Banking’s most intense current debate centers on section 36(c) of the National Bank Act which allows a national bank to establish branches only where state banks are specifically authorized to do so by state law.\(^1\) So much population growth has occurred outside the centers of cities that even with bank-by-mail plans the downtown banks find it increasingly difficult to get and retain customers. Thirty-nine states prohibit or restrict the establishment of branch banks.\(^2\) Comptroller of the Currency James J. Saxon has sought amendment of section 36(c) to free national banks from these state restrictions,\(^3\) but failing this, he has approved alternative forms of bank organization, notably “chain” and “group” systems,\(^4\) which give national banks some of the desired benefits of branching. Smaller, state banks, fearing competition from large combines in any form, have sought protection from section 36(c). Courts have thus had to decide whether these other techniques constitute branch banking within

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2 See notes 11 & 12 infra.


the meaning of that provision. To do this they have been forced to choose between applying a uniform federal definition of "branch banking," and applying that definition used by the state in which the bank operates. This comment concludes that the courts have properly chosen the federal standard and suggests a test for determining whether the federal standard has been violated.

Two recent developments have led large banks to press for branching privileges. First, modern farms and businesses are so big that when they seek a loan it is often for a large dollar amount. A national bank may legally lend a single borrower only ten percent of the bank's capital plus paid-in surplus, so the greater this figure is, the better able a bank is to compete for large loans. Second, the boom in sales of housing, automobiles, and consumer durables has made financing such purchases another attractive use of bank funds. The large banks have found it difficult, however, to enter this market since they and their potential customers—both depositors and borrowers—are often miles apart.

Branch banking—traditionally a single bank operating more than one office—is, from the large bank's viewpoint, the ideal way to achieve both proximity to customers and a larger lending limit. Since the network of offices is considered one legal entity, the sum of all the units' capital and surplus is the basis for calculating lending capacity. At the same time the branch offices can be located near population centers, and, having access to a central vault and common bookkeeping, they need occupy rel-

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8 See ADVISORY COMM., op. cit. supra note 3, at 45; ILL. COUNCIL FOR BRANCH BANKING, A DECISION FOR THE PEOPLE—THE CASE FOR LOCAL BRANCH BANKING IN ILLINOIS 8-9 (1963); Banks and Community Progress, Address by Mr. Saxon before the Florida Bankers Association, March 22, 1963, at p. 4.

In addition, the move toward branch banking is probably part of the general trend toward consolidation, most evident in mergers, to get the economies of scale offered by computers. ADVISORY COMM., op. cit. supra; Banks and Community Progress, supra; Wall St. Jour., Oct. 4, 1963, p. 1, col. 6. But cf. Cooperative Automation for Smaller Banks, Banking, June 1959, p. 58.

9 See, e.g., OSTROLENK, THE ECONOMICS OF BRANCH BANKING 51 (1930) ("[A branch bank] is as much a part of the central institution as the local station of a railroad.")

atively little space in a shopping center or other commercial area. Sixteen states, however, forbid all such branches, and twenty-three others place significant limits on their location.

To achieve some of the benefits of branching, banks have used, separately or together, three main techniques. First, correspondent banking is a system under which a smaller, usually out-of-town bank keeps a deposit in a larger, city bank. The large bank does not pay interest on the account, but it does perform free services for the smaller unit, such as


13 A further technique, in its infancy, is the sale of capital debentures to swell the bank's basis for its lending limit. The Comptroller has approved the technique as constituting "capital" for this purpose, but the Federal Reserve Board has refused to allow it for matters within its jurisdiction. N.Y. Times, Jan. 11, 1964, p. 28, col. 4. See also, Gates, Bank Debentures, Leverage and Debt Capacity, Bankers Monthly, Nov. 15, 1965, p. 21; id., Dec. 15, 1965, p. 38; N.Y. Times, Dec. 18, 1965, p. 59, col. 7 (Banker's Trust issue of debentures). But see 38 Stat. 264, as amended, 12 U.S.C. § 82 (1958) (limits permissible bank indebtedness).

Mr. Saxon sees branch banking as increasing the number of competing bank offices in presently under-banked areas. To achieve this same end he has approved new banks in states prohibiting branches. N.Y. Times, April 22, 1963, p. 37, col. 6; N.Y. Times, Jan. 17, 1963, p. 9, col. 6 (western ed.).
clearing checks cashed in the city and giving advice in fields where the small bank may have little experience. Most important, the small banks can get overline loans from their correspondents. When a local borrower requires an amount greater than the small bank's lending limit, the correspondent will lend the difference so that the borrower need not turn to the small bank's competitors. The effect of this system is that the city bank gets, in the form of the interbank balances, part of the dollars its branch might have lured. Frequently these balances are significant, but the large bank's potential borrowers are still as far away as before and only the small unit is freed from the constraint of its lending limit.

