Federal Reserve Board Control Over Bank Holding Companies: ***Board of Governors of the Federal Reserve System v. First Lincolnwood Corp.***[1]—Respondent First Lincolnwood Corporation was incorporated under Illinois law for the purpose of becoming a bank holding company[2] by acquiring the First National Bank of Lincolnwood (Bank).[3] Section 3(a) of the Bank Holding Company Act[4] makes it unlawful for a company to acquire control of a bank without first obtaining the approval of the Board of Governors of the Federal Reserve System (Board).[5] The attainment of bank holding company status is thus subject to the approval of the Board. On November 15, 1974, pursuant to Board regulations,[6] First Lincolnwood presented an application to the Federal Reserve Bank of Chicago to acquire control of the Lincolnwood Bank.[7] Eighty-six percent of the Bank's shares[8] were held by four individuals in a voting trust.[9] First Lincolnwood planned to issue its own shares to the same four persons in exchange for their shares of stock in the Bank.[10] In addition, it planned to assume a $3.7 million debt from the individuals and to issue $1.5 million in capital notes.[11] Since ownership would merely be transferred

---

[1] 439 U.S. 234 (1978).

[2] A bank holding company is defined by the Bank Holding Company Act of 1954, as amended, 12 U.S.C. §§ 1841-1850 (1976 & Supp. II 1978), as "any company which has control over any bank . . . ." *Id.* § 1841(a)(1) (1976). A company has control over a bank if

> (A) the company directly or indirectly . . . owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank . . . ;
>
> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank . . . ; or
>
> (C) the [Federal Reserve] Board determines . . . that the company directly or indirectly exercises a controlling influence over the management or policies of the bank . . . .

Id. § 1841(a)(2).

[3] First Lincolnwood Corp. v. Board of Governors of the Fed. Reserve Sys., 546 F.2d 718, 719 (7th Cir. 1976), *vacated*, 560 F.2d 258 (7th Cir. 1977) (en banc), *rev'd*, 439 U.S. 234 (1978). The Bank was formed in Chicago in 1955, moved to Lincolnwood, Illinois, a Chicago suburb, in 1962, and had total assets of $71 million at the end of 1974. Brief of the Respondent at 4-5, First Lincolnwood Corp. v. Board of Governors of the Fed. Reserve Sys., 439 U.S. 234 (1978). The Bank's deposits amounted to $65.7 million, approximately two-tenths of one percent of the total commercial-bank deposits in the Chicago area. 62 Fed. Res. Bull. 153, 153 (1976), *reprinted in* 546 F.2d at 722-23.

[4] 12 U.S.C. §§ 1841-1850 (1976 & Supp. II 1978) and I.R.C. §§ 1101-1103 (original version at ch. 240, 70 Stat. 133 (1956)).

[5] 12 U.S.C. § 1842(a) (Supp. II 1978).

[6] 12 C.F.R. §§ 225.1-.6, 262.1-.6 (1979). These regulations specify that bank holding company applications must be submitted to the local Federal Reserve Bank in each case. *Id.* §§ 225.3(a)-(b), 262.3(b)-(c), as amended, 44 Fed. Reg. 64,398, 64,399 (1979).

[7] Brief of the Respondent at 5.

[8] There were a total of 144,375 shares of common stock outstanding. 546 F.2d at 720.

[9] 439 U.S. at 237.

[10] *Id.*

[11] *Id.* The proceeds from the sale of the capital notes would be used to purchase additional shares to be issued by the Bank. *Id.*

from these four individuals to a holding company owned by the same persons, there would be no change in either control or management of the Bank.[12]

The primary motivation for the proposed change in structure was the tax savings that would result. Under the proposal, the holding company would assume the four shareholders' $3.7 million debt which they incurred when they acquired control of the Bank.[13] This debt was secured by the individuals' bank stock.[14] Although the shareholders would not be relieved of ultimate liability for the debt,[15] such a restructuring of ownership interests would allow the Bank and the holding company to file a consolidated tax return. On this return the Bank and the holding company would realize a substantial tax savings[16] by deducting the annual debt interest from the Bank's earned income. Prior to this restructuring, the debt interest would be deducted from the individuals' gross income, which presumably is less than that of the Bank.[17] Since deductions in excess of adjusted gross income are lost to the taxpayer under the Internal Revenue Code,[18] and interest on indebtedness can be deducted only by the individual or entity that pays and is liable for the indebtedness,[19] the interest deduction could be utilized more fully when deducted from the Bank's greater income rather than from the individuals' personal income.[20] The proposed change, therefore, could result in a greater

---

[12] 546 F.2d at 720.

[13] *Id.*

[14] *Id.* This debt, owed to the Central National Bank of Chicago, was incurred when the individuals bought control of the Bank from the Bank's former owners and managers after three of those principal officials, including the then-chairman and a former president, were indicted for manipulating the Bank's stock on the American Stock Exchange. 546 F.2d at 720; Brief for the Petitioner at 4 n.2, First Lincolnwood Corp. v. Board of Governors of the Fed. Reserve Sys., 439 U.S. 234 (1978).

[15] 439 U.S. at 237 n.3. The debt transfer would relieve the four individuals of their primary obligations under the loans, but they would still be secondarily liable if the holding company defaulted and its liabilities exceeded the value of the Bank's stock. *Id.*

[16] *Id.* at 238. For purposes of the Internal Revenue Code, respondent and the Bank would qualify as affiliated corporations, I.R.C. § 1504, and therefore could file a consolidated tax return, *id.* § 1501. On such a return, the interest on the $3.7 million debt could be deducted from the income earned by the Bank when calculating the consolidated entity's taxable income. *Id.* § 163(a); Treas. Reg. § 1.1502-11(a)(1) (1972). The tax savings then could be transferred to respondent as a tax-free intercorporate dividend and used to retire the $3.7 million acquisition debt. I.R.C. § 243(a)(3), (b)(1); Treas. Reg. § 1.1502-14(a)(1) (1972).

[17] I.R.C. § 163(a).

[18] *Id.* §§ 62, 63.

[19] *Id.* § 163(a).

[20] Alternatively, the individual shareholders could have deducted from their personal income the interest payments on the debt, *id.* § 163, but such income probably was not great enough to permit the entire interest charge of nearly $300,000 to be deducted. Based on an 8% annual interest rate and a corporate tax rate of 48%, respondent contended that the tax savings would be $142,080. Brief of the Respondent at 5-6 n.2. Furthermore, the assumption of the debt by the holding company placed the cash flow burden of the interest payments ultimately on the Bank rather than on the shareholders themselves.

tax savings to the shareholders than if the restructuring were not implemented.

The Chicago Federal Reserve Bank formally accepted First Lincolnwood's application[21] on June 3, 1975, and a copy of the application was sent to the Comptroller of the Currency.[22] The Chicago Reserve Bank's evaluation concluded that the Lincolnwood bank's capital position was weak[23] and that the holding company might not be able to service adequately its own debts without further weakening the capital and financial condition of its subsidiary.[24] Despite this conclusion, however, the Chicago Reserve Bank recommended approval of the holding company application[25] due to the Lincolnwood bank's capable management, the promise by First Lincolnwood to raise $1.5 million in capital for its subsidiary,[26] and the tax advantages which would accrue to the Bank.[27]

The Comptroller of the Currency made a separate evaluation and similarly found that the Bank's capital position needed to be strengthened, and that the Bank's earnings might not be great enough to service the holding company's proposed aggregate of long-term debt.[28] Although his agency's findings were essentially the same as those of the Chicago Reserve Bank, the Comptroller concluded that the positive aspects of the transaction did not outweigh sufficiently the negative ones, and hence recommended disapproval.[29]

---

[21] 546 F.2d at 720; 40 Fed. Reg. 26,587 (1975). See note 6 *supra*.

