercial bank assets.\textsuperscript{175} Prior to the passage of the Act in 1956, controls over the formation and expansion of bank holding companies were nonexistent with the exception of certain supervisory and examining powers granted to the Federal Reserve Board under the Banking Act

\begin{itemize}
\item entry into the securities business with respect to the operation and management of mutual funds and money market funds, and the underwriting of municipal revenue bonds. \textit{See} Politics Likely to Stall Major Banking Reform Bills This Year, [Jan.-June] \textit{WASH. FIN. REP.} (BNA) No. 2, at C-1 (Jan. 11, 1982). In contrast to the Garn Bill's approach, the Reagan Administration has proposed a plan that would permit banks to engage in securities activities, but only if performed through nonbank subsidiaries of bank holding companies. \textit{See} Wall Street, Banks Split Over Requiring Banks to Set Up Securities Subsidiaries, [Jan.-June] \textit{WASH. FIN. REP.} (BNA) No. 8, at A-1 to -3 (Feb. 22, 1982); \textit{see also} Wall St. J., Feb. 11, 1982, at 6, col. 3.
\item \textsuperscript{171} \textit{See}, e.g., Karmel, \textit{supra} note 125; Rogowski, \textit{supra} note 119. \textit{See generally} \textit{The Deregulation of the Banking and Securities Industries,} supra note 8, at 273-89; \textit{Securities Activities of Commercial Banks,} supra note 8, at 123-42.
\item \textsuperscript{172} \textit{See supra} text accompanying notes 154-59.
\item \textsuperscript{173} \textit{See generally} \textit{The Deregulation of the Banking and Securities Industries,} supra note 8, at 273-89; \textit{Securities Activities of Commercial Banks,} supra note 8, at 123-42.
\item \textsuperscript{174} \textit{12 U.S.C. §§} 1841-1850 (1976 & Supp. IV 1980). Section 1841(a)(2) of the Act provides that a company controls a bank if:
\begin{enumerate}
\item (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company;
\item (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
\item (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.
\end{enumerate}
\item \textsuperscript{175} \textit{See} P. Rose & D. Fraser, \textit{supra} note 2, at 153; Savage, \textit{Developments in Banking Structure 1970-81}, \textit{68 Fed. Reserve Bull.}, Feb. 1982, at 77, 81-82.
\end{itemize}
Following the Depression, banks operating under the holding company format discovered that many of the activities that were held to be nonbanking activities under the National Bank Act could be performed indirectly through a nonbank subsidiary of the holding company. That circumvention of the National Bank Act, combined with the fear of growing economic concentration in the banking industry, led Congress to adopt the Bank Holding Company Act which implemented the present controls on bank holding companies.\(^\text{177}\)

The original purpose of the Bank Holding Company Act was to define and regulate bank holding companies and to require the divestment of their nonbanking activities.\(^\text{178}\) Under the Act, multibank holding companies were required to register with the Federal Reserve Board and submit to extensive regulatory oversight from that agency.\(^\text{179}\) During the 1960s, however, when the courts were narrowly construing the scope of the commercial banking business under the National Bank Act and the Glass-Steagall Act, a plethora of one-bank holding companies emerged in the financial marketplace.\(^\text{180}\) Those holding companies and their nonbank subsidiaries were free of regulatory restraints on their nonbanking activities because they were neither multibank holding companies subject to the Act, nor “banks” subject to the National Bank Act and Glass-Steagall Act. Congress responded to that loophole in 1970 by amending the Bank Holding Company Act to cover one-bank holding companies.\(^\text{181}\) In addition, Congress implemented a dual standard in order to expand the range of nonbank activities permitted under the Act.\(^\text{182}\) Congress rejected a proposal to enumerate a “laundry list” of permissible nonbank activities and delegated the responsibility to the Federal Reserve Board.\(^\text{183}\) Under the 1970 amendments nonbank subsidiaries of bank holding companies are confined to activities that are “so closely related to banking or managing or controlling banks as to be a proper incident thereto.”\(^\text{184}\) Since 1970 the Board through Regulation Y has promulgated a list of thirteen permissible

