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Unlimited Branch Banking in Texas: The Next Step in Deregulation Comment.

Mark A. Giltner

COMMENTS

Unlimited Branch Banking in Texas: The Next Step in Deregulation?

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I. INTRODUCTION

In November of 1986, Texas voters approved a constitutional amendment allowing limited branch banking within the state.[1] The amendment and enabling legislation[2] abolished a 1904 prohibition[3] of branch banking in Texas

1. TEX. CONST. art. XVI, § 16(d)-(f). The amendment was approved on November 4, 1986. *See id. See generally* Comment, *Interstate Banking and Branch Banking in Texas: An Overview of the Constitutional and Statutory Provisions*, 18 ST. MARY'S L.J. 1329, 1331 (1987)(Texas banking laws recently liberalized to permit limited branching).

2. TEX. REV. CIV. STAT. ANN art. 342-903, § 1 (Vernon Supp. 1988).

3. *See* TEX. CONST. art. XVI, § 16(a) (1904). The old constitutional provision stated: Such [bank] shall not be authorized to engage in business at more than one place which shall be designated in its charter. *Id.* The prohibition of branch banking reflected a historical dis-

by allowing banks[4] to establish no more than three branch offices within the same city or county unless a branch was acquired through the purchase of a failed bank.[5] Only one year after approval of limited branch banking, however, the sufficiency of the amendment has been judicially challenged in an attempt to establish unlimited branch banking in the state.[6] The challenge is

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trust of financial institutions and fear of concentrated financial power. *See* TEX. CONST. art. XVI, § 16, interp. commentary (Vernon 1955).

4. Unless otherwise noted, "bank" refers to a commercial bank.

5. *See* TEX. REV. CIV. STAT. ANN. art. 342-903, § 1 (Vernon Supp. 1988). The pertinent portion of the limited branch banking statute provides:

> (a) A state, national or private bank may engage in the business of accepting demand deposits and making commercial loans only in its principal banking building and in the locations authorized by this article and Article 3A [relating to unmanned teller machines].
>
> (b) A state, national, or private bank may engage in business at:
>
> (1) any facility the nearest boundary of which is located within five thousand (5,000) feet of the nearest wall of the principal banking building and within the same county or city as the principal banking building;
>
> (2) not more than three (3) branch office facilities the nearest wall of which is located more than five thousand (5,000) feet from the nearest wall of the principal banking building, but within the same county or city as the principal banking building;
>
> (3) with respect to each branch office facility described in Subdivision (2), not more than two drive-in facilities whose nearest boundary is located within one thousand (1,000) feet of the nearest wall of the branch office facility and within the same county or city as the principal banking building; and
>
> (4) any facility in operation or under construction on July 15, 1986, and any facility provided for in an application or notice on file on July 15, 1986, with the regulatory authority having jurisdiction over the application or notice.

Id.

6. *See* Complaint at 5, State v. Clark, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987). On April 3, 1987 and March 20, 1987, respectively, Union National Bank of Laredo (Union National) and Texas Capital Bank-Westwood (Texas Capital) each sought permission from the United States Comptroller of the Currency to open branch offices. *See* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 1 (Dec. 3, 1987). Union National sought to establish a branch in San Antonio, Bexar County, Texas while Texas Capital sought to branch in Austin, Travis County, Texas. *See id.* Under current Texas law, commercial banks are not allowed to branch outside their home counties. *See* TEX. CIV. STAT. ANN. art. 342-903, § 1(b) (Vernon Supp. 1988). Since the banks sought to establish branches outside their home counties, the proposed branches would exceed the recently imposed branching limitations. *See* TEX. REV. STAT. ANN. art. 342-903, § 1 (Vernon Supp. 1988)(limiting banks to 3 branches within county); *see also* Complaint at 5, State v. Clarke, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987)(Comptroller's decision allowing Union National and Texas Capitol Bank to establish branch offices outside respective home counties). If the Bexar and Travis county branches were to be allowed, it would therefore set a precedent for branching beyond the statutory restrictions.

On December 3, 1987, the United States Comptroller granted permission for both Union National and Texas Capital to open a branch bank stating:

> Based on the determinations that Texas-chartered savings and loan associations are authorized to carry on the business of banking under Texas state laws, and that they are

premised upon the blurred distinction between banks and savings and loan associations.[7] Because savings and loan associations are not subject to geographical branching restrictions, and are now in direct competition with commercial banks, banks contend that they should be allowed to branch to the same extent as the savings associations.[8]

The National Bank Act of 1864[9] permits national banks to establish branches, but only to the extent that "State banks" are allowed to establish branches according to explicit state law.[10] Proponents of unlimited branch

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actually carrying on that business, such associations are "State banks" for purposes of 12 U.S.C. § 36(h). Therefore, national banks in Texas may branch to the same extent as Texas savings and loan associations under Texas law. The subject applications are hereby approved.

Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 23 (Dec. 3, 1987).

On December 17, 1987, Texas Attorney General Jim Mattox brought suit for a declaratory judgment at the request of Banking Commissioner Kenneth Littlefield, asking for a permanent injunction prohibiting both banks from operating their branch offices and seeking to have the Comptroller's approval rescinded. *See* Complaint at 7, State v. Clark, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987). In the alternative, the Attorney General requested a declaration that all laws applying to state savings and loan associations be equally applicable to the national banks. *See id.*

7. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 268 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). In *Clarke*, the Comptroller held that savings associations were engaged in the business of banking, thus, to maintain a competitive equality among all financial institutions, national banks should be allowed to branch to the same extent as savings associations. *See id.* at 271; *see also* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 3 (Dec. 3, 1987)(Texas regulations grant state savings and loan associations authority to perform services historically reserved for commercial banks). Texas savings and loan associations provide services such as offering negotiable order of withdrawal (NOW) and savings accounts, issuing credit cards, receiving deposits, making commercial and consumer loans, and other services national commercial banks offer. *Id.*

8. *See* Decision of the Comptroller of the Currency on the Application of Union National Bank of Laredo and Texas Capitol Bank-Westwood, at 11 (Dec. 3, 1987)(liberalized savings and loan statutes grant associations authority to perform traditional banking functions). Although Texas statutes do not expressly limit the authority of savings and loan associations to establish branches, the same standards which govern the savings and loan commissioner's approval of applications for an original charter apply to applications for opening branch offices. *See* Gerst v. Jefferson County Sav. & Loan Ass'n, 390 S.W.2d 318, 321 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

9. ch. 106, 13 Stat. 99 (codified in scattered portions of 12 U.S.C.).

10. *See* McFadden Act, 12 U.S.C. § 36(c) (1982). The McFadden Act amended the National Bank Act in 1927. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99-100 (codified in scattered portions of 12 U.S.C.). The McFadden Act provides:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question . . . .

banking contend that the definition of "State banks"[11] as defined in the National Bank Act includes all financial institutions allowed by law to engage in the "business of banking,"[12] thus including savings and loan associations.[13] Therefore, as the analysis progresses, national banks in Texas should be allowed to branch to the same extent as Texas savings and loan associations.[14]

Advocates of unlimited branch banking rely primarily upon the decision of *Department of Banking and Consumer Finance v. Clarke*,[15] in which the United States Court of Appeals for the Fifth Circuit upheld the United States Comptroller's approval of a branch office in Mississippi that was beyond the one hundred mile radius branching restriction imposed on Mississippi state banks.[16] The court based its decision on the functions performed by the state savings and loan associations, maintaining that they were "[s]tate banks" involved in the "business of banking" for purposes of the National Bank Act.[17]

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12 U.S.C. § 36(c) (1982).

11. McFadden Act, 12 U.S.C. § 36(h) (1982). The statute defines state banks as: "trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." *Id.*

12. *Id.* § 24. The "business of banking" consists of:

(1) the discounting and negotiating of promissory notes, drafts, bills of exchange, and other evidence of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

Id. Succinctly, any institution which receives deposits, makes commercial loans and negotiates checks and drafts is engaged in the business of banking. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 268 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 266 (1987)(banking business involves negotiating checks, making loans and receiving deposits).

13. *See Clarke*, 809 F.2d at 270 (Mississippi savings and loan associations are "state banks"); Complaint at 5, State v. Clark, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987)(federally chartered banks contend Texas savings and loan associations are "State banks").

14. *See* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas National Bank-Westwood, at 16 (Dec. 3, 1987)(savings and loan associations have minimal branching restrictions). *Cf. Clarke*, 809 F.2d at 269 (because savings associations participate in business of banking, national banks in Mississippi may branch to extent of Mississippi savings and loan associations).

15. 809 F.2d 266 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987).

16. *See id.* at 271. Mississippi statutes allow banks to branch only within the same county in which the bank's principal office is located or within a one hundred mile radius. *See id.* at 268. The United States Comptroller approved the application to open a branch office more than one hundred miles away from Deposit Guaranty's home office in Jackson, Mississippi. *See id.*

17. *See id.* at 270-71.

This comment will present a brief overview of the purposes for branch banking and the policy reasons for regulating it. An examination of pertinent federal and state regulations limiting branch banking in Texas will follow. Regulations pertaining to Texas savings and loan associations will be addressed as well as the evolving competition between banks and savings and loan associations. Finally, this comment will analyze *Department of Banking and Consumer Finance v. Clarke* in light of similar litigation pending in the Federal District Court for the Western District of Texas.

II. ADVANTAGES AND DISADVANTAGES OF BRANCH BANKING

One of the most prominent trends in American banking over the past century has been the increase in the number of banks operating under a branch banking system.[18] The expansion of agricultural and industrial markets, combined with the failure and subsequent merger of many small banking institutions during the 1930's fostered tremendous growth in branching systems.[19] More recently, technological advances such as improved telecommunications and automated teller machines (ATMs) have contributed to the trend toward branch banking.[20]

The branching movement has not been completely uncontrolled, however,

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> These associations, consistent with state law, accept deposits, pay interest on accounts, . . . act in a fiduciary capacity, make personal loans, sell money orders and traveler's checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease and mortgage both personal and real properties.

Id.

18. *See* P. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 3-12 (1987)(discussing major trends in United States banking). The number of banks operating branches in the United States grew from a mere eighty-seven in 1900 to more than seven thousand in 1984. *See id.* at 19 (citing statistics compiled in FDIC, ANNUAL REPORT 1984). Several factors such as overall growth in the economy, improved technology, and increased competition among all financial institutions have caused this trend. *Id.* at 12-13.