[22] 546 F.2d at 720. The Board is required to solicit recommendations from the Comptroller of the Currency if a national bank is involved. 12 U.S.C. § 1842(b) (Supp. II 1978). The Board, however, is not bound by such recommendations. Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 419-21 (1965). The Comptroller shares overlapping jurisdiction with the Board and the Federal Deposit Insurance Corporation (FDIC). See text and notes at notes 221-35 *infra*. In particular, the Comptroller supervises nationally-chartered banks. 12 U.S.C. §§ 21, 161(a), 481 (1976). Congress, however, delegated exclusive authority in the bank holding company area to the Board. *Id.* § 1842(a) (Supp. II 1978). Due to the expertise of the Comptroller, however, Congress included in the Bank Holding Company Act a requirement that the Board seek the recommendations of the Comptroller when a national bank is involved in the proposed transaction. *Id.* § 1842(b).

[23] 439 U.S. at 239. The Board uses several methods to analyze the adequacy of capital. One is the ratio of equity capital to total liabilities less cash on hand, known as the invested-asset ratio. Another is the ratio of total capital, debt, and equity, to total assets, known as the capital-asset ratio. *Id.* at 239 n.6.

[24] *See id.* at 239; Brief for the Petitioner at 6.

[25] 439 U.S. at 239.

[26] Under this proposal, First Lincolnwood would issue $1.5 million in 17-year capital notes, using the proceeds to purchase new shares to be issued by the Bank. *Id.* at 237-38. The resulting increase in the Bank's capital would improve the Bank's capital adequacy. See note 23 *supra*.

[27] 439 U.S. at 239; Brief for the Petitioner at 6. See note 16 *supra*.

[28] 439 U.S. at 239; Brief for the Petitioner at 7. Respondent planned to retire the debt with the dividends it would receive on its shares of Bank stock. 439 U.S. at 237.

[29] 439 U.S. at 239.

First Lincolnwood then modified its proposal by eliminating its plan to issue $1.5 million in capital notes.[30] Instead, the holding company proposed that the Bank itself issue $1 million in capital notes and $1.1 million in common stock.[31] This revision increased the total addition to the Bank's capital—$2.1 million instead of $1.5 million—thereby improving the Bank's capital position.[32] Since the new plan alleviated to some extent the previous concerns about capital adequacy, both the Chicago Reserve Bank and the Comptroller recommended that the First Lincolnwood application be approved.[33]

Despite these recommendations, the staff of the Federal Reserve Board recommended disapproval.[34] The primary reason for their recommendation was that the Bank's capital position, before and after the proposed transaction, did not meet the Board's requirements for capital adequacy.[35] There was also the possibility that the principal shareholders, to maintain sufficient control of the Bank, might have to borrow to purchase the additional shares of new stock to be issued under the modified proposal.[36] The staff realized that any further debt incurred by the individual shareholders in reality would be borne by the holding company and the Bank.[37] It determined that this added debt might impair the ability of the holding company to deal successfully with any unforeseen problems that might arise at the Bank.[38] The staff of the Board concluded that the capital structure of the Bank was inadequate, and that the holding company did not sufficiently strengthen it.[39] It therefore recommended disapproval.[40]

---

30 *Id.* at 240. Respondent still would issue, however, its own shares of stock in exchange for the individuals' shares, and still would assume the $3.7 million debt of the individuals. See text and notes at notes 8-14 *supra*.

31 439 U.S. at 240. The four principal shareholders would purchase 15,756 shares of the new stock issue and would exchange them for First Lincolnwood's stock so as to maintain the holding company's 80% ownership of the Bank. This amount was the minimum necessary for parent and subsidiary companies to be considered "affiliated" and thereby eligible to file consolidated tax returns. I.R.C. § 1504; Brief for the Petitioner at 7-8 n.9. See note 16 *supra*.

32 439 U.S. at 240; Brief for the Petitioner at 8. Under the original proposal, $1.5 million would have been added to the Bank's capital via the respondent's purchase of $1.5 million in new Bank stock with the proceeds of the sale of the capital notes. *Id.* The modified proposal, however, would add $2.1 million to the Bank's capital via the sale of $1 million in capital notes and $1.1 million in common stock; but the increase in equity capital would be only $1.1 million instead of $1.5 million. *Id.* Two of the Board's measures of capital adequacy are noted at note 23 *supra*.

33 439 U.S. at 240. The Chicago Reserve Bank, however, did consider the modification to have a negative aspect in that it decreased the proposed addition to the Bank's equity capital from $1.5 million to $1.1 million. *Id.*

34 *Id.* at 240-41.

35 *Id.* at 240. The Board has established certain ratios as the minimal levels of capital necessary for a bank to remain financially sound. *Id.* at 239 n.6, 240 & n.8. In First Lincolnwood's case, the Board staff estimated that neither restructuring proposal would bring the Bank's capital position to those minimal levels. *Id.* at 240 n.8.

36 Brief for the Petitioner at 8-9. See note 31 *supra*.

37 Brief for the Petitioner at 9.

38 439 U.S. at 240-41; 62 Fed. Res. Bull. at 154.

39 439 U.S. at 241.

40 *Id.*

Pursuant to the authority granted by section 3 of the Bank Holding Company Act,[41] the Board rejected the Chicago Reserve Bank and the Comptroller's advisory recommendations and adopted the findings and conclusions of its own staff. The Board voted to deny approval of First Lincolnwood's application on January 9, 1976.[42] In considering the statutory scheme, the Board noted that section 3(c) of the Act provides two instances where bank holding company applications shall not be approved.[43] First, the Board must deny approval to any acquisition, merger, or consolidation which would either result in a monopoly or further the monopolization of banking.[44] The second instance involves acquisitions, mergers, or consolidations which tend to have anticompetitive effects.[45] Here, the Board is again directed to withhold approval, unless the anticompetitive effects are outweighed by a positive impact on the community to be served by the bank.[46] Section 3(c) ends with the directive that "[i]n every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served."[47] With respect to First Lincolnwood, the Board concluded that, although there would be no monopolizing or anticompetitive effects, consideration of this final aspect, financial soundness, warranted disapproval.[48] The Board's application of the closing sentence of section 3(c) was embodied in its guideline that bank holding companies should be a source of financial and managerial strength to their subsidiary banks.[49] Reviewing the findings of its staff report, the Board concluded that First Lincolnwood would not be able to provide such strength and that its initial debt structure might even result in the weakening of the financial condition of the Bank.[50] Therefore, the Board denied the application on grounds of financial unsoundness.[51]

---

[41] 12 U.S.C. § 1842(b) (Supp. II 1978).

[42] 439 U.S. at 241.

[43] 12 U.S.C. § 1842(c) (1976) (*amended by* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 713, 94 Stat. 132, 190). See note 262 *infra*.

[44] 12 U.S.C. § 1842(c)(1) (1976).

[45] *Id.* § 1842(c)(2).

[46] *Id.*

[47] In part, § 3(c) provides:

> The Board shall not approve—
>
> (1) any acquisition or merger or consolidation . . . which would result in a monopoly, . . . or
>
> (2) any other proposed acquisition or merger or consolidation . . . whose effect . . . may be substantially to lessen competition . . . unless . . . the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest . . . .
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

Id. § 1842(c).

[48] 439 U.S. at 241; 62 Fed. Res. Bull. at 154.

[49] 62 Fed. Res. Bull. at 153.

[50] *Id.* at 154.

[51] *Id.*

Invoking the appeals provision of the Bank Holding Company Act,[52] First Lincolnwood appealed the Board decision to the United States Court of Appeals for the Seventh Circuit.[53] A divided, three-judge panel affirmed the Board's order.[54] The panel, however, did not question the legal basis for the Board's order—whether the Board had the power under section 3(c) to deny the application, given the facts of the case.[55] Instead, it merely examined the adequacy of the Board's factual findings of financial unsoundness.[56] Basing its decision on these narrow grounds, the panel found substantial evidence[57] to support the Board's order.[58]

On rehearing en banc,[59] however, the Seventh Circuit did question the legal basis for the Board's decision and unanimously set aside that order.[60] The court observed that "the Board is empowered to deny approval of a bank acquisition upon finding it not to be in the public interest for reasons other than an anticompetitive tendency."[61] But the court construed section 3(c) to mean that "in order to be grounds for disapproval, the condition or tendency deemed not to be in the public interest must be caused or enhanced by the proposed transaction."[62] The court noted that First Lincolnwood's proposal would not increase the acquisition debt, that it would result in beneficial tax savings, and that there would be no real change in ownership.[63] Since the proposal had no negative effects on financial or managerial resources that were not already in existence, the court concluded that the Board had exceeded the authority granted it by Congress under the Bank Holding Company Act.[64]

The United States Supreme Court granted certiorari,[65] and, in reversing the decision of the Seventh Circuit, HELD: The Bank Holding Company Act

---

[52] 12 U.S.C. § 1848 (1976). This section permits Board orders to be appealed directly to the courts of appeals, bypassing the district courts. *Id.*

[53] 546 F.2d at 719.