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176. P. Rose & D. Fraser, supra note 2, at 155.
177. Id.
178. See G. Fischer, supra note 174, at 61.
183. See P. Rose & D. Fraser, supra note 2, at 466.
nonbanking activities. These include mortgage banking and financing activities, industrial bank operations, loan servicing, trust company activities, investment and financial advising in certain situations, real and personal property leasing activities, the making of equity and debt investments in certain corporations, data processing and bookkeeping services, insurance agent activities, credit life insurance underwriting, courier services activities, management consulting in certain situations, and the selling of money orders, travelers checks, and U.S. savings bonds.

Notwithstanding the approval of these services, a nonbank subsidiary of a bank holding company is prohibited from extending credit to customers on a condition that the borrower obtain some additional service from a nonbank subsidiary of the same holding company. The Board has also promulgated a list of activities that are deemed to be not closely related to banking. These activities include insurance premium funding, life insurance underwriting not sold in connection with a credit transaction, real estate brokerage activities, land development activities, real estate syndication, management consulting not otherwise permitted, property management, and the operation of savings and loan associations.

In determining whether a nonbank activity is a proper incident to banking, the Act also requires the Board to make a net public benefits calculation. That calculation, which is the second part of the two-part statutory standard, requires the Board to consider whether the activity's performance by a nonbank subsidiary of a bank holding company will "produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Although the statutory language is unclear on how the Board is to handle the public benefits test procedurally, the Board has decided to examine the public benefits inquiry on a case-by-case basis. The cases construing the closely related clause

186. Id.
190. Id.
and the public benefits clause give considerably more deference to the Board's rulings than the Comptroller has enjoyed under the National Bank Act and the Glass-Steagall Act. The cases demonstrate, however, that the judiciary is unwilling to permit the Board to stray too far from the congressional intent to separate commercial banking from nonbanking activities.

A. Courier Services

In an early judicial challenge to the Board's discretionary authority under its statutory powers, a private courier group petitioned the federal courts for a review of a Board order permitting affiliates of a bank holding company to provide certain courier services. The sole issue before the court in *National Courier Association v. Board of Governors of Federal Reserve System* was whether courier activities were "closely related" to banking. The Board order permitted courier activities in the context of four situations, including:

1. the internal operations of the bank holding company and its subsidiaries;
2. checks and other negotiable instruments;
3. audit and accounting items of a banking or financial nature, and
4. nonfinancially related materials when requests were unsolicited and the services were not otherwise reasonably available.

After reviewing the legislative history behind the 1970 amendments to the Act, the District of Columbia Circuit concluded that Congress had at that time plainly intended to expand the range of nonbank activities permissible under the Act in comparison with the Act's policy prior to 1970. Nonetheless, the court refrained from supplying a judicial definition for the closely related clause and instead gave "considerable deference" to the Board to refine the definition "in a reasoned fashion consistent with the legislative intent." Despite that deference, the court set forth three factors for the Board to consider in making the required connection between banking and proposed nonbanking activities, including:

1. [Whether] banks generally have in fact provided the proposed services.
2. [Whether] banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service.
3. [Whether] banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form.

(1979); Alcaly, *Neither Convenient Nor Needed: The Convenience and Needs and Public Benefits Test of the Bank Holding Company Act*, 96 Banking L.J. 325 (1979) (concluding that the Board's main focus is upon the competition factor and not the convenience factor).

192. 516 F.2d 1229 (D.C. Cir. 1975).
193. Id. at 1233-34.
194. Id. at 1234-35.
195. Id. at 1236.
196. Id. at 1237.
197. Id.
In applying the three factors to courier activities, the court concluded that the requisite connections were properly made with respect to courier services involving banking material\textsuperscript{198} and the transporting of data processing material,\textsuperscript{199} but they were not satisfied with respect to the transporting of nonfinancially related material, regardless of whether the transportation was unsolicited or not otherwise reasonably available.\textsuperscript{200} As to the nonfinancially related material, the court was concerned that the Board's ruling would permit bank affiliates to engage in a general courier service for their customers, a result inconsistent with congressional policy.\textsuperscript{201} Thus the Board's ruling was upheld with the exception of the fourth category of activities.