In chain banking, the second alternative, the same stockholders open a series of banks as separate legal entities. By placing them where otherwise they would place branches, it is possible for a common group of stockholders to better reach their desired customers. Further, by having all the units lend individually to a particular borrower up to their separate limits, a chain can achieve the effect of a single institution with a large lending capacity. The only direct legal restraint is that no bank may lend over ten percent of its capital plus surplus to its sister bank, or lend to it without collateral. However, both the waste of resources from having legally separate banks, each with a full range of services, and the possibility that through sales of stock the common control may cease, make this "affiliate" system less attractive to a large banker than a branch system would be.

Finally, group banking describes control of a series of individual

14 "At its best, correspondent banking . . . provides efficient and flexible banking services for rural districts, as well as city banks. In short, it provides all the advantages of a nation-wide branch banking system without the dangers . . . inherent in such a system." Henbree, *Correspondent Banking: A Two-Way Street*, Banking, April 1963, p. 95. See also Tyng, *Correspondent Balances: Hardest Working Deposits*, Butroughs Clearing House, Jan. 1964, p. 32; *City Banks Lure Country Dollars*, Business Week, Oct. 24, 1959, p. 46.


16 "One Manhattan institution (the Hanover Bank) reported that over 26 percent of its total deposits were in the form of correspondent balances, and a prominent Loop bank (Continental Illinois) had 23 percent of its deposits in such accounts." FISHER, *BANK HOLDING COMPANIES* 108 (1961).

17 Very little has been written on this form of organization. Rep. Patman, through the Select Committee on Small Business, has been trying to show that it is more widespread than before supposed. He alleges the same kind of control is achieved when banks pledge their own stock as security for loans. See SELECT COMMITTEE ON SMALL BUSINESS, 88TH CONG., 1ST SESS., *CHAIN BANKING—STOCKHOLDER & LOAN LINKS OF 200 LARGEST MEMBER BANKS* (Comm. Print 1963).

banks by use of a holding company. Just as with chain banking, the units may be located near potential customers and all may take part of a large loan if necessary. Likewise, the same diseconomies from having separate legal entities can arise, but here the presence of a single large stockholder, the corporation, assures continuity of control. However, because group organization was thought to be too akin to branch banking, it was specifically regulated by the Bank Holding Company Act of 1956. The Act prohibits interstate holding companies unless they are affirmatively authorized by the states in which they own banks, and it reserves to each state the right to prohibit any holding company owning banks solely within that state. Fifteen states have acted to prohibit such “groups.”

Although not attacking the correspondent system which they find beneficial, small banks have strenuously resisted extensions of these other forms of multiple banking. The President of the American Bankers Association has predicted that of 13,400 banks with assets under ten million dollars, about 4,000 will be absorbed by larger banks by 1973. Small bankers see competition from branch, chain, and group systems as has-

19 “The most common practice is for the corporate owner to acquire 98 or 99 percent of all outstanding voting stock, the balance—an insignificant interest—being divided between the local enterprisers, who in this manner become members of the board of directors. The presence of a local board of directors gives to the group bank an outward appearance of local independence.” Hogenson, The Economics of Group Banking 184 (1955). See also Tyng, The Pros and Cons of Bank Holding Companies, Burroughs Clearing House, March, 1961, p. 64; Shortcut to Statewide Banking, Business Week, Feb. 9, 1963, p. 54.

20 “A bankers’ association asked the bankers of the country this question: ‘Do you consider holding company banking, in effect branch banking?’ More than 97 percent of the replies were ‘Yes.’ Your committee believes it obvious that . . . independent competitive banking is being thwarted by indirect branch banking through the mechanism of the holding company.” H.R. Rep. No. 609, 84th Cong., 1st Sess. 3 (1955). But see Fischer, op. cit. supra note 16, at 138 (“a group is not evading laws on branch banking”).


23 70 Stat. 135 (1956), 12 U.S.C. § 1846 (1958). By its terms the section only reserves to the states their jurisdiction to regulate, but Senator Robertson made clear that this was intended to allow state prohibition. 102 Cong. Rec. 6752 (1956).


tining that day. Currently, many small units have a monopoly of bank service in their city or region, and the most common single restriction on location in state branch banking statutes is that prohibiting branches in any area with an existing bank.

Section 36(c) provides, as immediately relevant:

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 same 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, and subject to the restrictions as to location imposed by the law of the State on State banks.