[54] 439 U.S. at 241.

[55] 546 F.2d at 720-22.

[56] *Id.*

[57] The Bank Holding Company Act specifically mandates the use of the substantial evidence test. 12 U.S.C. § 1848 (1976). This test is a test of the reasonableness, not the correctness, of agency findings of fact. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 595-96, 609 (1976).

[58] 546 F.2d at 720-21. The panel also rejected two other arguments raised by respondent, involving statutory and regulatory time periods. *Id.* at 721-22.

[59] The panel issued its decision on December 7, 1976. *Id.* at 718. Rehearing and rehearing en banc were granted three months later, on March 3, 1977. *Id.*

[60] 560 F.2d 258, 263 (7th Cir. 1977) (en banc), *rev'd*, 439 U.S. 234 (1978). The unanimity of the en banc decision was partially due to the fact that the two members of the panel-decision majority were not regular members of the Seventh Circuit court, and therefore could not participate in its en banc decision: the Honorable Tom C. Clark, Associate Justice, United States Supreme Court, Retired, and the late Honorable John S. Hastings, Senior Circuit Judge. 546 F.2d at 719. Judge Hastings died on February 7, 1977, 544 F.2d xvi (1976), two months before the en banc argument, 560 F.2d at 258.

[61] 560 F.2d at 261.

[62] *Id.* at 261-62.

[63] *Id.* at 262.

[64] *Id.* at 262-63.

[65] 434 U.S. 1061 (1978).

gives authority to the Board of Governors of the Federal Reserve System to disapprove holding company applications solely on grounds of financial or managerial unsoundness, (1) in the absence of anticompetitive effect[66] and (2) "regardless of whether that unsoundness would be caused or exacerbated by the proposed transaction."[67] Two justices dissented,[68] arguing that disapproval based on financial or managerial unsoundness is permissible only when that unsoundness results from or is enhanced by the proposed transaction.[69]

The holding in *First Lincolnwood* is significant because it adopts the broadest possible construction of the Federal Reserve Board's power to deny an application by a bank holding company to acquire a bank under section 3(c) of the Bank Holding Company Act.[70] The Supreme Court noted that the federal bank regulatory agencies have overlapping jurisdictions, and that Congress intended such duplicative powers.[71] Furthermore, the Court reaffirmed its earlier holding in *Whitney National Bank v. Bank of New Orleans*[72] that Congress intended the Board to be the primary bank holding company regulator in the United States.[73]

This casenote will examine the significance of the Supreme Court's decision in *First Lincolnwood* and its ramifications for the commercial banking industry and the federal bank regulatory machinery. First, the casenote will analyze the reasoning of the Court which led to the reversal of the Seventh Circuit. It then will evaluate two related issues concerning the interpretation of section 3(c). The first issue is whether the Board can disapprove a bank holding company application solely on grounds of financial or managerial unsoundness. The second issue is whether a denial based on financial or managerial unsoundness can occur *only* when that unsoundness is created or enhanced by the proposed transaction. Finally, the Court's holding on this second issue will be evaluated to determine its breadth.[74] Analysis will show that the Court's resolution of this controversy was proper in all respects.

I. Reasoning of the Court in *First Lincolnwood*

In *First Lincolnwood*, the Supreme Court interpreted the Bank Holding Company Act as giving broad authority to the Federal Reserve Board in the

---

[66] 439 U.S. at 243, 248.

[67] *Id.* at 252. Justice Marshall delivered the opinion of the Court which was joined by Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun, and Powell. *Id.* at 235.

[68] *Id.* at 254. Justice Stevens, joined by Justice Rehnquist, dissented. *Id.*

[69] *Id.* at 254-55.

[70] *Id.* at 252.

[71] *Id.* at 250-51.

[72] 379 U.S. 411 (1965).

[73] 439 U.S. at 250. See text at notes 98-103 *infra*.

[74] Justice Marshall reacted to the dissenting opinion by adding a footnote to the Court's opinion, noting that, even if the Court accepted the dissent's position, the transaction at issue would have had a present negative effect—that of creating a financially unsound bank holding company. 439 U.S. at 252 n.18. The dissent responded with a footnote of its own. *Id.* at 258 n.6. In it the dissenters suggested that the majority had limited its holding to situations where the proposed transaction has the effect of creating a financially unsound holding company. *Id.*

area of bank holding company regulation. Writing for the majority, Justice Marshall[75] noted that certiorari had been granted due to the adverse impact of the Seventh Circuit's holding on the Board's ability to carry out its regulatory duties under the Act.[76] With this concern in mind, the Court first examined respondent's contention that the Act did not grant authority to the Board to deny applications for holding company status solely on grounds of financial or managerial unsoundness, but that the Board must find evidence of an anticompetitive effect.[77] To support its contention, respondent noted that section 3(c) had been amended in 1966[78] to conform with that year's amendments to the corresponding provision[79] of the Bank Merger Act.[80] Respondent claimed that, since the Bank Merger Act amendments were intended to allow alternative grounds for approval of an otherwise impermissible anticompetitive merger, the Bank Holding Company Act amendments had a similar purpose.[81] First Lincolnwood maintained that the Board's authority to consider financial unsoundness as a ground for denial was limited to cases where an anticompetitive effect was found.[82]

The Court rejected this analogy, finding it contrary to the language of the statute.[83] The Court emphasized that section 3(c) specifies that financial and managerial factors are to be considered in every case, not just in cases in which it is found that the transaction probably will have an anticompetitive effect.[84] The Court compared the amended wording of section 3(c) to that of the original 1956 version[85] which had listed the financial history and condition of the applicant holding company and its proposed subsidiary banks as one of five factors to be considered in determining whether to approve the application.[86] Accordingly, the Court concluded that the final sentence of the 1966 amendment to section 3(c) was intended to retain financial unsoundness as an independent ground for disapproval.[87]

In reaching this conclusion, the Court also examined the legislative history of section 19 of the Banking Act of 1933,[88] the predecessor of the Bank

---

[75] *Id.* at 235.

[76] *Id.* at 242.

[77] *Id.* Though arguing for affirmance of the en banc decision, First Lincolnwood disagreed with the Seventh Circuit here and reiterated its argument, based on its interpretation of § 3(c), that "the Board has no authority to deny bank holding company status in the absence of some anti-competitive or anti-cartel consideration . . . ." Brief of the Respondent at 21.

[78] Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 7(c), 80 Stat. 236, 237-38 (codified at 12 U.S.C. § 1842(c) (1976)).

[79] Bank Merger Act of 1966, Pub. L. No. 89-356, § 1(a), 80 Stat. 7, 8 (codified at 12 U.S.C. § 1828(c)(5) (1976)).

[80] 12 U.S.C. § 1828(c) (1976 & Supp. II 1978) (originally enacted as the Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129); 439 U.S. at 242-43.

[81] 439 U.S. at 243.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Bank Holding Company Act of 1956, ch. 240, § 3(c), 70 Stat. 133, 135 (current version at 12 U.S.C. § 1842(c) (1976)).

[86] 439 U.S. at 244.

[87] *Id.* at 245-46.

[88] Ch. 89, § 19, 48 Stat. 162, 186-88 (1933) (current version at 12 U.S.C. § 61 (1976)).