19. *See* TEX. CONST. art. XVI, § 16 interp. commentary (Vernon 1955)(as agricultural, industrial and commercial markets grew, corresponding demand for financial facilities arose); *see also* P. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 18 (1987)(discussing spread of branch banking in United States).

20. *See, e.g.*, State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 344 (8th Cir. 1979)(consumer bank communication terminal (CBCT) considered branch); Missouri *ex rel.* Kostman v. First Nat'l Bank, 538 F.2d 219, 220 (8th Cir.)(operating CBCT meets federal definition of branch banking), *cert. denied*, 429 U.S. 941 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 941 (D.C. Cir.)(establishment of CBCT is branch banking), *cert. denied*, 429 U.S. 862 (1976); *see also* Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 267 (1982)(electronic funds transfer systems have affected geographic restrictions on bank expansion); Comment, *Operating Unmanned Teller Machines in Texas*, 13 TEX. TECH L. REV. 61, 79-82 (1982)(discussing impact of unmanned teller machines on Texas branching). Automated facilities greatly expand services offered by banks, since they can be established wherever adequate demand exists. *See* Baker, *Bank Expansion: Geographic Barriers*, 91 BANKING L.J. 707, 717 (1974).

because state and federal branching laws imposed strict regulations upon such growth.[21] One of the primary policy reasons for regulation was to prevent the concentration of market power in a few large banks.[22] Bank regulators feared an oligopoly market would result in a few large banks having the power to dictate unfair credit terms to consumers, who would then have few alternatives but to accept the banks' terms.[23] Another feared danger of branch banking was the lack of personal service offered to customers by impersonal branch employees who have little or no interest in the community.[24] The human aspects of banking were addressed during testimony before the Senate Subcommittee on Financial Institutions:

> Banking is very much of a public trust, and often that public trust is best administered locally with a bank that is responsive and responsible to the local community. You have local ownership, local directors, and people that live in that community. They have to be responsible to the members of that community and not branch managers passing through town on their way up some corporate ladder.[25]

Opponents of branching contend that the larger banks will eventually swallow up the smaller local banks, leaving small communities with no rea-

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21. *See* McFadden Act, Pub. L. No. 69-639, 44 Stat. 1224 (1927)(codified as amended at 12 U.S.C. § 36(c)(1982)). The McFadden Act originally permitted national banks to branch, but only within their home cities, and only if state law allowed state banks to branch. *See id.*; *see also* Bank of Italy v. Johnson, 251 P. 784, 788 (Cal. 1927)(discussing state regulatory branching statutes); Warren v. Commerce Union Bank, 274 S.W. 539, 540 (Tenn. 1925) (citing state statute allowing banks to branch within county).

22. *See* P. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 225-26 (1987)(branch banking arguably led to concentrated financial powers, often driving smaller banks from market). Statistics reveal that states which allow statewide branching have a greater percentage of assets controlled by three or four large banks than states which impose strict branching restrictions. *See* Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 278 (1982)(citing GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES, The Report of the President at 45 (Jan. 1981)).

23. *See* P. ROSE, THE CHANGING STRUCTURE IN AMERICAN BANKING 225 (1987). The resulting effect of an oligopoly is claimed to be an agreement upon prices by competitors, resulting in less competition, excessive profits for the banks, and more expensive services for the customer. *See id. See generally* Shull, *Bank Expansion: The New Competition and the Old Predatory Practices*, 91 BANKING L.J. 726, 729 (1974)(large banks, seeing opportunity to expand into new markets, will buy out smaller banks).

24. *See* Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 279 (1982)(feared result of branch banking is decrease in services and courtesy to local customers). Opponents of branching also fear that large commercial banks will drain money from local communities. *Id.*

25. *Federal Branching Policy: Hearings Before Subcommittee on Financial Institutions of Senate Committee on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 275 (1976)(statement of Alex Sheshunoff).

sonable banking alternatives.[26] Proponents of branching, on the other hand, claim that the ability to establish branch offices provides financial institutions with a more efficient means to acquire funds.[27] The additional convenience offered to customers through branching provides an incentive to make deposits at local institutions.[28] Thus, those institutions with the authority to branch have a significant advantage in competing for available funds in the marketplace.[29]

The increased competition promoted by branch banking also creates an efficient structure within which to offer bank services.[30] Many larger institutions can provide services on a cost-effective basis due to economies of scale which smaller institutions do not possess.[31] In addition, antitrust laws pre-

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26. *See* P. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 218 (1987)(concentration of banking resources results in increased charges compared to unit banking); Shull, *Bank Expansion: The New Competition and the Old Predatory Practices*, 91 BANKING L.J. 726, 733 (1974)(larger banks may acquire small banks through "predatory pricing" in which attractive price is offered to seller which may be offset by profits from other markets). *But see* Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 281 (1982)(citing Horvitz & Shull, *The Impact of Branch Banking of Bank Performance*, NAT'L BANKING REV. (1964)(average of five new services offered after merger of unit bank with branch bank)).

27. *See* Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 AM. U.L. REV. 633, 689 (1980)(branch offices provide means to attract loanable funds, thus creating competitive advantage in financial market); *see also Hearings of Tex. S.B. 10 and S.B. 11 Before the Senate Committee of Economic Development*, 69th Leg. tape 3, at 14 (testimony of Patrick Stafford, consultant with Texas Research League)(legislation relaxing branching restrictions will create new opportunities to obtain capital).

28. *See* P. ROSE, THE CHANGING STRUCTURE IN AMERICAN BANKING 212 (1987). The increase in competition for available capital has forced financial institutions to place greater emphasis on customer convenience by making it less time-consuming to transact business at the bank. *Id.*; *see also* Note, *CBCT's: Stranded at the Altar*, 28 BAYLOR L. REV. 353, 354 (1976)(customer-bank communication terminals convenient for bank customers by providing terminals at supermarkets).

29. *See* Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 AM. U.L. REV. 633, 689 (1980)(variety of branching laws allocate advantage of branching unevenly among financial institutions); *see also* Comment, *Customer-Bank Communication Terminals and Branch Banking*, 7 ST. MARY'S L.J. 389, 391 (1975)(before enactment of McFadden Act only state banks could branch, resulting in disadvantage to national banks which were unable to branch).

30. *See, e.g.*, Comment, *Interstate Banking and Branch Banking in Texas: An Overview of the Constitutional and Statutory Provisions*, 18 ST. MARY'S L.J. 1329, 1357 (1987)(limited branch banking allows financial institutions to operate in more efficient manner); Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 281 (1982)(geographic constraints upon branching impede competition by erecting protective barriers around local banks); *Hearings on Tex. S.B. 10 and S.B. 11 Before the Senate Committee on Economic Development*, 69th Leg. tape 1, at 4 (Aug. 13, 1986)(testimony of Bruce LaBoon, Vice Chairman of General Counsel, Texas Commerce Bancshares, representing Texas Assoc. of Bank Holding Companies)(branch banking will promote more free competition in Texas).

31. *See* GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED

vent undue concentration or banking oligopolies.[32]

III. STRUCTURE OF THE BANKING SYSTEM

American banks fall under a unique regulatory scheme known as the dual banking system, in which both federal and state governments have authority to issue banking charters.[33] As a result, a complex synthesis of state and federal regulatory agencies has evolved.[34] The responsibility of federal regulation is allocated among three separate agencies: the Comptroller of the Currency,[35] the Federal Deposit Insurance Corporation[36] (FDIC), and the Federal Reserve Board.[37] At the state level, however, a single agency is gen-

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STATES, The Report of the President at 137 (Jan. 1981). Services offered by larger banks, which are generally not offered by smaller banks, include revolving credit, trust services, payroll services, foreign exchange transactions, and special checking accounts. *Id*; *see also* Shull, *Bank Expansion: The New Competition and the Old Predatory Practices*, 91 BANKING L.J. 726, 732 (1974)(large banks acquire smaller banks because increased base for funds creates greater economies of scale).

32. *See* Baker, *State Branch Bank Barriers and Future Shock—Will the Walls Come Tumbling Down?*, 91 BANKING L.J. 119, 132 (1974)(antitrust laws will prevent excessive concentration of financial power in few large banks). The banking industry is subject to the same antitrust limitations as other industries. *See, e.g.*, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 120-22 (1975)(Clayton Act applied in proposed merger of banks); United States v. Third Nat'l Bank, 390 U.S. 171, 183-92 (1968)(application of antitrust laws in approving bank merger); United States v. First Nat'l Bank, 301 F. Supp. 1161, 1163 (S.D. Miss. 1969)(Clayton Act appropriate consideration in approving merger banks).

33. *Compare* 12 U.S.C. § 26 (1982)(granting Comptroller of Currency authority to charter national banks) *with* TEX. REV. CIV. STAT. ANN. art. 342-305 (Vernon Supp. 1988)(granting Banking Commissioner authority to charter state banks). The courts have recognized the dual regulation of the banking industry. *See, e.g.*, First Nat'l Bank v. Dickinson, 396 U.S. 122, 131 (1969)(referral to "dual banking structure where state and national banks coexist"); County Nat'l Bancorp. v. Board of Governors, 654 F.2d 1253, 1262 (8th Cir. 1981)(banks in United States governed by both state and federal agencies); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 932 (D.C. Cir.)(dual banking system established by Congress), *cert. denied*, 429 U.S. 862 (1976); First Nat'l Bank v. Camp, 465 F.2d 586, 592 (D.C. Cir. 1972)(unique dual banking system in which state and national banks have independent chartering authority), *cert. denied*, 409 U.S. 1124 (1973).

34. *See* Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STANFORD L. REV. 687, 687 (1980)(dual banking system created "intricate web of state and federal law"). In considering a branch application, the United States Comptroller may seek the guidance of applicable state law, but is bound to use federal law in defining terms of a federal statute. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987).

35. *See* 12 U.S.C. § 1 (1982)(Comptroller charged with execution of laws relating to regulation of national currency). The Comptroller is vested with general powers to administer national banking laws and supervise national banks. *See Clarke*, 809 F.2d at 268.

36. *See* 12 U.S.C. § 1811 (1982)(specifying duty of FDIC to insure deposits of all member banks).