Courts have consistently granted the Comptroller wide latitude in all matters entrusted to him by Congress. However, they have read section 36(c) as intending a specific limit on his discretion. As a result, the courts have reexamined the Comptroller's judgment of whether a branch has been created. At the same time, by reading into section 36(c) a statutory right to be free of "unlawful competition," they have held that state


27 In Illinois, for example, over half of the banks are the only banks in their towns. ILL. COUNCIL FOR BRANCH BANKING, WHAT A BRANCH BANK WOULD MEAN TO YOUR COMMUNITY 8 (1963). See also N.Y. Times, May 4, 1963, p. 28, col. 6, at p. 34, col. 7; ALHADEFF, MONOPOLY & COMPETITION IN BANKING 24 (1954); Shull & Horvitz, Branch Banking and the Structure of Competition, 1 NAT'L BANKING REV. 301 (1964).

28 See note 12 supra.


banks have standing to enforce the provision.\textsuperscript{32} Before a new national bank opens, it must receive a certificate of authority from the Comptroller.\textsuperscript{33} If a state bank believes the new bank is a branch of another, the usual procedure has been to seek both to enjoin the issuance of the certificate of authority and to get a declaratory judgment of the bank's illegality.\textsuperscript{34}

Two recent cases illustrate the courts' approach. In \textit{Camden Trust Co. v. Gidney,}\textsuperscript{35} the New Jersey statute allowed branches only in towns not already having bank service.\textsuperscript{36} A state bank with an existing branch in Delaware Township alleged that the "new" national bank about to be established there was actually the branch of a nearby bank. This other bank had previously been denied permission to branch in Delaware Township,\textsuperscript{37} and in an admitted attempt to avoid this prohibition it had had its directors subscribe all the shares in the new unit and offer them


\textsuperscript{35} \textit{Supra} note 34.

\textsuperscript{36} N.J. STAT. ANN. § 17:9A-19B (1963): "[A] bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office . . . . (3) when each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office."

\textsuperscript{37} 301 F.2d at 522: "The Haddonfield National Bank . . . had sought in 1960 to locate its main office in Delaware Township while retaining as a branch its Haddonfield office, only two miles from Ellisburg Circle. The Comptroller denied that application, correctly we think, for clearly the application related to a branch, not a 'new' bank." \textit{Cf.} 1960 Ops. Att'y Gen. (Ind.) 268.
to its present stockholders. Affirming a summary judgment denying an injunction, the court of appeals held that the new bank was an "affiliate" of the established bank, not a prohibited branch. It did not specifically find that chain banking could never be branch banking. Rather the court deemed it significant that here the banks had different names and were two miles apart, that the proposed bank had the paid-in capital required for a new bank and had an independent capital structure, that the proposed unit would be liable for its own debts, and that it had the same loan limit as a new bank. Judge Bastian, however, in dissent, saw only one relevant factor. Because the directors of the existing bank intended to circumvent the branch banking restriction, he argued that unless the court voided the plan it would be letting form, not substance, prevail.

Late in 1963, the same court in Whitney National Bank of Jefferson Parish v. Bank of New Orleans ruled against the bank's proposed plan. The Whitney National Bank of New Orleans caused a bank holding company and two new banks—one in New Orleans and one in Jefferson Parish—to be formed. Stock in the holding company was distributed to the Whitney stockholders in the same proportions as their former interests, and the holding company controlled all the stock in both new banks. Louisiana both restricted branch banking to parishes without bank service, and, after hearing of the Whitney plan, also prohibited

38 301 F.2d at 523 n.7:

"December 8, 1960

To the Shareholders of Haddonfield National Bank

On many occasions your Board of Directors and Officers have been invited by the residents and business men of Delaware Township to extend banking facilities to that area by the establishment of a branch office in that fast growing municipality. Under the New Jersey banking law, to which we are subject with regard to branches, it is not permissible for a bank, other than in its home community, to establish a branch office in a municipality where a branch office already exists. It is possible, however, to apply for a charter to start a new bank where the need, both present and future, would appear to exist. In line with that reasoning your Board of Directors as individuals, applied and have received from the Comptroller of the Currency, preliminary approval to establish a new bank . . . .

It is expected that the DELAWARE VALLEY NATIONAL BANK will be an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank. . . .

[A]s shareholders you are invited to subscribe for shares in the new bank.

Sincerely,

/s/ H. Moeller
President"

39 301 F.2d at 524-25. The nearest the court came to generalizing was in noting that Congress in the Banking Act had "recognized" the concept of affiliates. 301 F.2d at 524 n.11.

40 301 F.2d at 525-26.

41 323 F.2d 290 (D.C. Cir. 1963), cert. granted, 376 U.S. 948 (1964).

42 LA. REV. STAT. ANN. tit. 6, § 54 (1951): "[B]anks . . . may open and maintain a branch office or branch offices in parishes in which there are no state banks, savings banks, and trust companies."
bank holding companies. The old Whitney corporation merged with one of the new banks in New Orleans. A state bank with a branch already in Jefferson Parish sought, on the basis of both state statutes, to prevent the opening of the Whitney-controlled bank there. The district court based its injunction solely on the new holding company prohibition.