B. Insurance Activities

A challenge to a Board order that permitted bank holding companies to act as insurance agents reached the Fifth Circuit in 1976 in \textit{Alabama Association of Insurance Agents, Inc. v. Board of Governors of Federal Reserve System}.\textsuperscript{202} The Board issued its insurance regulation in 1972, authorizing bank holding companies to issue credit life insurance, credit health and accident insurance, mortgage redemption insurance, property damage insurance on bond-financed assets, borrowers' liability insurance, and "convenience" insurance.\textsuperscript{203} After finding that the promulgation of the regulation complied with the Administrative Procedures Act,\textsuperscript{204} the court considered whether the Board's regulation permitted activities that were closely related to banking.\textsuperscript{205}

The Fifth Circuit reviewed the legislative history behind the 1970 amendments to the Bank Holding Company Act,\textsuperscript{206} cited \textit{National Courier Association} as authority for according great deference to the Board's decisions under the closely related clause,\textsuperscript{207} and used the three-prong standard from that case to analyze the substantive validity of the order.\textsuperscript{208} The court found portions of the regulation invalid, including the power of bank holding companies to broker insurance for themselves or their nonbank subsidiaries\textsuperscript{209} and the power to sell any type of insurance under any conditions as "a matter of convenience."\textsuperscript{210} The court also denied bank hold-

\textsuperscript{198} \textit{Id.} at 1237-38.
\textsuperscript{199} \textit{Id.} at 1238-39.
\textsuperscript{200} \textit{Id.} at 1241, 1243.
\textsuperscript{201} \textit{Id.} at 1241.
\textsuperscript{202} 533 F.2d 224 (5th Cir. 1976), \textit{modified}, 558 F.2d 729 (5th Cir. 1977) (en banc), \textit{cert. denied}, 435 U.S. 904 (1978).
\textsuperscript{203} 533 F.2d at 233.
\textsuperscript{204} \textit{Id.} at 236; see 5 U.S.C. § 553(e) (1976).
\textsuperscript{205} 533 F.2d at 237.
\textsuperscript{206} \textit{See supra} note 181.
\textsuperscript{207} 533 F.2d at 240. The standard of judicial review was whether the Board's findings were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law."
\textit{Id.}
\textsuperscript{208} \textit{See supra} text accompanying note 197.
\textsuperscript{209} 533 F.2d at 241.
\textsuperscript{210} \textit{Id.} at 242.
ing companies the power to sell general insurance through a nonbank subsidiary in a town with less than five thousand people, but on rehearing, vacated that part of its opinion.211

Despite its limitations on the Board's regulation, the court upheld the power to issue liability insurance and property damage insurance to protect collateral used in connection with loans, reasoning that insurance in such instances relates to an extension of credit and constitutes a legitimate banking need.212 On rehearing, the court clarified this conclusion by stating that nonbank subsidiaries as well as bank subsidiaries could provide such insurance.213 The court also reviewed the elements of the public benefits test,214 noting that the Board's findings would be conclusive if supported by substantial evidence215 and if the reasons were clearly explained.216 With regard to the efficiency gains factor and the greater convenience factor, the court found in this case that the Board's findings were not supported by substantial evidence.217 Substantial evidence did exist, however, for the Board's findings of increased competition and an absence of decreased or unfair competition, undue concentration of resources, and conflicts of interest.218 The court decided that the Board was correct in its conclusion that the public benefits of the proposed insurance activities outweighed their adverse effects.219

C. Personal Property Leasing and Travel Services

The Federal Reserve Board has been cautious in extending permissible nonbank activities in comparison to the Comptroller's attitude toward the expansion of national bank powers. For example, in 1971 the Board permitted bank holding companies to engage in the leasing of personal property and equipment on a full payout basis,220 and although at least one company had urged the Board to extend the regulation to non-full-payout leasing activities, the Board refused.221 Subsequently, in Bank America