37. *See id.* §§ 248(a)-(*o*) (enumerated powers of Federal Reserve Board provide general supervisory responsibility for national bank operation).

erally designated to oversee banking within the state.[38] Since there is no "Uniform Bank Act" to provide guidance for individual states, some state statutes prohibit branch banking,[39] while others allow limited branch banking[40] and still others permit statewide branch banking.[41] Texas allows limited branch banking within a bank's county, but banks may also branch outside their home county pursuant to the takeover of a failed bank.[42]

The dual regulatory system provides flexibility in banking regulation by providing a safety valve for circumventing outdated state or federal regulations.[43] Frequently, states acting as "test-markets" have developed new financial services which provide greater convenience for the customer than is

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38. *See, e.g.*, GA. CODE ANN. § 7-1-61 (1982)(Department of Banking and Finance authorized to regulate provisions of chapter provisions); IND. CODE § 28-12-2-1 (1986)(department of financial institutions shall supervise and regulate all financial institutions); TEX. REV. CIV. STAT. ANN. art. 342-207 (Vernon Supp. 1988)(Commissioner shall supervise and regulate all state and private banks and enforce all Code provisions).

39. *See, e.g.*, ALA. CODE § 5-5A-20 (1987)(prohibiting branch banking absent serious financial crisis requiring branch to protect public); COLO. REV. STAT. § 11-6-101 (1987)(prohibiting branch banking); MONT. CODE ANN. § 32-1-372 (1987)(prohibiting branch banking). These branching restrictions require banks to utilize unit banking in order to operate separate offices. *See* NORTON & S. WHITLEY, BANKING LAW MANUAL § 1.04, at 21 (1987)(unit banking conducts banking operations through centralized facility with auxiliary facilities as allowed by law). A unit banking system establishes subsidiary banks of a bank holding company, each of which have independent management and a separate board of directors. *See* Comment, *Interstate Banking and Branch Banking in Texas: An Overview of the Constitutional and Statutory Provisions*, 18 ST. MARY'S L.J. 1329, 1333 & n.22 (1987)(citing HOUSE STUDY GROUP, SPECIAL LEGISLATIVE REPORT NO. 123, at 18 (Jan. 30, 1986)).

40. *See, e.g.*, IOWA CODE ANN. § 524.1202 (West Supp. 1987)(bank may establish branch if within same city as home office); KAN. STAT. ANN. § 9-1111 (1982)(bank may operate no more than three auxiliary banking facilities, at least one of which must be located within 2,600 feet of home office); TEX. REV. CIV. STAT. ANN. art. 342-903, § 1 (Vernon Supp. 1988)(bank may establish branch if achieved through failed bank purchase or restricted to no more than three branches within city or county). *See generally* J. NORTON & S. WHITLEY, BANKING LAW MANUAL § 1.04(2), at 22 (1987)(limited branch banking essentially branching on limited geographical basis).

41. *See, e.g.*, ALASKA STAT. § 06.05.399 (1987)(no geographic limitations upon branch offices); VT. STAT. ANN. tit 8, § 651(1) (1984)(no geographic restrictions upon branch offices); VA. CODE ANN. § 6.1-39.3 (Supp. 1988)(no geographic branching restrictions). *See generally* J. NORTON & S. WHITLEY, BANKING LAW MANUAL § 4.01(2), at 22 (1987)(statewide branching has no geographic restrictions, however states impose other restraints, including limits on branch numbers, or population requirements).

42. *See* TEX. REV. CIV. STAT. ANN. art 342-903, § 1 (Vernon Supp. 1988). Whether this statutory restriction will endure as an effective banking limitation is a question which may soon be answered by the Federal District Court for the Western District of Texas. *See* State v. Clark, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987). The federal district court will consider if Union National Bank-Laredo and Texas Capitol Bank-Westwood will be allowed to operate branches beyond the limitations imposed by article 342-903(a). *See id.*

43. *See* TASK GROUP ON REGULATION OF FINANCIAL SERVICES, BLUEPRINT FOR REFORM: THE REPORT OF THE TASK GROUP ON REGULATION OF FINANCIAL SERVICES 43

available at federally chartered institutions.[44] For example, the availability of Negotiable Order of Withdrawal (NOW) accounts, which essentially pay interest on checking account balances, was first developed at the state level before being allowed at the federal level.[45]

IV. FEDERAL BRANCHING REGULATION

A. *Banks*

The National Bank Act of 1864[46] marked the beginning of United States bank regulation.[47] Although the Act did not expressly address the issue of branch banking, in 1924 the United States Supreme Court interpreted it to prohibit branching by nationally chartered banks.[48] As a result, national banks were at a competitive disadvantage with state chartered banks which were permitted to branch in states with liberalized branching regulations.[49] In response to this dilemma, Congress passed the McFadden Act[50] in 1927

(July 1984)(available from United States Government Printing Office). Generally, the state regulatory systems are more apt to allow new services to be tested. *See id.*

44. *See id.* (states act as "laboratories for change" in developing new financial services). In recent years, the states have been the first to charter credit unions and to allow NOW accounts. *Id*; *see also* P. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 355 (1987)(state and federal governments are "co-equal partners" in promoting stable banking system).

45. *See* TASK GROUP ON REGULATION OF FINANCIAL SERVICES, BLUEPRINT FOR REFORM: THE REPORT OF THE TASK GROUP ON REGULATION OF FINANCIAL SERVICES 43-44 (July 1984)(available from United States Government Printing Office)(without prior experience of state banks, congressional mandated NOW accounts would have been delayed several years).

46. National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified in scattered portions of 12 U.S.C.).

47. *See id.* The Act established the Office of the Comptroller of the Currency, established reserve requirements, prohibited loans on a bank's own stock, required examinations of national banks, limited loans to any single individual or corporation, and limited interest rates on loans made by national banks. *See id.*

48. *See* First Nat'l Bank v. Missouri, 263 U.S. 640, 657-58 (1924)(Act fails to contemplate branch banking by nationally chartered banks). The Supreme Court closely scrutinized a statute which required the operations of the bank to be "transacted at an office or bankinghouse" as specified in the charter. The Court construed "an" as being singular and limiting First National Bank to one banking facility. *See id.* at 657.

49. *See, e.g.*, 1 W. SCHLICHTING, T. RICE & J. COOPER, BANKING LAW § 2.03 (1987)(national banks at competitive disadvantage because state banks permitted to branch); Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133, 1152 (1981)(state banks allowed to follow customers into suburbs, gaining competitive advantage over national banks); Note, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KENTUCKY L.J. 707, 712 (1983-84)(national banks at competitive disadvantage due to inability to branch).

50. 12 U.S.C. § 36(c) (1982).

to provide "competitive equality" between state banks and national banks.[51] The Act allowed nationally chartered banks to open branches within their home cities if state law permitted branching by state banks.[52] This privilege was further expanded by the Banking Act of 1933[53] which permitted national banks to branch within their respective states, without the home city restriction, to the same extent as the state banks.[54]

The National Bank Act of 1864 also created the Office of The Comptroller of the Currency within the Treasury Department and gave it the authority to charter national banks.[55] Pursuant to the McFadden Act, Congress empowered the Comptroller to make judgments on the applications of national

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51. *See, e.g.*, First Nat'l Bank v. Dickinson, 396 U.S. 122, 131-32 (1969)(congressional intent of McFadden Act to place national and state banks on equal terms); First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252, 258 (1967)(purpose of McFadden Act to continue policy of equalization of National Bank Act of 1864); Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 270 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987)(Congress concerned that "neither system have advantages over the other in the use of branch banking"); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 890 (9th Cir. 1980)(congressional intent to initiate competitive equality between state and national banks); Dakota Nat'l Bank & Trust v. First Nat'l Bank, 554 F.2d 345, 353 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977)(competitive equality underlying doctrine of McFadden Act); Independent Bankers Ass'n v. Smith, 534 F.2d 921, 932 (D.C. Cir. 1976)(competitive equality demands that state banks and national banks have equal rights to branch). At the time the legislation was being debated, Representative McFadden, the sponsor of the bill, stated:

> As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal reserve system.

68 Cong. Rec. 5815 (1927).

52. *See* McFadden Act, Pub. L. No. 639, 44 Stat. 1224, 1228 (1927). Section 5155(c) provided:

> A national banking association may, after the date of approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

Id.

53. Glass-Steagall Act, ch. 89, § 23, 48 Stat 189 (1933)(codified as amended at 12 U.S.C. § 36). This Act permitted national banks to branch "outside" the home city of the principal bank, but limited by the same branching restrictions applicable to state banks. *Id.* Senator Glass stated that branching would be permitted "in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking." First Nat'l Bank v. Walker Bank, 385 U.S. 252, 259 (1966)(quoting 76 Cong. Rec. 2511 (1933))(thorough documentation of legislative history of Glass-Stegall Act).

54. *See* Glass-Steagall Act, ch. 89, § 23, 48 Stat. 189, 190 (1933)(codified at 12 U.S.C. § 36)(permitting national banks to establish "outside" branches if such branches could be established by state banks under state law).

55. *See* National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified in scattered portions of 12 U.S.C.). The duties of the Comptroller include chartering, regulating, and supervising national banks, as well as approving any structural changes in national banks. J. NORTON & S. WHITLEY, BANKING LAW MANUAL § 3.04, at 3-19 (1987).

banks requesting approval for branch offices.[56] As a matter of policy, the Comptroller favors the granting of branch applications because branching promotes greater efficiency in the banking system.[57] In considering the branching applications of national banks in each respective state, the Comptroller is required to interpret branching restrictions of that state.[58] Further, if branching is permitted within the state, the Comptroller must consider federal law to determine if the banking operation is indeed a "branch" as defined by 12 U.S.C. § 36(f).[59] Upon review, the decision of the Comptroller will be upheld by the courts unless it is not a "permissible

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56. *See* 12 U.S.C. § 36(c) (1982). "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . ." *Id*; *see also* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 268 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987)(Congress granted Comptroller power to authorize branch locations of national banks).

57. *See* 12 C.F.R. § 5.30(c) (1987). The Office of the Comptroller is guided by the following policy:

> The Office is responsible for maintaining a sound banking system; the Office is responsible for encouraging a bank to help meet the credit needs of its entire community; the marketplace is normally the best regulator of economic activity; and competition promotes a sound and more efficient banking system that serves customers well . . . . Accordingly, it is the general policy of the Office to approve applications to establish and operate branches . . . provided that the approval would not violate the provisions of applicable federal law or State law that is incorporated into federal law regarding the establishment of such branches . . . .

Id.