The court of appeals unanimously affirmed, but relied only on section 36(c). Although Judge Bastian was not on the panel, the court adopted the attitude he had expressed in *Camden Trust*. It did not look to specific factors of organization but instead relied on letters from Whitney's president to its stockholders saying that the bank hoped to get a coordinated operation without running afoul of the branch banking restriction. The court reasoned that the new unit must be a branch since the desire was to operate "as if the institutions were one."

43 LA. REV. STAT. ANN. tit. 6, §§ 1001-06 (1963): "It is declared to be the policy of this state to protect and to foster the growth of the independent unit bank . . . by prohibiting the formation of new banking holding companies and the acquisition of control by whatever means of additional banking institutions by existing bank holding companies and by their subsidiaries."


It is unclear from the report why the Court of Appeals chose the second ground. The author of Note, 38 Tul. L. Rev. 126 (1964), speculates that because the defense to the first charge was that the holding company act violated the supremacy clause of the U.S. Constitution, the court was simply seeking a non-constitutional ground on which to decide. However, such restraint seems unnecessary here since the Supreme Court has already, in effect, sustained the statute's constitutionality by dismissing a similar appeal for want of a substantial federal question. Braeburn Securities Corp. v. Smith, 359 U.S. 311 (1959), dismissing appeal from 15 Ill. 2d 55, 153 N.E.2d 806 (1958). The district court's approach and conclusion seem clearly correct.

45 323 F.2d at 301. A letter of Oct. 27, 1961, read, as quoted by the court: "The basic purpose of the program is . . . to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved." *Ibid.*

The letter of Oct. 23 said: "From the depositors [sic] point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management."

"From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers."

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization." *Ibid.* (Emphasis by the court.)

The Comptroller's affidavit concerning the transaction was also quoted by the court as showing his awareness of the bank's "purpose of evading federal and state statutes." *Id.* at 302. "The bank management felt that a holding company . . . would be preferable to the formation of an affiliate . . . . [I]t was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management, as was their right and prerogative elected to use a holding company . . . ." *Id.* at 302-03.

46 323 F.2d at 303, citing First Nat'l Bank v. First Bank Stock Corp., 306 F.2d 937
It is important to notice that in both cases the court looked to state law to determine whether the state allowed branch banking, and did not look to state law to determine what a branch bank was. Yet in *Camden Trust*, the State of New Jersey had appeared as amicus curiae to urge that the application of a state bank to employ the identical technique would have been denied by the state banking commissioner as an instance of branch banking, and a comparable ruling by the Louisiana Attorney General was submitted by amicus curiae in *Whitney*.

The states' concern arose from what they saw as a potential threat to the "dual banking" principle. Under this system, state and federally-chartered institutions compete in the same markets and may convert from one system to the other. Its defenders praise this duality as establishing "checks and balances between regulatory authorities that provide an indispensable bulwark against overcentralization of public control." They argue that the right of conversion makes "both segments, National and State, hesitate to impose more onerous or stringent requirements on their banks than exist in the other segments." From this second argument the defenders deduce that national and state banks must be subject to the same restrictions on bank organization. To change the restrictions on one, their reasoning goes, would upset the systems' equality and sound the "death knell for dual banking."

This view has been strictly followed in construing the provision of section 36(c), which subjects national banks "to the restrictions as to location [of branches] imposed by the law of the state on state banks." Where the issue was whether a bank was located in a "village" as required by the state statute, a federal court looked to state case law, saying that it

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(9th Cir. 1962); cf. CCH Fed. Banking L. Rep. ¶ 98411 (1962) (Digest of Federal Reserve Board opinion approving the Whitney arrangement: "[T]he Board ruled that approval of this application would have the effect of creating a branch bank which was needed in the area to better serve the banking public."

48 301 F.2d at 523 n.8.

49 Brief for the National Association of Supervisors of State Banks as Amicus Curiae, p. 23-24.


was "the apparent purpose of Congress to have exactly the same standards—state law—apply to the establishment of national bank branches as apply to the establishment . . . of state bank branches." 54

That Congress did intend to use state law to determine limits on location is clear from the language of the statute. That it intended to have state law determine whether or not "branch banking" was permitted is likewise clear. But what is ambiguous on the face of the statute is whether state law should also be used to determine what constitutes "branch banking," or whether instead the federal courts should determine by a federal standard whether a given form of organization is branch banking within the meaning of section 36(c).

Notes discussing Camden Trust and Whitney have all urged that state law should have been applied throughout. 55 This view gives the word "branches" a meaning potentially more generic. If a state construed chain banks as branches, 56 or allowed "limited power branches" but not others, 57 by this view the Comptroller of the Currency could charter national banks only subject to the identical restrictions.