Holding Company Act.[89] This section required every bank holding company to obtain a permit from the Board before it could vote the shares of a national bank.[90] The Board could refuse to grant the permit on grounds of financial unsoundness.[91] The legislative history, the Court noted, indicated that Congress repealed these voting permit provisions in 1966[92] because it believed that section 3(c) of the Bank Holding Company Act gave the Board even broader authority to ensure the financial and managerial soundness of holding companies and their subsidiary banks.[93] Thus, the Court concluded that Congress did not intend to require the Board to find an anticompetitive effect before it could disapprove the acquisition of a bank by a holding company under section 3(c) of the Bank Holding Company Act.[94]

Having rejected respondent's first contention, the Court then considered whether a bank holding company application may be denied on grounds of financial or managerial unsoundness only when that unsoundness has been caused or exacerbated by the proposed transaction.[95] Unlike the court of appeals, the Supreme Court construed the "in every case" language to encompass cases in which the proposed transaction would weaken neither the bank nor the bank holding company.[96] In support of this construction, the Court noted the general legislative mandate which Congress had given the Board as a result of its "substantial concern for the financial soundness of the banking system."[97] The Court concluded that the congressional desire to ensure the soundness of the banking system would be furthered best by allowing the Board to require holding company applicants and subsidiary banks to meet minimum capital adequacy standards in all possible cases.[98]

Having concluded that the Board's policy was consistent with general congressional concerns, the Court next examined respondent's contention that day-to-day regulatory authority over national banks is the responsibility of the Comptroller of the Currency,[99] and that the Board should not share in that

---

[89] 439 U.S. at 243-44.

[90] Banking Act of 1933, ch. 89, § 19, 48 Stat. 162, 186-88 (current version at 12 U.S.C. § 61 (1976)).

[91] *Id.* at 186-87.

[92] Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 13(c), 80 Stat. 236, 242-43 (codified at 12 U.S.C. § 61 (1976)).

[93] 439 U.S. at 246-47.

[94] *Id.* at 248. This conclusion sidestepped the question whether Congress intended to impose such a limitation on the § 1(a) criteria of the Bank Merger Act, 12 U.S.C. § 1828(c)(5) (1976), as the respondent's argument had assumed. In a footnote, however, the Court implied a similarly negative answer to the question. Reviewing the legislative history of the 1966 amendments to the Bank Merger Act, Justice Marshall dismissed, as possibly "unwarranted," respondent's assumption that banking regulators applying the Bank Merger Act can consider financial and managerial factors "only as they bear upon competitive considerations." 439 U.S. at 245 n.11. See text at notes 167-83 *infra*.

[95] 439 U.S. at 249.

[96] *Id.* at 249-50.

[97] *Id.* at 250.

[98] *Id.*

[99] 12 U.S.C. § 481 (1976).

authority by questioning capital adequacy.[100] Citing its decision in *Whitney National Bank v. Bank of New Orleans*,[101] the Court noted that the Board's jurisdiction is paramount in the area of bank holding company regulation.[102] It was apparent to the Court that Congress intended the Board to have broad power concerning bank holding companies.[103] Thus, the Court concluded that the Board's powers could overlap those of the Comptroller, and that the Board could use its holding company approval power as a regulatory lever to effect indirectly changes which the Comptroller could order directly.[104]

To support its conclusion regarding congressional intent, the Court referred to the principle of judicial "defer[ence] to an agency's construction of its own statutory mandate . . ., particularly when that construction accords with well-established congressional goals."[105] The Court observed that the Board had long used its power to deny applicants the advantages of holding company status to induce applicants to improve their own capital position and that of their subsidiaries.[106] It commented that "Congress has been made aware of this practice, yet four times has 'revisited the Act and left the practice untouched.'"[107] Hence, the Court maintained that, since Congress did not change the relevant provision when it amended the statute in other places, it could be assumed that Congress agreed with the agency's interpretation of that provision.[108]

In a dissent joined by Justice Rehnquist, Justice Stevens[109] essentially adopted the reasoning of the Seventh Circuit's en banc decision that the financial unsoundness must be created or enhanced by the proposed transac-

---

[100] 439 U.S. at 250; Brief of the Respondent at 14, 21.

[101] 379 U.S. 411 (1965). In *Whitney*, the Board had approved a holding company application, but competitors of the bank sought to restrain the Comptroller from issuing the necessary certificate because of a change in state law. *Id.* at 413-14. The Court held that the Board's authority was paramount in the holding company area and that any reconsideration of the granting of the application should be done before the Board. *Id.* at 423.

[102] 439 U.S. at 250-51.

[103] *Id.*

[104] *Id.* at 251.

[105] *Id.* (citations omitted).

[106] *Id.*

[107] *Id.* at 248 (quoting Saxbe v. Bustos, 419 U.S. 65, 74 (1974)).

[108] *Id.* at 248. The Court concluded its opinion by examining and rejecting respondent's contention that the Board's decision had been arbitrary and capricious. *Id.* at 252-53. In reviewing the Board's fact determination, the Court found "in [the] record more than the amount of evidence 'a reasonable mind might accept as adequate to support [the Board's] conclusions.'" *Id.* at 253 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). According to § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976), an agency action shall be set aside if the reviewing court finds it to have been "arbitrary, capricious, an abuse of discretion . . . ." The Bank Holding Company Act specifically mandates the use of the substantial evidence test to determine whether the decision was arbitrary and capricious. 12 *id.* § 1848. This test is a test of the reasonableness, not the correctness, of agency findings of fact. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 595-96, 609 (1976).

[109] 439 U.S. at 254.

tion.[110] The dissent first maintained that the Board had overstepped the bounds of its authority by using its approval power to force banks and their holding companies to bring their financial positions up to Board standards.[111] The dissent noted that the language of section 3(c) confined the Board's authority to the evaluation of the *effects* of proposed bank holding company transactions,[112] and that the "in every case" provision must be read in the context of that language.[113] Justice Stevens emphasized that denial of an application for pre-existing financial unsoundness was not based on an *effect* and hence was outside the scope of the Board's authority.[114] The dissenting opinion noted that the general structure of federal banking legislation clearly granted "day-to-day regulatory jurisdiction over existing financial and managerial conditions at national banks" to the Comptroller of the Currency.[115] It maintained that the Court's holding improperly delegated some of this authority to the Board.[116] The dissent also viewed the legislative history cited by the Court as too "sparse" to be of any help to the Board's construction of the Bank Holding Company Act.[117] Justice Stevens insisted that the legislative history did not support a conclusion that Congress intended the Board's authority to be as wide-ranging as the majority claimed it was.[118] He concluded that the majority's decision rested far too heavily on the principle that courts should defer to an agency's own construction of its statutory powers.[119] In essence, the dissent stated that there should be no judicial deference to an agency's erroneous construction of its statutory mandate, even when Congress has "revisited" the Act and then left the provision at issue unchanged.[120]

II. FACTORS TO BE CONSIDERED IN REVIEWING BANK HOLDING COMPANY APPLICATIONS

In analyzing the existence and scope of the Board's power to deny applications solely on grounds of pre-existing financial unsoundness, it will be recalled that the Court first had to consider respondent's argument that the Board's disapproval power under section 3(c) of the Bank Holding Company Act was limited to cases where an anticompetitive effect is present.[121] The Court chose to take that section's last sentence—the "in every case" provision—at face value. In the Court's view, the use of these words clearly

---

[110] *Id.* at 254-55. Without so stating, Justice Stevens agreed with the majority that financial and managerial resources may be considered by the Board in the absence of anticompetitive effects, as he confined his dissent solely to this second issue.

[111] *Id.* at 254.

[112] *Id.* at 255.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 256.

[116] *Id.*

[117] *Id.* at 257.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 242. See text at notes 77-94 *supra*.

indicated that Congress intended the Board to consider financial and managerial factors in all cases, and that these factors alone could lead to denial of a holding company application.[122] This conclusion will now be examined to determine whether it is sound.