58. *See, e.g.*, *Clarke*, 809 F.2d at 269 (Comptroller properly considered applicable state statutes in allowing national banks to branch); Marshall & Isley Corp. v. Heimann, 652 F.2d 685, 695 (7th Cir. 1981)(state branching requisites must be met prior to Comptroller's approval to branch); State *ex rel.* Edwards v. Heimann, 633 F.2d 886, 890 (9th Cir. 1980)(Comptroller must consider requirements of state statutes in ruling on branching application); First Bank & Trust v. Smith, 545 F.2d 752, 753 (1st Cir. 1976)(if state law allows, Comptroller may authorize branch), *cert. denied*, 430 U.S. 931 (1977).

59. *See* 12 U.S.C. § 36(f) (1982). "Branch" is defined as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Id; *see also* First Nat'l Bank v. Dickinson, 396 U.S. 122, 125 (1969)(federal law governs threshold determination of "branch"). In *Dickinson*, the Supreme Court reasoned that allowing states to independently regulate banking operations "would make them the sole judges of their own powers. Congress did not intend such an improbable result . . . ." *Id.* at 133-34. The issue of what constitutes a "branch" has been frequently litigated. *See, e.g.*, State Bank v. Merchants Nat'l Bank & Trust, 593 F.2d 341, 344 (8th Cir. 1979)(customer bank communications terminals are branch banks as defined by 12 U.S.C. § 36(f)); St. Louis County Nat'l Bank v. Mercantile Trust Co. Nat'l Ass'n, 548 F.2d 716, 719-20 (8th Cir. 1976)(trust office which conducts substantial business with "home bank" constitutes branch); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 948 (D.C. Cir.)(bank communications terminals perform as least one of requisite banking functions of receiving money, paying checks, or lending

construction" of the National Bank Act.[60]

B. *Savings and Loan Associations*

Savings and loan associations, like banks, operate within a dual system in which both federal and state governments may charter savings and loan institutions.[61] At the federal level, the Home Owners' Loan Act of 1933[62] established the Federal Home Loan Bank Board (FHLBB) as the supervisory agency responsible for chartering federal savings and loan associations.[63] Although the Act contains no express provision granting the FHLBB power to authorize branching, extensive case law supports this authority.[64] In accordance with this branching privilege, the Board promul-

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money, and therefore constitute a branch pursuant to section 36(f)), *cert. denied*, 429 U.S. 862 (1976).

60. *See* 5 U.S.C. § 706 (1982).

The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Id. Courts are charged with upholding the decision of the Comptroller if it is a "permissible construction" of the National Bank Act. *See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)(question for Court is whether agency's ruling was "permissible construction" of statute); Texas v. United States, 756 F.2d 419, 425 (5th Cir.)(upon review of agency's ruling court considers if statute permissively construed), *cert. denied*, 474 U.S. 843, (1985). Further, "substantial deference" should be accorded the Comptroller's interpretation of the National Bank Act. *See* Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971).

61. *See* 12 U.S.C. § 1464 (1982)(federal statute granting authority to charter federal savings and loan associations); TEX. REV. CIV. STAT. ANN. art 852a, § 2.01 (Vernon Supp. 1988)(Texas statute granting authority to state agency to charter state savings and loan associations).

62. Home Owners Loan Act of 1933, Pub. L. No. 73-43, 48 Stat. 128 (codified as amended in 12 U.S.C. §§ 1461-1470 (1982)).

63. *See* 12 U.S.C. § 1464(a) (1982). The statute provides in part: "the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations . . . and to issue charters therefor . . . ." *Id.*

64. *See, e.g.*, Central Sav. & Loan Ass'n v. FHLBB, 422 F.2d 504, 506 (8th Cir. 1970)(use of mobile facilities as form of branching by savings and loan associations as authorized by FHLBB); Bridgeport Fed. Sav. & Loan Ass'n v. FHLBB, 307 F.2d 580, 581 (3rd Cir. 1962)(recognizing FHLBB's authority to establish branching of federal savings and loans), *cert. denied*, 371 U.S. 950 (1963); First Nat'l Bank v. First Fed. Sav. & Loan Ass'n, 225 F.2d 33, 35 (1955)(FHLBB authorized by Homeowner's Loan Act of 1033 to permit associations to establish branches); North Arlington Nat'l Bank v. Kearny Fed. Sav. & Loan Ass'n, 187 F.2d 564, 565 (3d Cir.)(Board's power to establish branch office for associations authorized by statute), *cert. denied*, 342 U.S. 816 (1951); Lyons Sav. & Loan Ass'n v. FHLBB, 377 F. Supp. 11, 16 (N.D. Ill. 1974)(FHLBB's statutory powers include authority to approve applications for branch offices); Springfield Inst. for Sav. v. Worcester Fed. Sav. & Loan Ass'n, 107 N.E.2d

gated a set of regulations to govern procedures in establishing branches.[65] In considering a branching application, the board first assesses the applicant's record in meeting the credit needs of its community.[66] Upon finding that the association has fulfilled this requirement, the FHLBB may grant the application to branch regardless of prohibitory state law.[67] As a result, most state savings and loan regulatory authorities have placed minimal branching restrictions upon state savings and loan associations in order to maintain a competitive level with the national savings and loan associations.[68]

315, 317 (Mass. 1952)(FHLBB empowered by Act to establish branch offices), *cert. denied*, 344 U.S. 884 (1953).

65. *See* 12 C.F.R. § 545.92 (1987)(general administrative regulation establishing procedure to apply for branch office). The applicant must publish a notice in a local newspaper stating its intent to open a branch in the community. *Id.* § 543.2(c). Any individual may file a protest to this branch office within ten days of the publication. *Id.* § 543.2(e). In the event a valid protest is filed, oral arguments are heard to determine if the branch should be allowed. *Id.* § 543.2(f). Subsequently, the FHLBB makes a ruling on the application. *See id.*

66. *See id.* § 545.92(e). In considering the application to branch, the FHLBB will consider the applicant's record in meeting the credit needs of its community, including low and moderate-income neighborhoods. The Board also considers "overall policies, condition and operation of applicant." *Id.*

67. *See, e.g., North Arlington Nat'l Bank*, 187 F.3d at 565-56 (3d Cir.)(state law does not prohibit FHLBB from establishing branch offices), *cert. denied*, 342 U.S. 816 (1951); *Lyons Sav. & Loan Ass'n*, 377 F. Supp. at 17 (state law permitting local associations to branch does not limit FHLBB's power to approve branch offices); *Springfield Inst. for Sav.*, 107 N.E.2d at 318 (state statute limiting locality of branch office in conflict with FHLBB's authority to establish branch bank), *cert. denied*, 344 U.S. 884 (1952); *see also Central Sav. & Loans*, 422 F.2d at 506 (FHLBB's authority to approve branching not limited by affidavit of state Commissioner of Banking). Some courts have held that the congressional intent behind the Home Owner's Loan Act was to preempt all state regulation, thereby precluding any state restrictions. *See, e.g.*, FHLBB v. R.Y. Empie, 628 F. Supp. 223, 225 (W.D. Okla. 1983)(congressional intent behind Home Owner's Loan Act to preempt state regulation); People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951)(Congress provides no authority to share FHLBB's power to regulate with state). Other courts have stated that the absence of a provision comparable with section 36(c) of the National Bank Act, which defers branching regulation for banks to the states, reveals a congressional awareness of the Board's broad powers to disregard state restrictions on branching. *See* Departamento de Asuntos del Consumidor v. Oriental Fed. Sav., 648 F. Supp. 1194, 1197 (D.P.R. 1986); *Lyons Sav. & Loan*, 377 F. Supp. at 17.

68. *See* Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KENTUCKY L.J. 707, 722 (1984)(lack of state restrictions on branching permits competitive equality between state and national savings and loans); *see also, e.g.*, COLO. REV. STAT. § 11-41-116 (1987)(no geographic branching restrictions on Colorado savings and loan associations); GA. CODE ANN. § 7-7-777 (1982)(authorizing Georgia savings and loan associations to branch without geographic restrictions); IND. CODE § 28-4-3-2 (Supp. 1987)(authorizing Indiana savings and loan associations to branch throughout state); MONT. CODE ANN. §§ 32-2-101 to 32-2-503 (1987)(no branching restrictions on Montana savings and loan associations); TEX. REV. CIV. STAT.

V. THE DEPOSITORY INSTITUTION DEREGULATION AND MONETARY CONTROL ACT OF 1980

Prior to 1980, the distinction between banks and savings and loan associations was relatively clear.[69] Banks had authority to make consumer, commercial, and mortgage loans, while savings and loan associations were restricted to making loans for the construction or purchase of homes.[70] Banks could offer more services to their customers, such as checking accounts or bank credit cards, while savings and loan associations were generally limited to passbook savings accounts and certificates of deposit.[71] As a result of these restrictions on services and the rising interest rates of the 1970's, savings and loan associations were forced to increase the rate of interest paid to depositors to meet competition from banks.[72] The resulting

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ANN. art. 852a, § 2.07 (Vernon Supp. 1988)(same regulations apply to charter of savings and loan association and to branch office of savings and loan association).

69. *See, e.g.*, United States v. Connecticut Nat'l Bank, 418 U.S. 656, 664 (1974)(servicing of commercial enterprises still unique to commercial banks); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359 (1970)(specified cluster of products and services offered by banks makes commercial banking distinct line of commerce); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356-57 (1963). In noting distinctions of commercial banks, the Supreme Court identified a unique "cluster of products and services" provided only by commercial banks. *Id.* The Court stated:

> Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions . . . . Finally, there are banking facilities which, although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition . . . .

Id.

70. *Compare* Home Owners' Loan Act of 1933, Pub. L. No. 43, 48 Stat. 128 § 5(a) (1933)(purpose of thrift institutions to provide financing for homes) *with* National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified in scattered portion of 12 U.S.C.)(purpose of banks to perform business of banking through personal, commercial, and real estate loans). Historically, savings and loan associations have been limited to financing home purchses or construction. *See generally* Lapidus, *Commercial Banks and Thrift Institutions: The Differing Portfolio Powers*, 92 BANKING L.J. 450, 453 (1975) (discussing limited authority of savings and loans); Note, *Interstate Branch Banking: That Someday is Today*, 21 WASHBURN L.J. 266, 272 (1982)(prior to 1980, savings and loan associations permitted to offer only savings and time deposit accounts and lending limited to real estate loans).