The alternative position recognizes that Congress defined "branch" in section 36(f), albeit vaguely, 58 and maintains that the federal courts should determine, without using state law, whether the proposed association constitutes branch banking within the meaning of that provision. The courts would inquire simply whether under state law a state bank might adopt the form of bank organization construed as "branch banking" by the federal courts. If the state bank could, any form of bank organization could be approved by the Comptroller. If the state bank could not, a national bank would still be permitted any form not considered a "branch" as section 36(c) uses the term, regardless of how much more


56 E.g., Business Week, Jan. 16, 1954, p. 49 (action of Texas banking commissioner).

57 E.g., N.D. Cent. Code § 6-03-14 (Supp. 1963) (bank may establish "a receiving and paying station").

58 44 Stat. 1228 (1927), 12 U.S.C. § 36(f) (1958): "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 . . . at which deposits are received, or checks paid, or money lent."
restrictive the state might be on its own banks. This comment concludes that the court was correct in following this alternative view in both cases.

To construe an ambiguous statute the first inquiry must be the intent of Congress. Congressional debates on section 36(c) never got beyond the issue of the desirability of branch banking to a direct discussion of the standard by which the statute should be construed. From the reliance on state law in two places in the section, some have found it tempting to infer that Congress meant to incorporate the conclusions of the dual banking advocates throughout. Yet the legislative history reveals that that was not in fact what Congress was trying to do, and that having the federal courts interpret the definition of "branch" is generally consistent with the views of both defenders and opponents of the section.

The McFadden Act of 1927 was passed "to put new life into the national banking system." Since state banks could be members of the Federal Reserve System and have branches as well, national banks lost nothing by converting to state charters and getting the right to have branches. To make its system more attractive, Congress allowed national banks to have branches within the city of the parent bank if state banks were allowed to do so. But the attempt was not to have national and state banks treated exactly the same. Even if state banks could branch statewide, the national bank was confined to its city. Explaining the bill to the House, Congressman McFadden made clear, "This amendment establishes a national branch banking policy." Consistent with this view, the bill was amended to provide the definition of "branch" in section 36(f).

The Banking Act of 1933 contained the part of section 36(c) quoted

This is the thesis of Note, Banks and Banking—A Century of Conflict Between National and State Banks Over Branch Banking, 8 VILL. L. REV. 209 (1963), and it is implicit in the other references cited supra note 55.

61 Id. at 6-7. The bill contained language similar to what is now section 36(c)(1). "A national banking association may ... 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 same time permitted to State banks by the law of the State in question."

62 State banks which were members of the Federal Reserve System were also confined to their home city at that time, but non-members were not. As proposed, the equality would have been even less. The "Hull amendments" would have prohibited a national bank from having branches even if subsequently state law were amended to allow state banks to do so. H.R. Rep. No. 83, 69th Cong., 1st Sess. 4 (1926). The Senate opposed this position, however, as needlessly intending to prevent national banks from lobbying against the state laws. S. Rep. No. 473, 69th Cong., 1st Sess. 9-10 (1926). The Senate view prevailed.

63 68 CONG. REC. 5815 (1927).
64 The definition had been inserted in the Senate committee revision of the House bill and was not separately debated.
earlier. As proposed by Senator Glass, the provision would have allowed a national bank to branch anywhere within its own state and, within 50 miles of the parent bank, in other states as well. This proposal aroused determined filibusters in both 1932 and 1933. The opponents saw the bill as an attempt to make the McFadden Act's "national branch banking policy" into a national branch banking system. The recurring objection to such a plan was the fear that with branch banking small banks would be eliminated and a few people soon would be able to manipulate the nation's money. As Senator Norbeck put it, "We have the unit bank, the American kind of a bank, the bank owned and managed by the home folks of a community . . . ." Senator Bratton maintained, "[I]t is easily conceivable that if we (adopt the Glass proposal) in the course of 10 years or less three of four powerful banking institutions may control the banking system of the country." When preservation of the dual banking system was invoked, it was not, as today, to argue that both systems should have the same rules; it was to graphically express the fear that a few banks would soon absorb both national and state systems. Initial approval by the state of the principle of branch banking was required not so much in the interest of equality as because Senator Wheeler and others did "not want to permit national banks to go in there and establish branches against the will of the people." Senator Bratton, then, offered as his amendment substantially the present section 36(c)(2), limiting national branch banking to only those states which allow branches, apparently hoping that enough states would prohibit them to effectively break up the system. Having the federal courts interpret "branch" is consistent with this view.