211. 558 F.2d at 730-31; accord Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968) (national bank may not sell general insurance as part of the business of banking in localities with more than 5,000 inhabitants); see supra text accompanying notes 53-62.
212. 533 F.2d at 244.
214. See supra text accompanying notes 189-90.
215. 533 F.2d at 246.
216. Id. at 247.
217. Id. at 248.
218. Id.
219. Id. at 252. For a discussion of recent issues concerning the insurance activities of nonbank subsidiaries of bank holding companies, see Schweitzer & Halbrook, Insurance Activities of Banks and Bank Holding Companies: A Survey of Current Issues and Regulations, 29 Drake L. Rev. 743 (1979-1980).
Corp. v. Board of Governors of Federal Reserve System that the company brought suit to challenge the denial of its application to engage in the computer equipment leasing business. The Ninth Circuit affirmed the Board's order, concluding that the Board's denial of a hearing was not error, that the Board's decision was rendered properly, and that the Board's conclusion regarding the closely related test was correct. In a similar situation, an association of bank travel agents petitioned for review of a Board decision that denied travel agency services a status of closely related to banking activity. The Board found that travel agency activities were not closely related to banking, and the court in Association of Bank Travel Bureaus, Inc. v. Board of Governors of Federal Reserve System upheld the decision.

D. Investment Advisory Activities

The United States Supreme Court in 1981 rendered its first decision concerning the interrelationship between the Bank Holding Company Act and the Glass-Steagall Act in Board of Governors of Federal Reserve System v. Investment Company Institute. That case involved a challenge to a Board ruling permitting bank holding companies and their nonbank subsidiaries to act with certain limitations as investment advisors to closed-end investment companies. The Board promulgated its ruling following the Supreme Court's decision prohibiting national banks from engaging in open-end investment funds or mutual funds in Investment Company Institute v. Camp. By negative implication the Board reasoned that the Camp decision permitted bank holding companies, as well as their subsidiaries, to act as investment advisors to closed-end investment companies when the units of participation are arguably not securities within the meaning of the Glass-Steagall Act. In contrast to the open-end investment company, a closed-end investment company does not issue shares except upon its initial organization and does not redeem its shares. Notwithstanding the distinction between open-end and closed-end investment companies, the same trade association of investment companies that had challenged the Comptroller's ruling in the Camp case challenged the Board's ruling on grounds that any investment advisory service performed by a bank violated Glass-Steagall and, therefore, was not only outside the business of banking, but also not closely related to banking under the

222. 491 F.2d 985 (9th Cir. 1974).
223. Id. at 988.
224. Id.
225. 568 F.2d 549, 550 (7th Cir. 1978); accord Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) (national banks prohibited from engaging in travel agency business as part of the business of banking under National Bank Act); see supra text accompanying notes 78-98.
227. Id. The regulation is codified at 12 C.F.R. § 225.4(a)(5)(ii) (1981); see 450 U.S. at 49 n.3.
228. 401 U.S. 617 (1971); see supra text accompanying notes 145-62.
229. 450 U.S. at 52.
230. Id. at 51.
Bank Holding Company Act.231

The District of Columbia Circuit Court did not agree that the Board’s ruling violated Glass-Steagall and reasoned that the Act applied only to banks and not to bank holding companies.232 Nonetheless, the court held that the investment advisory activity permitted by the Board failed to satisfy the Bank Holding Company Act’s closely related test,233 and thus the regulation was invalid.234