71. *See* D. CRANE, R. KIMBALL & W. GREGOR, THE EFFECT OF BANKING DEREGULATION 24 (1983)(commercial banks monopolized checking accounts); *see also* Lapidus, *Commercial Banks and Thrift Institutions: The Differing Portfolio Powers*, 92 BANKING L.J. 450, 454 (1975)(savings associations restricted to servicing savings and time deposit accounts).

72. *See, e.g.*, Vartanian, *Remarks Regarding the Depository Institutions Act of 1982*, in THE DEPOSITORY INSTITUTIONS ACT OF 1982 (1983)(rising and volatile interest rates in late 1970's caused severe strain on financial institutions); Note, *Ohio's Response to the Savings and Loan Crisis*, 12 U. DAYTON L. REV. 173, 175 (1986)(citing rising interest rates as cause of

increase in costs was not met by a proportionate increase in income, creating losses for many savings and loan associations.[73]

In response to this dilemma, Congress enacted the Depository Institutions Deregulation and Monetary Control Act[74] (DIDMCA) in 1980. This act eliminated the traditional distinction between banks and savings and loan associations by expanding the number of services which savings and loan associations could provide and reducing loan restrictions previously imposed on savings associations.[75] In particular, the Act allowed federal savings and loan associations to offer negotiable order of withdrawal (NOW) accounts, credit cards, and trust services, all of which had historically been reserved to commercial banks.[76] Savings and loan associations were no longer limited to personal residence loans, but could provide consumer loans so long as the

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problems with Ohio savings and loan associations); W. WOERHEIDE, THE SAVINGS AND LOAN INDUSTRY: CURRENT PROBLEMS AND POSSIBLE SOLUTIONS 8 (1984)(discussion of rising interest rates since 1966).

73. *See, e.g.*, D. CRANE, R. KIMBALL & W. GREGOR, THE EFFECT OF BANKING DEREGULATION 28 (1983)(thrift institutions burdened with low-yielding mortgages experienced operating losses due to increased costs to attract funds); Note, *S. 113 and S. 143: Ohio's Response to the Savings and Loan Crisis & Analysis of the Causes, Problems, and Solutions to the S&L Crisis*, 12 U. DAYTON L. REV. 173, 175 (1986)(cost of operating Ohio savings and loan associations increased, while income did not).

74. 12 U.S.C. §§ 3501-3509, 3521-3524 (1982)(effective March 31, 1980).

75. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 202-10, 94 Stat. 132 (codified at scattered sections of 12 U.S.C.). The Act extended the authority to all financial institutions to offer NOW accounts, and granted authority to savings and loan associations to make commercial real estate loans if limited to 20 percent of their assets. *See id.* at 145-51. The distinction between banks and savings and loan associations was thus reduced to enable savings and loan associations to effectively compete with commercial banks. *See* S.R. REP. No. 96-368, 96th Cong., 2d Sess. 76, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 236, 248. The purpose of the DIDMCA is summarized below:

> The legislation authorizes Federal savings and loan associations to provide consumers with virtually all of their household borrowing needs. Thrifts have historically functioned as depositories and home mortgage lenders. But the home mortgage borrower has had to go elsewhere to other types of financial institutions to obtain a checking account, make a consumer loan and obtain trust services. The inability to offer the consumer such services has handicapped savings and loan associations in competition with other depository institutions which offer the consumer convenient one-stop financial services across the board. As a result, in periods of tight money savings and loan associations suffer from fund outflows even though the rates they pay on deposits are competitive. This legislation gives Federal savings and loans the ability to compete for the savings dollar while remaining housing oriented . . . . These powers should enable thrifts to become one-stop family financial centers making them more competitive . . . .

Id.

76. *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1464(b)(1)(F)(4) (1982)(allowing associations to offer credit cards); *id.* § 1464 (n)(1) (allowing associations to offer trust services); *id.* § 1832(a) (allowing depository institutions to offer NOW accounts).

aggregate amount of the loans did not exceed ten percent of the total assets of the savings and loan.[77] Legislation two years later allowed savings and loan associations to make consumer loans totaling thirty percent of assets, commercial loans totaling ten percent of assets, and commercial real estate loans totaling forty percent of assets.[78] While savings and loan associations remain primarily home financers, deregulation of the financial services industry has placed them in direct competition with commercial banks.[79]

VI. REGULATION OF BRANCH BANKING IN TEXAS

Analysis of the evolution of the banking system in Texas reveals an historical distrust of financial institutions and a fear of financial power concentration.[80] Beginning in 1845, state chartered banks were expressly prohibited by the Texas Constitution for more than twenty years.[81] State banks were allowed to be established under the Civil War reconstruction government,[82]

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77. *See* H.R. REP. No. 96-842, 96th Cong., 2d Sess. 76, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 236, 238 (Act allows federal savings and loan associations to hold 10% of assets in consumer loans, bankers acceptances, commercial paper, or corporate debt securities).

78. *See* Garn-St. Germain Depository Institutions Act, Pub. L. No. 97-320, 96 Stat. 1469 (1982)(codified in scattered sections of titles 11, 12, 15, 20 & 42 U.S.C.); *see also e.g.*, 12 U.S.C. § 1464(c)(2)(B) (1982)(consumer loans may not exceed thirty percent of total assets); *id.* § 1464(c)(1)(R)(commercial loans may not exceed 10 percent of total assets; *id.* § 1464(c)(1)(B)(commercial property loans may not exceed 40 percent of total assets). The purpose of the Garn-St. Germain Act was to provide flexibility and earnings opportunities for associations in the long run. *See* H.R. REP. No. 97-899, 97th Cong., 2d Sess. 76, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3067; *cf.* National Bank Act, 12 U.S.C. § 24 (1982)(authorizing national banks to negotiate promissory notes and other forms of debt, and to lend money on personal security).

79. *See* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 10-13 (Dec. 3, 1987). The Comptroller found that Texas statutes confer broad powers to savings and loan associations, and place these associations in direct competition with banks. *See id.* A study on Texas savings and loan associations conducted by the FHLBB concluded that the additional powers allowed to savings and loan associations by deregulation provided a valuable means to diversify savings and loan portfolios and helped to achieve a better balance between maturities of assets and liabilities. *See* H.R. REP. No. 97-899, 97th Cong., 2d Sess. 76, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3054, 3067. Although savings associations had expanded lending capabilities, they remained predominately committed to housing, with nearly 80 percent of their portfolios consisting of mortgages. *See id.*

80. *See* TEX. CONST. art. XVI, § 16, interp. commentary (Vernon 1955)(summary of Texas banking history).

81. *See* TEX. CONST. art. VII, § 30 (1845)(prohibition of state banking system); TEX. CONST. art. VII, § 30 (1866)(same language as 1845 constitution).

82. *See* TEX. CONST. art. XVI (1869)(traditional prohibition against state banks absent from constitution). During the four years of the reconstruction government many state banks were established by special legislative acts. TEX. CONST. art. XVI, § 16, interp. commentary (Vernon 1955).

but the Texas Constitution of 1876 again imposed a ban on state banks.[83] Finally, in 1904, the constitution was amended to authorize establishment of a state banking system.[84] Both the constitution and the enabling legislation, however, prohibited all forms of branch banking.[85] This absolute restriction on branching remained until November of 1986 when Texas voters approved an amendment to the Texas Constitution allowing limited branch banking.[86]

This amendment was the culmination of many events leading to increased flexibility in Texas banking regulation.[87] In 1980, Texas citizens had approved an amendment to the constitution allowing the legislature to authorize state and national banks to operate unmanned teller machines in locations separate from their existing office.[88] Subsequent legislation also allowed banks to extend the permissible distance between the home office and "drive-in/walk-up facilities" from 2,000 feet in 1981 to 20,000 feet in 1985.[89] In June of 1986 however, the Texas Attorney General issued an

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83. *See* TEX. CONST. art. XVI, § 16 (1876)(identical prohibition of state banks as in 1866 constitution).

84. TEX. CONST. art. XVI, § 16 (1876, amended 1904). The provision states: "The legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof." *Id.*

85. *See* Act of May 26, 1905, ch. 10, § 4, 1905 Tex. Gen. Laws 489, 489-520, *amended by* Texas Banking Code of 1943, ch. 97, 1943 Tex. Gen. Laws 127, 127-68. The branching restriction was in section four of the Act: "Corporations created under the terms of this act shall not be authorized to engage in business at more than one place which shall be designated in their charters." *Id.* at 490. A provision with substantially similar language was subsequently incorporated into the Texas constitution. *See* TEX. CONST. art. XVI, § 16(a) (1876, amended 1955).

86. TEX. CONST. art. XVI, §§ 16(d)-(f) (Vernon Supp. 1988). The amendment allows banks to operate up to three branches within the same city or county, or on a statewide basis if established through the purchase of a failed bank. *See id.* §§ 16(d), (e).

87. *See generally* Note, *Interstate Banking and Branch Banking in Texas: An Overview of the Constitutional and Statutory Provisions*, 18 ST. MARY'S L.J. 1329, 1331-32 (1987)(discussing events leading to liberalization of Texas banking laws).

88. TEX. CONST. art. XVI, § 16(b) (Vernon Supp. 1988); *see also* Op. Tex. Att'y Gen. No. JM-498, at 2284 (1986)(discussing 1980 amendment allowing unmanned teller machines). The enabling legislation provides "a bank or group of banks, for the convenience of the customers, may install, maintain, operate, or utilize one or more unmanned teller machines . . . ." TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1988); *see also* Oak Forest Bank v. Harlingen State Bank, 646 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1983, no writ)(citing unmanned teller machine exception to branching restrictions). *See generally* Note, *Operating Unmanned Teller Machines in Texas*, 13 TEX. TECH L. REV. 61 (1982)(discussing operation of unmanned teller machines in Texas).