But even if the legislative history were ambiguous, the fact remains that here the courts are construing a federal statute. Ordinarily they would not be bound by state court construction of the statute itself; cer-
tainly they are not restricted by state court construction merely of similar language in state statutes unless the federal law itself requires it. It can hardly be maintained that section 36(c) clearly contains such a command, and there is good reason not to force such an interpretation upon it.

The nature of bank regulation and the sizes of banks in the respective systems make a consistent definition of branch banking desirable. State statutes are as vague as the federal, so "state law" will not be obvious. Further, since most controversies are "worked out" by the banking commissioners before they reach the courts, state case law on the definition of "branch" is extremely limited. Of the forty-nine states with statutes concerning branch banking, only eight were found with cases construing the term "branch"; only four of the cases are from the sixteen states directly prohibiting branch banking. In such a situation, the most authoritative interpretation of what constitutes a branch under state law would be the current attitude of the state banking commissioners.

State banking officials properly have no right to such a veto over the plans of national banks. What is so often argued as a state vis-à-vis federal dispute is, more nearly, a conflict of the interests of large and small banks. The cause is hard to pinpoint, but a large proportion of the large banks have national charters while most of the small are state

71 There is certainly no application of state law problem of the sort traditionally, and perhaps unfortunately, associated with Erie R.R. v. Tompkins, 304 U.S. 64 (1938), presented here. The power of Congress to provide national banks with branch banking privileges regardless of state law is unquestioned. And while it has been suggested that gaps or interstices in federal statutes might have to be filled by reference to state law (Vestal, Erie R.R. v. Tompkins: A Projection, 48 IOWA L. REV. 248 (1963)), there is no gap here. Even if lack of a definition of a key term could be considered a gap, such a tenuous theory is inapplicable where, as here, Congress has provided a definition of branch banking.


73 Cases cited from Illinois, Iowa, & Texas note 72 supra.

74 Cf., Attorney General ex rel. Comm'r of Banking v. Michigan Nat'l Bank, 298 Mich. 417, 299 N.W. 129 (1941) (need not get certificate of authority from state commissioner); 1961 Ops. ATT'y GEN. (Ind.) 310; 1950 Ops. ATT'y GEN. (Ind.) 186; 1950-52 Ops. ATT'y GEN. (Ore.) 75; 36 Ops. ATT'y GEN. (Wis.) 93 (1947). The Comptroller's position is that "to allow state authorities to veto decisions of the Comptroller of the Currency according to any standards the state authorities would choose to apply would constitute an improper delegation to the state authorities of control over federal instrumentalities." Mr. Saxon's Reply to State Supervisors' Poll, Banking, May 1963, p. 158.
banks.\textsuperscript{75} Banking commissioners have shown a marked tendency not only to regulate, but also to represent the interests of the banks in their charge.\textsuperscript{76} Courts have properly not deferred to the Comptroller's view of what constitutes a branch, but they should not now go to the other extreme and rely on the various rulings of fifty state commissioners, some of whose purposes may be directly counter to the Comptroller's. Instead, the courts should examine each arrangement in terms of whether it creates the undesirable effects which Congress was trying to prevent.

Having the federal courts thus define "branch" would certainly not undermine the dual banking system. The alternative of branching is really only relevant to those banks large enough to maintain branches and located in an area large enough to make branching worthwhile. To take even the extreme case, if all state banks with branching capability felt they had to convert to national charters, active state banking systems could still remain.\textsuperscript{77} Further, state authorities could allow branch banking themselves or offer other incentives such as the right to hold different investments.\textsuperscript{78} Indeed, there are already differences between the systems. National banks, for example, need higher initial capitalization than do many state banks;\textsuperscript{79} at the same time, by federal statute, they are not

\textsuperscript{75} For example, of the 100 largest banks, only 26 have state charters. POLK, BANK DIRECTORY (1963). Of these, ten are from New York state and three from California, whose commissioners have kept them in the system by historically being even more willing that the federal officials to allow mergers and other consolidations of capital. See N.Y. Times, July 18, 1962, p. 31, col. 7; Id., Sept. 13, 1962, p. 48, col. 4. Among small banks, the preponderance of state charters is even more pronounced because state banks need not belong to the Federal Reserve System or F.D.I.C. Prominent bankers themselves frame the issue as one between large and small banks when not engaged in partisan debates. See N.Y. Times, Oct. 13, 1963, sec. III, p. 28, col. 1; Id., Oct. 3, 1963, p. 47, col. 5; Id., Sept. 24, 1962, p. 45, col. 2.

\textsuperscript{76} For many years the National Association of Supervisors of State Banks has represented the interests of the state banks. See, e.g., State Bank Supervisors Discuss Federal "Encroachment," Banking, Nov. 1962, p. 55; Id., Dec. 1962, p. 45. An organization of national banks has recently been established to support Comptroller Saxon's position. N.Y. Times, Feb. 14, 1964, p. 39, col. 2.