In part, section 3(c) provides:

> The Board shall not approve—
>
> (1) any acquisition or merger or consolidation . . . which would result in a monopoly, . . . or
>
> (2) any other proposed acquisition or merger or consolidation . . . whose effect . . . may be substantially to lessen competition . . . unless . . . the anticompetitive effects of the proposed transactions are clearly outweighed in the public interest . . . .
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.[123]

As the Court observed, this section resulted from amendments to the Act in 1966 to bring the Act into conformity with the corresponding provision of the Bank Merger Act.[124]

It is first instructive to note that an alternative construction, leading to a conclusion that the Board can deny approval only when it finds an anticompetitive effect, is possible.[125] This alternative construction would hold that section 3(c) calls for a two-tiered test. The first tier of such a test would involve a determination by the Board as to whether the proposed acquisition, merger, or consolidation would have an anticompetitive effect. If no such effect were found to be probable, the application would have to be granted. If anticompetitive effects were determined to be probable, however, the Board, under the second tier of this test, would have to weigh those effects against (1) the possible benefits to the community and (2) the financial resources, managerial resources, and future prospects of the holding company and its proposed subsidiary bank or banks.[126] If the anticompetitive effects were found to outweigh either or both of the latter criteria, the Board would have to disapprove the transaction. Under this view, the final sentence of section 3(c) merely becomes part of the weighing process designed to determine whether an anticompetitive acquisition should be approved.

This alternative interpretation lacks foundation in terms of statutory construction, legislative intent, and judicial precedent. Indeed, the very structure of section 3(c) belies such an interpretation. In reviewing the schema of that

---

[122] 439 U.S. at 252.

[123] 12 U.S.C. § 1842(c) (1976).

[124] *Id.* § 1828(c) (1976 & Supp. II 1978) (originally enacted as the Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129); 439 U.S. at 243.

[125] This construction is what First Lincolnwood argued when it maintained that the Board had erred "by considering the unnumbered subparagraph of [section 3(c)] as providing for it a separate head of jurisdiction, unrelated to the first two considerations set forth in the statute . . . ." Brief of the Respondent at 19.

[126] 12 U.S.C. § 1842(c) (1976).

section, it is important to note that there is no weighing process in subsection (1).[127] Rather, if the Board finds that the transaction would result in or lead to a monopoly, it must disapprove the application.[128] Subsection (2), however, does include a weighing process whereby anticompetitive effects may be weighed against possible benefits to the community.[129] Thus, since there is no weighing process in subsection (1), respondent's interpretation would confine the relevance of the final sentence of section 3(c) to the weighing process of subsection (2), even though the sentence is contained in neither subsection, but instead applies to the section as a whole. This view of the unnumbered paragraph as merely a part of subsection (2), rather than as an independent part of section 3(c), is not supported by the physical structure of the statute.[130] A glance at the text of the statute reveals that the unnumbered paragraph is flush to the margin, rather than indented as the numbered paragraphs are.[131] This structure indicates that its application is independent of the two subsections. Positioned in this manner, the closing sentence has general application in the context of section 3(c). Had the "in every case" provision been indented, it would have come within the scope of the directive of section 3(c)'s opening line, which applies only to the two subsections, and therefore it could be argued that the sentence could apply only when the two subsections are applicable. Since it was not indented, the provision does not appear dependent on either subsection (1) or subsection (2), and it therefore transcends both subsections. Thus, the Board can deny applications on grounds of financial unsoundness even in the absence of anticompetitive effect.

The Court's upholding of the Board's interpretation of section 3(c) is supportable not only in terms of statutory construction, but also on the ground that it furthers the congressional intent. First Lincolnwood's interpretation clearly would limit the Board's discretion by effectively mandating pro forma approval of all applications which do not have anticompetitive effects. Such a result would frustrate the purpose of the Bank Holding Company Act and the 1970 amendments[132] to that Act which brought one-bank holding companies within its scope.[133] The Act was enacted in 1956[134] to control the acquisition of banks and to restrict the non-banking activities of holding companies,[135] but this regulatory power extended only to multi-bank holding companies.[136] Many banks took advantage of this limitation and formed

---

[127] *Id.* § 1842(c)(1).

[128] *Id.*

[129] *Id.* § 1842(c)(2).

[130] *Id.* § 1842(c). See text at note 123 *supra*.

[131] *Id.*

[132] Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, §§ 101-106, 84 Stat. 1760 (codified at 12 U.S.C. §§ 1841-1850 (1976)).

[133] 439 U.S. at 247.

[134] Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (current version at 12 U.S.C. §§ 1841-1850 (1976 & Supp. II 1978) and I.R.C. §§ 1101-1103).

[135] Kintner & Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. Ind. & Com. L. Rev. 213, 260 (1972).

[136] Bank Holding Company Act of 1956, ch. 240, § 2(a), 70 Stat. 133, 133 (current version at 12 U.S.C. § 1841(a)(1) (1976)).

one-bank holding companies so that they would not have to seek the Board's approval and be subject to the strictures of section 3(c).[137] In response, Congress amended the Act in 1970 to include one-bank holding companies within its scope,[138] thereby closing the so-called "loophole."[139]

In amending the statute, however, Congress did not change the criteria for disapproval in section 3(c) of the Act.[140] It must therefore have thought them fully applicable to the newly-covered one-bank holding companies. Yet, the formation of a one-bank holding company usually will have no anticompetitive effects since there is usually no change in control or management.[141] Indeed this is exactly the case in *First Lincolnwood*. If respondent were correct in contending that applications cannot be denied in the absence of anticompetitive effect, then the Board would have to approve virtually all one-bank holding company applications while scrutinizing only multi-bank holding company applications. This would make the 1970 amendments to the Bank Holding Company Act which brought one-bank holding companies within its scope[142] virtually meaningless. Congress could not have intended such a result. Furthermore, nothing in the legislative history of the 1970 amendments suggests that Congress intended to establish a different rule for one-bank holding companies.[143]

The Board's interpretation of the intent of section 3(c) also finds support when one looks at its predecessor, section 19 of the Banking Act of 1933.[144] That section required bank holding companies to obtain a permit from the Board in order to vote the shares of a national bank.[145] Before it could grant such a permit, the Board was directed to consider the applicant's financial condition.[146] After obtaining a voting permit, the holding company became subject to examination by the Board and had to maintain a prescribed reserve of liquid assets.[147] The Board, however, could revoke the permit if it determined that the holding company affiliate had violated any provisions of the Banking Act of 1933.[148] Thus, the Board could deny or revoke the permit solely on grounds of financial unsoundness.[149] Section 19, therefore, performed the same function as the last sentence of section 3(c) does today.

---

137 Kintner & Hansen, *supra* note 135, at 260.

138 Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, § 101, 84 Stat. 1760, 1760 (codified at 12 U.S.C. § 1841(a)(1) (1976)).

139 Legislation Note, *The Bank Holding Company Act Amendments of 1970*, 39 GEO. WASH. L. REV. 1200, 1201 (1971).

140 439 U.S. at 247. Section 3(c) was enacted in its present form in 1966. Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 7(c), 80 Stat. 236, 237-38 (codified at 12 U.S.C. § 1842(c) (1976)).

141 Brief for the Petitioner at 22-23.

142 Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, §§ 101-106, 84 Stat. 1760 (codified at 12 U.S.C. §§ 1841-1850 (1976)).

143 439 U.S. at 247.

144 Ch. 89, § 19, 48 Stat. 162, 186-88 (1933) (current version at 12 U.S.C. § 61 (1976)).

145 *Id.* at 186.

146 *Id.*

147 *Id.* at 187.

148 *Id.* at 188.

149 439 U.S. at 243-44.