In 1981 the Supreme Court reversed the circuit court.235 The Court generally agreed with the circuit court that the investment advising approved by the Board did not violate Glass-Steagall,236 but reversed the result on grounds that the investment advisory activities were closely related to banking under the Bank Holding Company Act.237 Writing for the majority, Justice Stevens reiterated the legislative history of the 1970 amendments to the Bank Holding Company Act238 and concluded that those amendments neither expanded nor reduced the prohibitions of Glass-Steagall.239 Consequently, the Court stated that if a securities-related activity is not prohibited by the Glass-Steagall Act, then the Board has discretion to permit bank holding company subsidiaries to engage in such activities when the activities are closely related to banking.240 Moreover, the Court stated that even if the activity would violate Glass-Steagall, the prohibition would not necessarily prevent the Board from authorizing bank holding companies to engage in such activities pursuant to the closely related clause.241 The Court deferred to the Board’s discretion in determining whether the closely related standard had been met242 and did not comment upon the meaning of that standard or whether the gloss provided by National Courier Association was correct.

The significance of Board of Governors of Federal Reserve System v. Investment Company Institute is twofold. First, an expansive reading of that

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231. Id. at 58-60.
233. 606 F.2d at 1023-24.
234. The court reached this result by examining the legislative policies behind the 1970 amendments to the Bank Holding Company Act. See supra note 181. It found that the main goals of the amendments were to extend coverage of the Act to one-bank holding companies, which had previously been exempt from regulation, to end nonbank subsidiaries’ abusive treatment of bank subsidiaries, and to prevent the “centralization of economic power in the American economy.” 606 F.2d at 1023. Applying this rationale to the Board’s ruling, the court concluded that the power of bank holding companies to make investment decisions in this situation would be inconsistent with the goal of the amendments. Id.
235. 450 U.S. at 78.
236. Id. at 59-60. The Court went one step further, however, by ruling that a bank subsidiary of a bank holding company may perform the investment advisory services authorized by the Board without violating Glass-Steagall. Id. at 60. The Court reasoned that the Board’s ruling did not authorize the sale or distribution of securities nor the purchase of securities from an investment company, either of which would have violated Glass-Steagall. Id. at 62.
237. Id. at 78.
239. 450 U.S. at 74-75.
240. Id. at 76-77.
241. Id. at 63-64.
242. Id. at 77-78.
case suggests that Glass-Steagall does not prohibit national banks, or bank and nonbank subsidiaries of bank holding companies, from engaging in investment advisory services to closed-end investment companies. Second, the gloss on the closely related test from National Courier Association appears to have survived as an acceptable method for determining whether a bank or nonbank subsidiary of a bank holding company may engage in a nonbank activity that is closely related to banking under the Bank Holding Company Act. The Court's deference suggests that in the future the judiciary might accord even greater weight to the Board's determination on the issue of what constitutes a closely related activity.

IV. CONCLUSION

This Comment has traced the regulatory and judicial construction of the National Bank Act, the Glass-Steagall Act, and the Bank Holding Company Act to provide an overview of the restrictions on national bank powers under the present federal bank regulatory scheme. Confronted with competition from savings and loan associations and credit unions on the one hand, and securities firms on the other, national banks have found their position in the financial markets threatened with a loss of deposits and an inability to compete effectively. Although the federal bank regulatory agencies have attempted by administrative fiat to expand the powers of national banks and the nonbanking activities of nonbank subsidiaries of bank holding companies, the judiciary has narrowly construed the federal banking statutes in accordance with its view of congressional policy. Accordingly, the expansion of national bank powers is an issue Congress must confront.

Under the present statutory framework governing national banks, at least two approaches exist for expanding national bank powers. One approach is to amend the National Bank Act or the Glass-Steagall Act or both to permit national banks to engage in new activities as express powers within the range of activities permitted under the traditional business of banking. A second approach is to retain nontraditional banking activities outside the realm of the banking business, but to permit those activities to be performed by nonbank subsidiaries of bank holding companies under the Bank Holding Company Act. The latter approach will entail greater regulatory burdens on the banking industry, but it might be viewed as a significant first step toward the direct expansion of bank powers. Moreover, in the area of securities activities, the holding company subsidiary approach might serve to buffer the bank subsidiary from some of the risks and conflicts of interest that led to the separation of commercial and investment banking during the Depression.