89. *See* Act of June 12, 1985, ch. 484, § 1, 1985 Tex. Gen. Laws 2053-54; *see also* Op. Tex. Att'y Gen. No. JM-498, at 2271-72 (1986). Originally, in 1957, the "drive-in/walk-up facilities" were required to be within 500 feet of the nearest wall of the central building and were required to be connected by a hallway or pneumatic tube. Subsequent amendments gradually expanded the allowable distance to 1,850 feet and then up to 2,000 feet. *See id.*

opinion declaring that the allowable extension to 20,000 feet violated the constitutional branching restriction.[90] In response to this opinion and the prospect of dismantling existing bank facilities separated from the home office, legislators proposed an amendment to the Texas Constitution allowing limited branch banking.[91] That amendment was subsequently adopted, along with the current enabling legislation thus allowing branching within the same city or county if limited to no more than three branches, or statewide if pursuant to the purchase of a failed bank.[92]

B. *Savings and Loan Associations*

While geographic limits are imposed on Texas banks' branching powers, Texas savings and loan associations are not subject to such restrictions.[93] Although no express statutory provision allows branching by savings associations in Texas, case law nevertheless supports their right to branch.[94] In an effort to provide guidelines for the Savings and Loan Commissioner[95] to follow in considering branching applications, the Texas Savings and Loan Department established standards that parallel chartering requirements, but are less stringent.[96] In considering an application for a branch office, the

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90. *See* Op. Tex. Atty. Gen. No. JM-498, at 2288. The opinion provided a historical analysis of branch banking in Texas. The Attorney General noted that the meaning of the constitution is fixed when it is adopted and the existing intent of the people at that time must be respected. *See id.* at 2285. Consequently, in light of Texas' historical restrictions upon branching, the Attorney General declared article 342-903 unconstitutional. *See id.* at 2286-88.

91. *See* J. Sexton, *Interstate Banking and Branch Banking* 12-13 (July 31, 1986)(unpublished manuscript available from Texas Senate Economic Development Committee)(potential burden of dismantling extended bank facilities a factor necessitating branch banking legislation).

92. *See* TEX. REV. CIV. STAT. ANN. art. 342-903, § 1 (Vernon Supp. 1988)(enabling legislation of article 16, section 16 of Texas Constitution).

93. *Compare id.* (limiting banks to branches only within same city or county) *with id.* art. 852a, §§ 2.07-1124 (no provision limiting savings and loan associations to geographic boundaries).

94. *See, e.g.*, Gerst v. Oak Cliff Sav. & Loan Ass'n, 432 S.W.2d 702, 706 (Tex. 1968)(power to establish branch offices implied); Benson v. San Antonio Sav. Ass'n, 374 S.W.2d 423, 425 (Tex. 1964)(authority of savings and loan associations to branch implied, otherwise purpose of statutes would be nullified); Southwestern Sav. & Loan Ass'n v. Falkner, 160 Tex. 417, 421 331 S.W.2d 917, 920 (1960)(no statutes expressly authorize savings and loan associations to branch; such authority implied); Gerst v. Jefferson County Sav. & Loan Ass'n, 390 S.W.2d 318, 321 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.)(implied authority to create branch offices).

95. *See* TEX. REV. CIV. STAT. ANN. art. 852a § 5.01 (Vernon Supp. 1988). The section requires the Commissioner to adopt rules which are consistent with sound lending practices and will promote the purposes of the act. *See id.*

96. *See* Tex. Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 53.4 (Hart Nov. 1, 1986)(section entitled "Findings Necessary for Approval of Branch Office"). Chartering is a method of incorporation for banks and savings and loan associations which determines their

Commissioner must find that the new entity will meet the public need for an association, the volume of business will be substantial enough to provide a profitable operation in time, and the establishment of a new association will not "unduly harm any existing association."[97] These minimal standards and unlimited authority to branch statewide have allowed state savings and loan associations to provide greater convenience for their customers.[98]

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structure, capital requirements and regulatory supervision. *See* J. NORTON & S. WHITLEY, BANKING LAW MANUAL § 5.02, at 5-4.2 (1987). The Commissioner must find that:

(1) the applying association has had no supervisory problems which would affect its ability to properly operate such office;

(2) the proposed operation will not unduly harm any other association operation in the community of the proposed branch;

(3) a separate enclosed office area will be provided;

(4) the proposed branch office will have qualified full-time management;

(5) there is a public need for the proposed branch office and the volume of the business in the community in which the proposed branch office will conduct its business is such as to indicate a profitable operation to the association within a reasonable period of time;

(6) the facility will commence operation within a period of 12 months after the date of approval unless an extension is granted in writing by the commissioner . . . ;

(7) the character, responsibility, and general fitness of the current directors and officers of the applicant are such as to command confidence and warrant belief that the branch office will be honestly and efficiently conducted in accordance with the intent and purpose of this Act.

Id. These rules are less exacting than similar statutes regulating the initial chartering of a savings and loan association. *Compare* Tex. Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 53.4(5) (Hart Nov. 1, 1986)(Commissioner to consider whether branch will be profitable "within a reasonable period of time") *with* TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.07 (Vernon Supp. 1988)(Commissioner must find that operation will be profitable) *and* Strain v. Lewis, 461 S.W.2d 498, 501 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.)(proof that new association will be profitable different from proof that branch will be profitable).

97. Tex. Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 53.4 (Hart Nov. 1, 1986)(section entitled "Findings Necessary for Approval of Branch Office"). Many cases discuss the Commissioner's determination to grant a branching application. *See, e.g.*, Valley Fed. Sav. & Loan Ass'n v. Vandygriff, 609 S.W.2d 605, 607 (Tex. Civ. App.—Austin 1980, no writ)(Commissioner's finding reflected that granting of branch bank application did not unduly harm competitor's branch even though competitive alternative created); Colorado County Fed. Sav. & Loan Ass'n v. Lewis, 498 S.W.2d 723, 727 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.)(Commissioner granted branch application despite lack of evidence that community had need for it); Citizens of Texas Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359, 365-66 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.)(Commissioner's approval of branch office valid even though providing competitive alternative in community).

98. P. ROSE, THE CHANGING STRUCTURE IN AMERICAN BANKING 212 (1987). Increased competition has forced financial institutions to provide more convenient services for customers. *Id.*; *cf.* Note, *CBCT's: Stranded at the Altar*, 28 BAYLOR L. REV. 353, 354 (1976)(customer-bank communication terminals operating at supermarkets provide convenience for bank customers).

VII. *DEPARTMENT OF BANKING AND CONSUMER FINANCE V. CLARKE*

The conflict in *Department of Banking and Consumer Finance v. Clarke* arose when Deposit Guaranty National Bank (DGNB) applied to the Comptroller of the Currency for permission to open a branch office beyond the statutory limits imposed on banks by Mississippi statutes.[99] DGNB contended that national banks should be allowed to branch to the same extent as savings associations in Mississippi to maintain a "competitive equality" between financial institutions in the business of banking.[100] After reviewing the application and considering protests filed by the Department of Banking and Consumer Finance of Mississippi and other local banks, the Comptroller approved DGNB's application.[101] In reaching the decision, the Comptroller applied a functional analysis rather than conceding to state-applied labels in order to determine whether Mississippi savings associations were "carrying on the banking business."[102] The Department of Banking immediately filed suit, seeking to enjoin the establishment of the branch office.[103] Its contention was that the definition of "State banks" in section 36(h) of the McFadden Act referred only to those banks chartered under state law to carry on the banking business.[104] Since savings associations were not included in the Mississippi statute regulating corporations "carrying on the commercial banking business," the Department contended that these associations were not "State banks" within the meaning of section 36(h) and that the McFadden Act therefore does not include savings associations.[105]

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99. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). The application to operate a branch office was filed on September 10, 1984. *Id.* at 267.

100. *See* Department of Banking & Consumer Fin. v. Selby, 617 F. Supp. 566, 568 (S.D. Miss 1985), *rev'd*, 809 F.2d 266 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). In support of its application, DGNB submitted a study entitled *Mississippi's State-Chartered Savings & Loan Associations as State Banks for Purposes of the McFadden Act*, which elaborated on the similarities between Mississippi savings associations and Mississippi banks. *See* Brief for Appellant at 6-7, Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987).

101. *See Selby*, 617 F. Supp. at 567.

102. *See Clarke*, 809 F.2d at 271. "In reaching his conclusion the Comptroller applied a federal definition of banking, eschewed state-applied labels, and looked primarily to the function of the institutions." *Id.* at 269.

103. *See Selby*, 617 F. Supp. at 567. The day after the Comptroller approved DGNB's application, the Department of Banking and Consumer Finance of the State of Mississippi filed its suit. *See* Brief for Appellant at 7, Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). Gulf National Bank, Merchants Bank & Trust Company, Hancock Bank, Peoples Bank of Biloxi, Bank of Wiggins, The Peoples Bank & Trust Company, and Bank of Mississippi subsequently intervened as plaintiffs. *See Selby*, 617 F. Supp. at 567-68.

104. *See Selby*, 617 F. Supp. at 579.

105. *See id.*

In granting the injunctive relief sought by the Department of Banking, the federal district court held that the Comptroller's decision was inconsistent with the intent of the McFadden Act and that national banks could not circumvent the express intent of the Mississippi legislature to provide greater branching privileges to savings associations than to banks.[106]

On appeal, the Court of Appeals for the Fifth Circuit reversed the holding of the district court.[107] The court of appeals held that the Comptroller may seek the guidance of applicable state law, but is bound by federal law in defining terms within a federal statute, including "State bank."[108] At the federal level, "State bank" includes "institutions carrying on the banking business,"[109] The court subsequently scrutinized the Comptroller's decision that Mississippi savings associations are engaged in the banking business.[110] The Fifth Circuit agreed with the Comptroller's application of a functional analysis to determine if savings associations were in the banking business, upholding the decision as a "permissible construction" of the federal statute.[111] As a result, national banks in Mississippi are allowed to branch statewide to the same extent as Mississippi savings and loan associations.[112]

VIII. THE IMPACT OF *CLARKE* ON THE REGULATION OF BRANCH BANKING IN TEXAS

In Texas, Union National Bank of Laredo and Texas Capitol Bank-Westwood, both nationally chartered banks, applied to the United States Comptroller for permission to open branch offices beyond the boundaries set by existing Texas statutory branching restrictions.[113] Both banks relied on the

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106. *See id.* at 570-71. The court stated: "The McFadden Act, however, actually is intended to preserve a dual banking system, an intent which obviously is not furthered by a decision of the Comptroller that would force a state to change state law in order to preserve its state banking system." *Id.*

107. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 271 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987).

108. *Id.* at 269. The court relied upon the United States Supreme Court's decision in *First National Bank v. Dickinson* which held that the definition of "branch" was a question of federal law. *See id* (citing First Nat'l Bank v. Dickinson, 396 U.S. 122, 134 (1969)).

109. *See* 12 U.S.C. § 36(h) (1982).

110. *See Clarke*, 809 F.2d at 271.

111. *See id.* at 270. "This task could only be accomplished by a targeted functional analysis." *Id.* The court noted a similar holding by the District of Columbia Circuit in *Independent Bankers Association of America v. Smith*, in which the court examined services provided by bank offices in determining whether they were branches, irrespective of the offices' actual labels. *See id.* at n.2 (citing Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976)).