\textsuperscript{77} There are currently twice as many state banks as national; the nation has 9000 state banks with combined assets of $130 billion and 4500 national banks with assets of $150 billion. Further, small banks are not necessarily less efficient than branches of large. "In competition with a large branch bank, the small bank . . . has some advantages. The small bank, of course, cannot make large loans, but it is apparently more efficient than the large bank in making small loans." Horvitz, Economies of Scale in Banking, in COMM. ON MONEY & CREDIT, PRIVATE FINANCIAL INSRUTIONS 52 (1963). See also, Black, California Banks: Smaller Institutions Find Their Size an Asset, Not a Liability, Barrons, June 12, 1961, p. 9.

\textsuperscript{78} Representatives of state banks argue that forcing them to adapt to federal policy would make the states merely be "rubber stamping Congressional legislation." Bell, supra note 52, at 19. However it seems simply rhetoric to say state adaptation to federal policy is "rubber stamping" while federal adaptation to state policy is "uniformity."

\textsuperscript{79} By 48 Stat. 185 (1935), 12 U.S.C. § 51 (1958), the capital requirement for a national
subject to some state taxes. The system of dual banking has not collapsed in the face of these differences, and indeed a "dual" system has little meaning if the rules in each must always be the same.

But while the courts in Camden Trust and Whitney properly sought a federal standard, the tests they used do not seem to recognize what it was Congress was trying to prevent. Three possible explanations for congressional opposition to branch banking should be highlighted. First is the belief that branch banking tends toward monopoly. Implicit is a supposition that economies of scale are an important factor in banking, that a small unit bank cannot effectively compete with the branch of a large bank, and that the branch will ultimately assume a monopoly position. This defense of competition, however, is suspect when it is so often made by the very small bankers who currently have monopolies in their own cities or regions. A second possible reason for opposition, then, is to prevent any competition which would eliminate existing banks' monopoly profits. The third position recognizes that branching may indeed provide economies and that currently there are many banking monopolies. But, out of desire to prevent failure of the current unit bank, or to avoid its being forced to sell to the larger combine, this view holds that a bank in association with other banks should not be able to succeed to the position of monopolist.

Although often expressed, the first position is hardly plausible. The tendency seen earlier to bank close to home makes a bank's relevant market for many purposes quite small. Branch banking restrictions serve not to eliminate monopoly, but to perpetuate monopolies currently existing. Conversion of such unit banks to branches might reduce the number of monopolists, but it would not likely increase the amount of monopoly.

The second view may be the underlying rationale employed by some state commissioners, but it was not the rationale of Congress. The Comptroller is not constrained by state law in his power to permit establishment of a unit bank in competition with a state bank. He may, however, find that of those seeking to establish the new bank, the best qualified to do so is an existing bank or its stockholders. If the state bank is never lower than that for a state bank, but a state may set any lower requirement it desires.

81 See note 27 supra and accompanying text.
82 See ALHADEFF, MONOPOLY AND COMPETITION IN BANKING 24 (1954): "The powerful opposition to branch banks in certain quarters has found expression in laws which are intended to protect unit banks from the competition of branch banks. . . . [T]he purely economic effect of such a law has tended to preserve competitors rather than competition."
83 See cases and opinions of attorneys general cited note 74 supra.
84 For example: "Branches can exist in communities where unit banks could not
missioners declare all such associations “branch banking,” they can prevent what they would be powerless to prevent were the stockholders different.

It seems that the third position is the intent of Congress and the most desirable result—that the only associations that should be prevented are those which, because of economies of scale, can make effective competition by existing unit banks improbable. While there seems to be a congressional presumption that branch banking in the traditional sense does entail this evil, such a test would not affect correspondent relationships where all dealing is done at arms-length in order to pool capital for large borrowers. It would likewise not affect chain banking if the banks are independent and reflect merely some people’s desire to invest in more than one bank. Whether it would reach group banks and what it would do to hybrids of these other forms would have to be resolved case by case.\(^8\)

The Whitney test of intent to avoid the branch banking restrictions does not reach the relevant questions. In presumably every case under § 36(c), the defendant will have preferred branch organization and will have chosen the form being examined as the next best way to achieve proximity to customers, pool capital, etc. In each case, then, the court should look beyond intent to the relationship of the banks and ask whether they can so take advantage of economies of scale as to make effective competition by existing banks improbable.