The voting permit provisions of section 19, however, had a much narrower scope than the present statutory structure. They applied only when the holding company actually attempted to vote the shares of the subsidiary bank and the bank had a national charter.[150] If the holding company could control the bank without actually voting its shares, or if its subsidiary was not a national bank, the Board could not oversee its financial structure.[151] Congress remedied this situation by enacting the Bank Holding Company Act in 1956.[152] The new statute accomplished two things. First, it increased the scope of the Board's control to encompass every instance in which a multibank holding company desired to acquire a bank.[153] Second, the Act made anticompetitive effect a ground for denying the acquisition, in addition to the already-existing criterion of financial soundness.[154] The Board was thereby empowered to deny applications for reasons of anticompetitive effect even when the financial condition of the holding company and its subsidiary bank warranted approval.[155] Later, when section 3(c) was revised to its current form,[156] Congress simultaneously repealed the voting permit provisions.[157] It did so because, in its view, section 3(c) gave the Board the same power to deny acquisitions solely on grounds of financial unsoundness as the voting permit provisions, but now that power applied more broadly.[158] Respondent's argument thus turned the legislative history on its head. Financial unsoundness has been an independent ground for denying the application of a holding company to control a bank since 1933.[159] Congress added anticompetitive effect as a second independent ground when it passed the Bank Holding Company Act of 1956.[160] Thus, congressional intent in the area of bank holding company acquisitions is furthered by the Board's interpretation of section 3(c).

The Court's conclusion here is supported not only by legislative history but also by past judicial precedent. *First Lincolnwood* was not the first case in which a court agreed with the Board's interpretation of section 3(c).[161] In

---

[150] *Id.* at 244.

[151] *Id.*

[152] Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (current version at 12 U.S.C. §§ 1841-1850 (1976 & Supp. II 1978) and I.R.C. §§ 1101-1103).

[153] *Id.* § 3(a), 70 Stat. at 134 (current version at 12 U.S.C. § 1842(a) (1976)).

[154] *Id.* § 3(c), 70 Stat. at 135 (current version at 12 U.S.C. § 1842(c) (1976)).

[155] *Id.*

[156] 12 U.S.C. § 1842(c) (1976). See note 47 *supra*.

[157] Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 13(c), 80 Stat. 236, 242-43 (codified at 12 U.S.C. § 61 (1976)); 439 U.S. at 246.

[158] 439 U.S. at 246.

[159] *Id.* at 245.

[160] *Id.*

[161] *See* Grandview Bank & Trust Co. v. Board of Governors of the Fed. Reserve Sys., 550 F.2d 415, 421 (8th Cir.), *cert. denied*, 434 U.S. 821 (1977). *First Lincolnwood* is also not the first time the Board has denied an application on grounds of financial unsoundness, despite the absence of an anticompetitive effect. *See* Bankshares of Hawley, Inc., 62 Fed. Res. Bull. 610, 610-11 (1976) (nonoperating corporation was organized for the purpose of becoming a holding company through the acquisition of already-operating bank); Citizens Bancorp, 61 *id.* 806, 807 (1975) (nonoperating corporation was organized for the purpose of becoming a holding company through the

Grandview Bank & Trust Co. v. Board of Governors of the Federal Reserve System,[162] the Court of Appeals for the Eighth Circuit affirmed the Board's approval of an application from a bank holding company.[163] While *First Lincolnwood* involved the acquisition of an already-existing bank by a newly-formed holding company,[164] *Grandview* involved the acquisition of a new bank by an already-operating holding company.[165] But in *Grandview*, as in *First Lincolnwood*, the Board initially determined that there would be no anticompetitive effect.[166] Such a determination, it was held, did not require automatic approval.[167] The Eighth Circuit stated in *dictum* that section 3(c) required the Board to consider financial soundness; even where there is no possibility of an anticompetitive effect.[168]

An earlier decision[169] of the Ninth Circuit, interpreting section 1(a) of the Bank Merger Act of 1966,[170] is also relevant, since that section is identical to section 3(c) of the Bank Holding Company Act.[171] It should be remembered that First Lincolnwood argued that the Bank Merger Act and the Bank Holding Company Act both required the appropriate agency to approve the application at hand if there were no anticompetitive effects, regardless of financial unsoundness.[172] In *Washington Mutual Savings Bank v. Federal Deposit Insurance Corp.,*[173] however, the Ninth Circuit indicated otherwise in the context of the Bank Merger Act.[174] In that case, the court of appeals affirmed a federal district court order enjoining the Federal Deposit Insurance Corporation (FDIC)[175] from withholding its approval of a bank merger.[176] The FDIC initially had denied approval on anticompetitive grounds because of its

---

acquisition of already-operating bank); Midwest Bancorporation, Inc., 56 *id.* 948-50 (1970) (multi-bank holding company desired to acquire a third bank); Mid-Continent Bancorporation, 52 *id.* 198, 203 (1966) (nonoperating corporation was organized for the purpose of becoming a holding company through the acquisition of two already-operating banks from their respective one-bank holding companies); Clayton Bancshares Corp., 50 *id.* 1261, 1267 (1964) (one-bank holding company desired to acquire two banks from their respective one-bank holding companies).

[162] 550 F.2d 415 (8th Cir.), *cert. denied*, 434 U.S. 821 (1977).

[163] 550 F.2d at 422.

[164] 439 U.S. at 237-38.

[165] 550 F.2d at 417.

[166] *Id.* at 420; 439 U.S. at 241.

[167] 550 F.2d at 421.

[168] *Id.*

[169] Washington Mut. Sav. Bank v. Federal Deposit Ins. Corp., 482 F.2d 459 (9th Cir. 1973).

[170] 12 U.S.C. § 1828(c)(5) (1976).

[171] *Id.* § 1842(c). See note 47 *supra*.

[172] 439 U.S. at 242-43.

[173] 482 F.2d 459 (9th Cir. 1973).

[174] *Id.* at 465.

[175] The FDIC is one of three banking agencies charged with enforcement of the Bank Merger Act. 12 U.S.C. § 1828(c)(2)(C) (1976). The other two agencies are the Comptroller of the Currency, *id.* § 1828(c)(2)(A), and the Federal Reserve Board, *id.* § 1828(c)(2)(B). The FDIC supervises federally-insured, state nonmember banks, including mutual savings banks. *Id.* §§ 1813(a), (b), (f), (h), 1817(a)(1) (1976 & Supp. II 1978).

[176] 482 F.2d at 465.

concern that such approval would set a precedent for approval of additional mergers in highly concentrated markets.[177] The district court reversed the FDIC order due to the arbitrariness of the agency's competitiveness test which used the entire state of Washington as the relevant geographic market.[178] The court of appeals affirmed the district court on this point.[179] The court went on to comment, however, that "[t]he final paragraph of [the provision analogous to the "in every case" language in section 3(c)] recognizes that the FDIC retains its traditional role of evaluating banking factors. All bank supervisory agencies can reject merger applications if the banking factors are unfavorable whether or not a potential antitrust violation is present."[180] Although the court recognized this broad supervisory authority, the FDIC had made no attempt to disapprove the merger on these grounds.[181] The court therefore refused to enforce the FDIC order. The Ninth Circuit observation implies that a bank supervisory agency can reject merger applications solely on grounds of financial unsoundness, even when there is no anticompetitive effect.[182]

Thus, three circuits share the view that the crucial "in every case" paragraph found in both the Bank Holding Company Act[183] and the Bank Merger Act[184] allows the respective government agencies to disapprove applications solely on grounds of financial unsoundness. This would seem to indicate a uniform approach to the statutory construction of this provision which resulted from the 1966 amendments to both Acts.[185] The Supreme Court's decision on this issue therefore is supported by statutory construction, legislative history, and judicial precedent.

III. Financial and Managerial Unsoundness Not Required To Be an Effect of the Proposed Transaction

The second part of the Court's decision in *First Lincolnwood* considered whether the Board's power to disapprove applications solely on grounds of financial unsoundness is limited to situations where that unsoundness is created or exacerbated by the proposed transaction.[186] First Lincolnwood argued that "[t]he Board should not be allowed to disapprove the formation of

---

177 *Id.* at 461.

178 347 F. Supp. 790, 800 (W.D. Wash. 1972), *aff'd*, 482 F.2d 459 (9th Cir. 1973).

179 482 F.2d at 464-65.

180 *Id.* at 465.

181 *Id.*

182 *Id.*

183 12 U.S.C. § 1842(c) (1976).

184 *Id.* § 1828(c)(5).