112. *See Clarke*, 809 F.2d at 269. The court upheld the Comptroller's ruling which concluded that "national banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, i.e., statewide." *Id.* (quoting the Decision of the Comptroller).

113. *See* Decision of the Comptroller of the Currency on the Applications of Union Na-

Fifth Circuit's holding in *Department of Banking and Consumer Finance v. Clarke*, which allowed national banks to branch to the same extent as Mississippi savings associations.[114] Determining that savings and loan associations in Texas are in the "business of banking," the Comptroller granted the national banks' applications to branch statewide on the same basis as Texas savings and loan associations.[115] The Texas Attorney General immediately filed suit in federal court to enjoin the banks from opening branch offices.[116] The case is currently pending before the United States District Court for the Western District of Texas.[117] In applying *Department of Banking and Consumer Finance v. Clarke* in Texas, the federal district court must scrutinize the Comptroller's decision that both Texas savings and loan associations and banks are in the "banking business."[118] Differences between Mississippi and Texas branching laws must also be considered.

The Comptroller's determination that savings and loan associations in Texas are in direct competition with local banks is based upon state and federal regulations expanding the powers of savings and loan associations.[119] Pursuant to state regulations, Texas savings and loan associations may offer NOW accounts, credit cards and certificates of deposit, make consumer, commercial and oil and gas loans, and issue letters of credit.[120] Through

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tional Bank of Laredo and Texas Capital Bank-Westwood at 1 (Dec. 3, 1987). Union National applied on April 3, 1987 and Texas Capital on March 20, 1987. The Comptroller considered the applications together since identical issues were involved. *See id.* at 1. Union National, based in Laredo, sought permission to establish a branch in San Antonio, Texas, and Texas Capital, based in Houston, sought permission to establish a branch in Austin, Texas. *See id.*

114. *See id.* at 2.

115. *See id.* at 23. The Comptroller first considered the expanded powers of Texas savings and loan associations in determining that they carry on the business of banking. *See id.* at 11-16. Next, the Comptroller applied the same standards necessary for the approval of a branch for a savings and loan association to the applications of the national banks. *See id.* at 18. The Comptroller found that the banks clearly met these standards and therefore approved the applications. *See id.* at 23.

116. *See* Complaint, State v. Clark, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987). The Attorney General sought a declaratory judgment and permanent injunction prohibiting defendant banks from establishing branch offices beyond statutory boundaries. *See id.*

117. *See id.*

118. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). The court is required to uphold the Comptroller's ruling that Texas savings and loan associations and banks are in the business of banking if it is a "permissable construction" of applicable statutes. *Id.*

119. *See* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 10-16 (Dec. 3, 1987).

120. *See* TEX. REV. CIV. STAT. ANN. art. 852a, § 4.01 (Vernon Supp. 1988)(granting savings and loan associations power to engage in banking business subject to approval of Commissioner). Pursuant to authority provided by this statute, the Commissioner established various standards and regulations. *See, e.g.*, Texas Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 67.12 (Hart November 1, 1986)(authorizing NOW accounts); *id.* § 67.16 (authorizing credit

Texas' "enlargement of powers" statute,[121] which allows any state chartered savings and loan association to perform any activity permitted to federally chartered associations, state associations may offer demand deposits to businesses that have previously borrowed money from them, make commercial loans of up to ten percent of the associations' assets, and make investments in personal property for rental purposes if amounts are limited to ten percent of assets.[122] As a result of these expanded powers, savings and loan associations are no longer limited to providing home mortgages.[123] The Comptroller determined that these services are essential to the banking business and concluded that savings and loan associations in Texas are in the "business of banking."[124] The Comptroller's decision is entitled to "considerable respect" on judicial review and should be upheld if it is a "permissible construction" of the applicable statutes.[125] In light of the similar powers granted to Mississippi savings associations[126] and the Fifth Circuit's approval of the Comptroller's analysis of Mississippi's laws governing savings

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and debit cards); *id.* § 67.8 (authorizing certificates of deposit); *id.* §§ 65.1, 65.18 (Hart November 1, 1986)(authorizing letters of credit).

121. *See* TEX. REV. CIV. STAT. ANN. art. 852(a), § 5.05 (Vernon Supp. 1988). This provision, also known as a "wild card" statute, permits state savings and loan associations to perform any activity federal savings and loan associations are authorized to perform. *Cf. Clarke*, 809 F.2d at 268 (noting Mississippi version of wild card statute). The statute provides: "Notwithstanding any provisions of this Act to the contrary, an association may make any loan or investment, perform any function, or engage in any activity permitted a federal association domiciled in this state." TEX. REV. CIV. STAT. ANN. art. 852(a), § 5.05 (Vernon Supp. 1988).

122. *See* 12 U.S.C. § 1464(b)(1)(A) (1982)(savings and loan associations may offer demand deposit only to businesses known through loan relationship); *id.* § 1464(c)(1)(R) (savings and loan associations may make commercial loans up to five percent of assets, and up to 10 percent of assets after Jan. 1, 1984); *id.* § 1464(c)(2)(A) (savings and loan associations may invest in personal property for rental purposes).

123. *See* S.R. REP. No. 96-368, 96th Cong., 2d Sess. 76, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 236, 248. "These powers should enable thrifts to become one-stop financial centers making them more competitive and giving them the earnings they need to pay market rates to depositors." *Id.*

124. *See* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 23 (Dec. 3, 1987).

125. *See, e.g.*, Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984)(court to consider whether agency's ruling "permissible construction" of statute); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)(interpretation of statute by agency official requires "considerable respect"); Texas v. United States, 756 F.2d 419, 425 (5th Cir.)(review of agency's ruling considers if statute permissively construed), *cert. denied*, 474 U.S. 843, 106 S. Ct. 129, 88 L. Ed. 2d 106 (1985).

126. *Compare* TEX. REV. CIV. STAT. ANN. art. 852a, § 4.01 (Vernon Supp. 1988)(authorizing Texas savings and loan associations to offer NOW accounts) *and id.* § 5.05 (authorizing Texas savings and loan associations to perform any function allowed a federal savings and loan association) *with* MISS. CODE. ANN. § 81-12-149 (1987)(authorizing Mississippi savings and loan associations to offer NOW accounts) *and id.* § 81-12-49(r) (authorizing Mississippi

and loan associations, the federal court in Texas should defer to the Comptroller's decision that Texas savings and loan associations are in the business of banking.[127]

Once it is established that Texas savings and loan associations are in the banking business, a comparison of bank branching restrictions between Texas and Mississippi is necessary to determine if a similar ruling should come about in Texas.[128] Although both states allow limited branch banking, Mississippi branch banking regulations are purely statutory, whereas Texas regulations consist of both constitutional and statutory limitations upon branching.[129] The Texas Constitution expressly distinguishes between the branching privileges of banks and those of savings and loan associations by providing that "this restriction shall not apply to any other type of financial institution chartered under the laws of this state."[130] The legislative intent, and intent of Texas citizens, to place restrictions on branch banking is obvious.[131] This Texas constitutional provision could potentially be circumvented by a ruling of the Comptroller that Texas banks and savings and loan associations are in the same business, and therefore to maintain a "competitive equality," an application of minimal savings and loan branching restric-

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savings and loan associations to perform any function allowed a federal savings and loan association).

127. *See* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987)(banks and savings and loan associations both in business of banking). The Comptroller applied the same functional analysis used in considering Mississippi savings and loan association powers to the Texas applications. *Compare Clarke*, 809 F.2d at 269 (discussing Comptroller's functional analysis holding Mississippi banks and savings and loans associations to be in business of banking) *with* Decision of the Comptroller of the Currency on the Applications of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 23 (Dec. 3, 1987)(Comptroller's ruling that Texas savings and loan associations are in business of banking). The district court lacks the power to overrule precedent, but instead must apply the law as it is written or implied. *See* Kennard v. United Parcel Serv., 531 F. Supp. 1139, 1142 (E.D. Mich. 1982).

128. *See Clarke*, 809 F.2d at 269. The issues in *Department of Banking v. Clarke* and *State v. Clark* are basically the same, the primary difference being each state's respective savings and loan branching laws. *Compare Clarke*, 809 F.2d at 269 (allowing national banks to branch to same extent as Mississippi savings and loan associations) *with* Complaint, *State v. Clark*, No. 87-CA-860 (W.D. Tex. filed Dec. 17, 1987)(pending litigation attempting to authorize national banks to branch to same extent as Texas savings and loan associations).

129. *Compare* MISS. CODE ANN. § 81-7-7 (1987)(statute limiting branch offices to one hundred mile radius from parent bank) *with* TEX. CONST. art. XVI, §§ 16(d)-(f) (constitutional provision limiting branch offices within same city or county as parent bank).

130. TEX. CONST. art. XVI, § 16(a).

131. *See* TEX. CONST. art. XVI, § 16 (voters approved limiting branch banking amendment on November 4, 1986). Although this amendment relaxes branching restrictions, banks are still generally prohibited from branching outside their home county. *Id.*; *see also* TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1988)(act took effect on day constitutional amendment approved).

tions, rather than the bank branching restrictions, is required.[132] However, even if national banks could branch to the same extent as savings and loan associations, state banks would still be allowed only limited branch banking due to the constitutional restriction.[133] The "enlargement of powers" provision in article 16, section 16(c) of the Texas Constitution would prevent state banks from branching as if they were national banks because it is not applicable to any other provision of section 16, including the county-wide branching restriction.[134] As a result, the primary purpose of the McFadden Act, to maintain "competitive equality" between state and national banks, would be defeated by allowing national banks to branch statewide in Texas.[135]

Further, the "competitive equality" doctrine of the McFadden Act takes into consideration only those state branching provisions which are expressly provided by statute.[136] Section 36(c) states:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by *language specifically granting such authority affirmatively and not merely by implication or recognition* . . . .[137]

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132. *Cf.* Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 270 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987). The Fifth Circuit found that the Comptroller's application of savings and loan branching regulations was proper after determining that savings and loan associations were "state banks" under the McFadden Act. *See id.*

133. *See* TEX. CONST. art. XVI, §§ 16(d)-(f). The restrictive provision states: "The legislature shall authorize a state or national bank of the United States domiciled in this state to establish and operate banking facilities at locations within the county or city of its domicile, subject to limitations the legislature imposes." *Id.* § 16(e).