The inquiry in Camden Trust likewise did not develop such facts. Differences in the banks' names and locations are formal, not economic distinctions. Arguments from the banks' separate liability and loan limits are simply circular.\(^8\) The decisions here and in Whitney were on sum-

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8 It should not be surprising if conditions reached by the test are not often found. The Comptroller may be expected to not deliberately endanger the safety of an existing bank, and economists have found that, “economies of scale do exist, but they are relatively small. . . . The argument that branch banking must inevitably lead to monopoly is untenable.” Horvitz, supra note 77, at 52. See also, Alhadeff, op. cit. supra note 82; Carson & Cootner, The Structure of Competition in Commercial Banking in the United States, in COMM. ON MONEY & CREDIT, PRIVATE FINANCIAL INSTITUTIONS (1963); Shull & Horvitz, Branch Banking and the Structure of Competition, 1 NAT'L BANKING REV. 301 (1964). Further, states with branch banking have generally not found these disadvantages. See Gould, Gleiss & Benn, Inc., COMPARISON OF FINANCIAL ADVERTISING (Feb. 1962); ILL. COUNCIL FOR BRANCH BANKING, WHAT LEADERS IN OTHER STATES . . . HAVE TO SAY ABOUT LIMITED BRANCH BANKING (1961).

86 The conclusions presume that the banks are separate. If they were held to be in a “branch” relationship, liability and loan limits would change.
mary judgment and do not give a sufficient factual basis to bring out relevant factors. But the decision in *First Nat'l Bank v. First Bank Stock Corp.* does show how a court, faced with relevant information, can ignore it by looking at formalities.

First Bank Stock Corporation, a bank holding company, was granted a state charter for a bank it wished to open in a new shopping center. It had for many years also controlled a national bank in the Billings area. After the new bank opened, a competitor alleged that the new organization was operating as a branch of the existing bank. Summarily rejecting this contention, the court found these facts decisive: Each bank was a separate corporation with only one common director and its own capital; each had its own bankinghouse and employees; each had its own stationery; each was chartered by a separate authority. In most cases a deposit at one could not be withdrawn at the other. The court apparently regarded as neutral that: The old bank was the new bank's major correspondent; the new cleared its checks through the old, since it did not belong to the clearinghouse; it stored its deposits in the vault of the old since it did not have one itself, and the new paid only nominal rent to the old for the right to have its depositors use the latter's night depository. It seems that all four of the ignored circumstances might have been relevant had the court explored them further. If the new bank was getting inexpensive use of the old bank's facilities and services at times the old bank could not have sold or used them itself, the court should not have so flatly rejected the contention that a prohibited branch relation existed.

The thesis of this comment has been that the federal courts are required under § 36(c) to protect the legitimate interests of both state and national banks when the Comptroller approves a new bank which in some way is related to an older one. Both legislative history and fairness

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88 A second issue, not relevant here, was whether a bank holding company required approval by the Federal Reserve System to control a bank approved by the state days before passage of the Bank Holding Company Act, but opened much later. The court held it did not. *Id.* at 941.
89 *Id.* at 942-43.
90 De minimis problems often currently arising with drive-in teller windows located next to or across the street from the bank are subject to the analysis presented here, if indeed they have any relation to what Congress was reaching. Courts and attorneys-general have largely concluded that close proximity is all that is required. See Michigan Nat'l Bank v. Saxon, Civil Action No. 821-62 (D.D.C. 1962), reported in 1 NAT'L BANKING REV. 144 (1963); Great Plains Life Ins. Co. v. First Nat'l Bank, 316 S.W.2d 98 (Tex. Civ. App. 1958); Annot., C.C.H. FED. BANKING L. REP. ¶ 3169. But others have said there must be physical connection or the unit is a "branch." *See, e.g., 1955 REPT OF (Mich.) ATT'Y GEN. 676. Surely the dispute at this level is irrelevant to economic considerations, and national banks should not be bound by such details. A more im-
to all the banks require that the court not tailor its definition of branch banking to state law which, as construed by a state commissioner, might prohibit all competition, but that it look only to whether, because of economies of scale,\(^9\) the association constitutes competition an existing unit bank cannot be expected to meet. In this way, it is submitted that the courts are more likely to preserve the Comptroller's discretion in banking affairs, while avoiding the evils Congress feared.

The important problem involves the use of mobile units, grocery stores, insurance agents, etc., to act as agents for the bank. See Thrift, Inc. v. State Bank & Trust Co., 298 Ill. App. 501, 19 N.E.2d 126 (1939); Continental Bank & Trust Co. v. Taylor, 14 Utah 2d 370, 384 P.2d 796 (1963); Annot., C.C.H. Fed. Banking L. Rep., supra. Insofar as these are branch banking problems, the analysis presented here should deal with them, but it seems they are more importantly questions of bank safety and the kind of problem in which the court should defer to the Comptroller's expertise.

\(^9\) This is not to say that one bank may never legally be more efficient than another. Only if the efficiency is because of the form of multiple bank organization should § 36(c) be invoked.