185 Bank Holding Company Act Amendments of 1966, Pub. L. No. 89-485, § 7(c), 80 Stat. 236, 237-38 (codified at 12 U.S.C. § 1842(c) (1976)); Bank Merger Act of 1966, Pub. L. No. 89-356, § 1(a), 80 Stat. 7, 8 (codified at 12 U.S.C. § 1828(c)(5) (1976)).

186 439 U.S. at 252.

a one bank holding company when it cannot demonstrate any difference in the banking situation, in the public convenience or in the competitive factors before or after the formation of the holding company."[187] Thus, respondent maintained that the Board could use the unnumbered paragraph of section 3(c) to reject holding company applications only when the financial or managerial unsoundness results from the proposed transaction itself.[188] It will be shown that this contention has no basis in either statutory construction or legislative history.

In terms of statutory construction one can see that section 3(c) mandates the consideration of financial and managerial factors, and of future prospects, in *every case*.[189] Such a reading emphasizes the plain language of the statute and gives no indication of any "present effect" limitation on the Board's power. It is, indeed, a principle of statutory construction that effect be given to each word in the statute;[190] it is assumed that no part of the statute was intended to be inoperative, superfluous, or void.[191] For the words "in every case" to have their fullest possible meaning, they should be construed to extend to situations where the financial unsoundness predated the application and the proposed transaction does not improve that situation in any manner.

There is, however, an even more persuasive reason for construing section 3(c) in this fashion. Such an interpretation accords with a repeatedly expressed congressional intent to do everything possible to ensure the safety of the banking system.[192] A construction of a banking regulatory statute that construes the regulatory power in the broadest possible sense implements this intent. Section 3(c) must be read in the context of banking statutes and bank regulation in general.[193] These statutes are the result of Congress's concern for the financial soundness of the banking system.[194] The Court's decision on the transactional issue properly furthers this congressional intent in a way that is beneficial to the financial community and bank depositors in general.

---

[187] Brief of the Respondent at 9.

[188] *Id.*

[189] 12 U.S.C. § 1842(c) (1976). See note 47 *supra*.

[190] 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973) (A Revision of the Third Edition of SUTHERLAND STATUTORY CONSTRUCTION).

[191] *Id.*

[192] 439 U.S. at 250.

[193] *See, e.g.*, the Federal Reserve Act's membership provisions, 12 U.S.C. § 329 (1976), the insurance coverage provisions of the Federal Deposit Insurance Act, *id.* §§ 1811-1832 (1976 & Supp. II 1978), and the provisions of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (codified in scattered sections of 12 U.S.C.).

[194] *See, e.g.*, HOUSE COMM. ON BANKING, FINANCE & URBAN AFFAIRS, REPORT ON FINANCIAL INSTITUTIONS REGULATORY & INTEREST RATE CONTROL ACT, H.R. REP. No. 95-1383, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9280-82, 9288-89, 9291; HOUSE COMM. ON BANKING & CURRENCY, REPORT ON BANK MERGER ACT, H.R. REP. No. 1221, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 1860, 1861; S. REP. No. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 2482, 2482-83; H.R. REP. No. 2564, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. CODE CONG. SERV. 3765, 3765-66. See also text and notes at notes 206 & 213-15 *infra*.

The congressional concern for bank safety dates back to the post-World War I era.[195] During the 1920's and the early 1930's, an epidemic of bank failures began in the rural areas of the nation and then spread to the cities. Approximately 15,000 banks failed during that period.[196] In the early 1930's alone, approximately 9,000 banks failed and 2,300 more were absorbed by mergers.[197] This banking crisis[198] led to the bank holiday of March 1933,[199] the Emergency Banking Relief Act of 1933,[200] and the Banking Act of 1935.[201] The federal actions were successful, and the banking situation stabilized during the middle 1930's.[202] As a result of this crisis, a basic component of federal bank legislation has been the requirement that bank agencies review the financial condition of banks and bank holding companies to protect the public and, in particular, bank depositors.[203] A prime example of such legislation are statutes which give regulatory agencies the power to oversee the financial conditions of banks and their holding companies and which force them, directly or indirectly, to conform to certain standards. The result of these provisions is a regulatory framework with overlapping authority granted to various agencies.[204]

The system of bank regulation continued into the 1950's when bank holding companies began to develop.[205] Congress reacted by enacting the Bank Holding Company Act in 1956,[206] (1) to control the acquisition of banks by holding companies and (2) to restrict the non-banking activities of holding companies.[207] Its ultimate purpose was to ensure further the soundness of the banking system by extending the scope of regulation.[208] As the legislative history shows, the Act was considered necessary "because of the importance of the banking system to the national economy . . . [and because] banking activities are carried on to a large extent by the use of depositors' funds rather than by the use of equity capital subscribed by bank shareholders."[209] To

---

[195] Leavitt, *The Philosophy of Financial Regulation*, 90 BANKING L.J. 632, 633-35 (1973).

[196] Shull & Horvitz, *The Bank Merger Act of 1960: A Decade After*, 16 ANTITRUST BULL. 859, 863 (1971).

[197] *Id.* at 863-64.

[198] *See* Franklin D. Roosevelt's first inaugural address (delivered March 4, 1933), *reprinted in* COMM. ON HOUSE ADMINISTRATION, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, H.R. DOC. NO. 93-208, 93d Cong., 1st Sess. 235, 235-37 (1974).

[199] Pres. Proc. 2039, 31 C.F.R. § 120.1 (1979); Pres. Proc. 2040, *id.* § 120.2.

[200] Ch. 1, 48 Stat. 1 (1933) (current version codified in scattered sections of 12, 50 app. U.S.C.).

[201] Ch. 614, 49 Stat. 684 (1935) (current version codified in scattered sections of 11, 12, 15, 39 U.S.C.).

[202] Shull & Horvitz, *supra* note 196, at 864.

[203] Leavitt, *supra* note 195, at 633.

[204] *Id.* at 635.

[205] *Id.* at 635-36.

[206] Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (current version at 12 U.S.C. §§ 1841-1850 (1976 & Supp. II 1978) and I.R.C. §§ 1101-1103).

[207] Kintner & Hansen, *supra* note 135, at 260.

[208] *See* 439 U.S. at 244, 250.

[209] S. REP. NO. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 2482, 2482-83.

carry out the purposes of the Act as uniformly as possible, the Act's regulatory authority was delegated to one agency, the Federal Reserve Board.[210] By such delegation, Congress foreclosed the possibility that a bank holding company would tailor the characteristics of a bank affiliate to fall within the jurisdiction of the agency whose interpretation would be most desirable for that particular transaction.[211] Hence, in the context of holding companies, Congress desired the Board's power to be paramount so that it could impose financial requirements on banks and holding companies desiring approval of a proposed transaction.

A broad interpretation of Congress's delegation of power to the Board is reasonable and proper in light of the legislative history of federal bank legislation. The preamble to the Federal Reserve Act of 1913 called for "a more effective supervision of banking in the United States . . . ."[212] The Banking Act of 1933 created the FDIC to protect bank deposits and to instill public confidence in the banking system.[213] In addition, when the Federal Deposit Insurance Act[214] was amended in 1950,[215] a House committee report praised the effectiveness of the FDIC.[216] The goal of a sound financial system was further expressed when Congress considered amendments to banking statutes in 1966[217] and 1978.[218] It is evident that Congress has long been concerned about the safety of the nation's banking system. The history of congressional concern for bank safety and the responsibility delegated to the Board to ensure this safety therefore would support a broad interpretation of the Board's authority under the Bank Holding Company Act.

Although it is clear that Congress has been concerned with the soundness of the banking system[219] and that it entrusted the enforcement of the Bank Holding Company Act to the Board,[220] First Lincolnwood argued that Congress intended the various banking agencies' areas of jurisdiction to be mutually exclusive and non-overlapping.[221] It maintained that the Board's interpretation of its power extended too far,[222] that allowing the Board to

---

[210] Kintner & Hansen, *supra* note 135, at 262-63.

[211] *Id.* at 262.

[212] Federal Reserve Act, ch. 6, 38 Stat. 251, 251 (1913) (current version codified in scattered sections of 12, 31 U.S.C.).