134. *See id.* § 16(c). "A state bank created by virtue of the power granted by this section, *notwithstanding any other provision of this section*, has the same rights and privileges that are or may be granted to national banks of the United States domiciled in this State." *Id.* (emphasis added).

135. *See, e.g.*, First Nat'l Bank v. Dickinson, 396 U.S. 122, 131-32 (1969)(intent of McFadden Act to place state and national banks on even level); First Nat'l Bank v. Walker Bank & Trust, 385 U.S. 252, 258 (1967)(policy of equalization of National Bank Act of 1964 furthered by McFadden Act); Department of Banking & Consumer Fin. v. Clarke, 809 F.2d 266, 270 (5th Cir.), *cert. denied*, __ U.S. __, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987)(Congress concerned that neither state nor national banks have advantage in branch banking); State *ex rel.* Edwards v. Helmann, 633 F.2d 886, 890 (9th Cir. 1980)(competitive equality between state and national banks intent of McFadden Act); Independent Bankers Ass'n v. Smith, 534 F.2d 921, 932 (D.C. Cir. 1976)(McFadden Act demands state and national banks be allowed equal branching rights).

136. *See* McFadden Act, 12 U.S.C. § 36(c) (1982).

137. *Id.* (emphasis added).

In *Department of Banking and Consumer Finance v. Clarke*, the necessity of an affirmative statute allowing branching was not an issue because Mississippi statutes expressly provide savings and loan associations the power to branch on a statewide basis.[138] Conversely, in Texas, an express statutory provision granting authority to savings and loan associations does not appear to exist,[139] though it is argued that section 2.11 of the Texas Savings and Loan Act entitled "Change of office or name" expressly provides such authority.[140] The statute does not affirmatively grant savings and loan associations the authority to open branch offices.[141] It may, however, be implied that savings and loan associations may establish branch offices upon approval of the Savings and Loan Commissioner.[142] Although no case has interpreted this aspect of section 2.11, courts interpreting its predecessor, section 2.13, have held that while no express authority exists for the estab-

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138. *See* MISS. CODE ANN. (1987)(application for Mississippi savings and loan associations to branch must state necessity for branch, estimate volume of business and estimate expenses to be incurred); *see also Clarke*, 809 F.2d at 266-71 (no discussion of necessity for affirmative statute authorizing savings and loan associations to branch).

139. *See* TEX. REV. CIV. STAT. ANN. art. 852(a) (Vernon Supp. 1988)(absence of section providing standards for savings and loan associations to branch).

140. *See id.* § 2.11. The Comptroller contends that this statute fulfills the requirement for an affirmative grant of authority allowing savings and loan associations to operate branch offices. *See* Decision of the Comptroller of the Currency on the Application of Union National Bank of Laredo and Texas Capital Bank-Westwood, at 17 (Dec. 3, 1987). In support of this contention, the Comptroller compared section 2.11 of the Texas Code with section 81-12-175 of the Mississippi Code entitled "Branch offices," which sets standards Mississippi Code savings and loan associations must follow in operating branches. *See id.*; *see also* MISS. CODE ANN. § 81-12-175 (1987)(requiring submission of application to board prior to establishment of branch). A more properly comparable Mississippi statute is section 81-12-43 of the Mississippi Code entitled "Change of name or location of home office; hearing." *Id.* § 81-12-43. The provisions of section 81-12-43 are virtually identical to those of section 2.11. *Compare id.* § 81-12-43 (requiring commissioner approval prior to name change or establishment of office separate from home office) *with* TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.11 (Vernon Supp. 1988)(requiring commissioner approval prior to name change, establishment of office other than principal office, or change in vicinity).

141. *See* TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.11 (Vernon Supp. 1988). Section 2.11 provides: "An association may not, without the prior approval of the commissioner, establish an office other than the principal office stated in its articles of incorporation, move an office from its immediate vicinity, or change its name . . . ." *Id.*

142. *See, e.g.*, Gerst v. Oak Cliff Sav. & Loan Ass'n, 432 S.W.2d 702, 706 (Tex. 1968)(implied power to establish branch offices); Benson v. San Antonio Sav. Ass'n, 374 S.W.2d 423, 425 (Tex. 1963)(authority of savings and loan associations to branch implied, otherwise purpose of statutes nullified); Southwestern Sav. & Loan Ass'n v. Falkner, 160 Tex. 417, 421, 331 S.W.2d 917, 920 (1960)(no statutes expressly authorize savings and loan associations to branch; such authority implied); Spring Branch Sav. & Loan Ass'n v. Gerst, 420 S.W.2d 618, 621 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.)(authority for savings and loan associations to branch implied); Gerst v. Jefferson County Sav. & Loan Ass'n, 390 S.W.2d 318, 321 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.)(implied authority to create branch offices).

lishment of branches, the authority to do so is implied.[143] Thus, the McFadden Act's requirement that a statute grant "such authority affirmatively and not merely by implication or recognition" is not met.[144]

It may be argued that any express provisions set by the Texas Savings and Loan Department empowering savings and loan associations to establish branch offices will satisfy the "affirmative authority" standard of the McFadden Act.[145] Pursuant to its duties to regulate Texas savings and loan associations, the Department has promulgated rules which establish the right to branch.[146] In particular, the regulation provides: "The commissioner may authorize by his approval . . . (1) [b]ranch offices at which the association . . . may transact any business that could be done in the home office."[147] Although agency regulations must yield to state statutes in the event of a conflict, it may be that this provision satisfies the "affirmative authority" standard of the McFadden Act.[148] Nonetheless, a strict construction of the McFadden Act requires that "statute law of the State" and not agency regulations must provide the authority to branch.[149]

The decision of the federal court in *State v. Clark*[150] will ultimately turn upon the court's construction of the McFadden Act. If the court finds the language of the McFadden Act unambiguous and strictly construes its provisions,[151] then the absence of an affirmative statute granting savings and loans

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143. *See Jefferson County Sav. & Loan*, 390 S.W.2d at 321 (interpreting section 2.13 of article 852(a) as implied authority to branch); *see also* Gibralter Sav. Ass'n v. Franklin Sav. Ass'n, 617 S.W.2d 322, 326 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.)(citing Gerst v. Jefferson County Sav. & Loan holding implied authority to branch in § 2.13); Lewis v. Peoples Sav. & Loan Ass'n, 463 S.W.2d 284, 287 (Tex. Civ. App.—Austin 1971, no writ)(approval of holding in Gerst v. Jefferson County Sav. & Loan).

144. *Compare* McFadden Act, 12 U.S.C. § 36(c) (1982)(requiring affirmative statutory branching authorization) *with* TEX. REV. CIV. STAT. ANN. art 852 (a), § 2.11 (Vernon Supp. 1988)(no express authorization to branch).

145. *Compare* Tex. Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 53 (Hart Nov. 1, 1986)(Findings Necessary for Approval of Branch Office)(administrative authority to operate branch office) *with* 12 U.S.C. § 36(c) (1982)(requiring affirmative state statute authorizing state banks to operate branch offices).

146. *See* Tex. Savings & Loan Dep't, 7 TEX. ADMIN. CODE § 53 (Hart Nov. 1 1986).

147. *Id.* § 53.2.

148. *See* Gerst v. Jefferson County Sav. & Loan Ass'n, 390 S.W.2d 318, 322 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.)(conflict between statutes and rules of Building and Loan Section of the Finance Commission renders rules void).

149. *See* McFadden Act, 12 U.S.C. § 36(c) (1982). In interpreting a statute, a court must first look to the statutory language, and then to legislative history only if the language is ambiguous. *See* Blum v. Stenson, 465 U.S. 886, 896 (1981) (Court considers legislative history in determining what is reasonable attorney's fee upon finding statute ambiguous).

150. No. 87-CA-860 (W.D. Tex., filed Dec. 17, 1987).

151. *See, e.g.*, Columbia Broadcasting System v. FCC, 453 U.S. 367, 377 (1981)(look to Congressional language to ascertain intended scope of statute); Burns v. Alcala, 420 U.S. 575, 580-81 (1975)(apply plain and ordinary meaning to words, absent convincing reasons to the

the authority to branch will prevent the national banks from branching statewide. If the court finds the provisions of the McFadden Act ambiguous and looks to the legislative intent[152] of "competitive equality," then national banks may be allowed to operate branches on a statewide basis and thus remain competitive with savings and loan associations.

IX. CONCLUSION

Recent deregulation of the financial services industry has blurred the traditional distinction between banks and savings and loan associations. The enlarged powers of savings and loan associations has thrust these institutions into direct competition with banks. Savings and loan associations may now offer credit cards, negotiable order of withdrawal accounts, consumer loans, and other services which have traditionally been reserved for banks. Banks are at a competitive disadvantage, however, as savings and loan associations may provide greater customer convenience through the operation of branch offices. Predictably, many banks have claimed that they should be allowed to branch to the same extent as savings and loan associations because they both essentially perform the business of banking. On this basis, the Court of Appeals for the Fifth Circuit granted national banks authority to operate branches statewide in Mississippi.

Similar litigation is pending in federal court involving financial institutions in Texas. Although the Fifth Circuit's opinion in *Department of Banking and Consumer Finance v. Clarke* will provide guidance in the pending litigation, differences between Mississippi and Texas branching restrictions must be addressed. In particular, a Mississippi statute expressly allows savings and loan associations to establish branches, whereas, the authority to operate savings and loan branches in Texas appears to be implied. This is an important distinction since the McFadden Act requires an *affirmative* statute allowing "State banks" to branch and not merely an implication. The likelihood of unlimited branch banking in Texas will depend upon the federal court's construction of the McFadden Act. A strict interpretation will restrict bank branching, whereas a liberal interpretation based on the intent behind the act may allow unlimited branching in Texas. Construing the unambiguous language of the McFadden Act, which requires state branching

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contrary); Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977)(wording of statute is "most persuasive evidence of Congressional intent").

152. *Cf.* Blum v. Stenson, 465 U.S. 886, 897 (1981)(legislative history considered only when statute unclear); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)("Absent a clearly expressed legislative intent to the contrary, that language [statutory] must ordinarily be regarded as conclusive"); United States v. Babcock, 530 F.2d 1051, 1053 (D.C. Cir. 1976)(court not required to adhere to literal reading of statute if Congressional intent would be undermined).

approval through "statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition," unlimited branch banking in Texas may not be feasible without express authorization by the Texas legislature allowing savings and loan associations to branch statewide.

Mark A. Giltner