[213] Randall, *The Federal Deposit Insurance Corporation: Regulatory Functions and Philosophy*, 31 LAW & CONTEMP. PROB. 696, 698-99 (1966).

[214] 12 U.S.C. §§ 1811-1832 (1976 & Supp. II 1978).

[215] Act of September 21, 1950, ch. 967, 64 Stat. 873.

[216] H.R. REP. NO. 2564, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. CODE CONG. SERV. 3765, 3765-66.

[217] HOUSE COMM. ON BANKING & CURRENCY, REPORT ON BANK MERGER ACT, H.R. REP. NO. 1221, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 1860, 1861.

[218] HOUSE COMM. ON BANKING, FINANCE & URBAN AFFAIRS, REPORT ON FINANCIAL INSTITUTIONS REGULATORY & INTEREST RATE CONTROL ACT, H.R. REP. NO. 95-1383, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9273, 9280-82.

[219] 439 U.S. at 250.

[220] 12 U.S.C. § 1842(a) (Supp. II 1978).

[221] 439 U.S. at 250; Brief of the Respondent at 14-15, 21.

[222] *Id.*

disapprove holding company applications solely on the ground of financial unsoundness not created or exacerbated by the proposed transaction improperly involved the Board in areas which Congress had delegated exclusively to the Comptroller of the Currency.[223] A review of the banking laws, though, belies the validity of respondent's interpretation of congressional intent.

It is true, of course, that day-to-day responsibility for the examination of banks is divided among the various banking agencies.[224] There is also, however, much duplication in banking regulation, partly because the United States has a dual system of banking under which banks are subject to federal regulation or state regulation, or both.[225] Under this system, banks have the options of (1) seeking a national or state charter,[226] (2) being or not being members of the Federal Reserve System,[227] and (3) having or not having federal deposit insurance.[228] As a result, depending on the decisions made by the banks, the various agencies' jurisdictions may overlap. For example, if a bank applies for and receives a national charter, it thereby subjects itself to regulation by three federal agencies.[229] This overlapping of regulatory powers developed partly because the national-bank system was established in 1863 by the National Bank Act,[230] while the Federal Reserve System was not established until fifty years later by the Federal Reserve Act.[231] In 1933 the Fed-

---

[223] *Id.*

[224] Randall, *supra* note 213, at 708. The Comptroller examines nationally-chartered banks. 12 U.S.C. §§ 21, 161(a), 481 (1976). The Federal Reserve Board examines state-chartered banks that are members of the Federal Reserve System. *Id.* §§ 221, 248(a), 338. The FDIC examines all other banks that have federal deposit insurance. *Id.* §§ 1811, 1817(a)(1), 1820(b) (1976 & Supp. II 1978).

[225] Davis, *Banking Regulation Today: A Banker's View*, 31 LAW & CONTEMP. PROB. 639, 642-43 (1966). *See also* Bell, *State Regulation of Commercial Banks*, 26 BUS. LAW. 109 (1970).

[226] 12 U.S.C. §§ 35, 214a, 328 (1976). *See* Redford, *Dual Banking: A Case Study in Federalism*, 31 LAW & CONTEMP. PROB. 749, 754-60 (1966).

[227] 12 U.S.C. § 321 (1976). Only state-chartered banks, however, have this option. Nationally-chartered banks are required to be members of the Federal Reserve System. *Id.* §§ 222, 282, 501a; Redford, *supra* note 226, at 768-69.

[228] 12 U.S.C. § 1815(a) (Supp. II 1978). Only nonmember banks, however, have this option. Member banks must have federal deposit insurance. *Id.* §§ 222, 1814, 1818(a) (1976 & Supp. II 1978); Redford, *supra* note 226, at 768-69.

[229] The Comptroller of the Currency exerts day-to-day control over national banks. 12 U.S.C. §§ 21, 161(a), 481 (1976). Nevertheless, national banks are required to be members of the Federal Reserve System, *id.* §§ 222, 282, 501a, and the Board is given authority under the Federal Reserve Act to regulate all member banks, *id.* §§ 221, 284(a), 338. In addition, member banks must carry federal deposit insurance. *Id.* §§ 222, 1814, 1818(a) (1976 & Supp. II 1978). To use their resources efficiently, the three banking agencies coordinate their supervisory activities. Thus, the Office of the Comptroller shares many of its examination reports with the Board, *id.* § 1844(c) (bank holding company applications), and the FDIC has similar access to the examination reports of the other agencies, on a reciprocal basis, *id.* § 1817(a)(2).

[230] National Bank Act of 1863, ch. 58, 12 Stat. 665 (repealed 1864). Though the National Bank Act of 1863 was repealed by the National Bank Act of 1864, ch. 106, § 62, 13 Stat. 99, 118, the latter Act continued the national-bank system, National Bank Act of 1864, ch. 106, 13 Stat. 99 (current version codified in scattered sections of 12, 19, 31 U.S.C.).

[231] Ch. 6, 38 Stat. 251 (1913) (current version codified in scattered sections of 12, 31 U.S.C.).

eral Deposit Insurance Corporation was created,[232] vesting federal bank regulatory authority in three different agencies, with supervisory power over national banks, Federal Reserve System member banks, and federally-insured banks.[233] In 1960, however, Congress directly expressed its intention that the various supervisory agencies share their overlapping regulatory powers, with the enactment of the Bank Merger Act.[234] The Act specifies that the primary agency involved in a proposed merger must seek the comments of the other two agencies.[235] The present structure, therefore, undercuts First Lincolnwood's arguments that Congress did not envision an overlapping regulatory system.

In addition, although the nature of our federal banking system provides that the Comptroller supervises national banks and the state banking departments supervise state banks,[236] this national-state dichotomy is not always preserved. State-chartered banks have the options of (1) belonging to the Federal Reserve System[237] and (2) carrying federal deposit insurance.[238] Those state banks that do exercise these options automatically subject themselves to supervision by either the Federal Reserve Board or the FDIC. Since they retain their state charters, however, such banks also remain under the supervisory authority of their state banking departments. Thus, due to the intricate system of banking and bank regulation in the United States, federal bank regulators must work with each other and with their state counterparts in enforcing the various banking laws. Hence, it is clear that Congress did not intend the various banking agencies' areas of jurisdiction to be mutually exclusive and non-overlapping, and that the Board's action in *First Lincolnwood* did not involve it in areas which Congress had delegated exclusively to the Comptroller.

The wisdom of this legislative choice to provide overlapping jurisdiction is apparent in *First Lincolnwood* where the Comptroller recommended approval of the modified proposal despite its negative aspect of a decreased addition to bank equity capital.[239] The Federal Reserve Board disagreed and opted in favor of a choice that tilted toward recognizing the primary goal of protecting depositors. This second, protective layer of regulation makes it more likely that banks and holding companies will be forced to maintain their capital structures at levels which provide maximum investor protection. Such a result is desirable and accords with congressional intent. The concern of Congress for a stable banking system therefore underscores the correctness of the Court's conclusion that a banking agency may deny applications solely on

---

[232] Banking Act of 1933, ch. 89, § 8, 48 Stat. 162, 168-80 (current version codified at 12 U.S.C. §§ 1811-1832 (1976 & Supp. II 1978)).

[233] *See* 12 U.S.C. § 1813(a)-(h) (1976 & Supp. II 1978).

[234] Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129 (current version at 12 U.S.C. § 1828(c) (1976 & Supp. II 1978)).

[235] 12 U.S.C. § 1828(c)(4) (1976).

[236] Wille, *State Banking: A Study in Dual Regulation*, 31 LAW & CONTEMP. PROB. 733, 744-45 (1966).

[237] 12 U.S.C. § 321 (1976).

[238] *Id.* § 1815(a) (Supp. II 1978).

[239] 439 U.S. at 240.

grounds of financial and managerial unsoundness even when that unsoundness was not caused or exacerbated by the proposed transaction, and that the Board is the proper agency to perform this task.

IV. Dispute over the Breadth of the Holding of *First Lincolnwood*

Though it would seem that the Court's decision was correct, the dissent questioned the breadth of the holding.[240] The Court held that the Federal Reserve Board may disapprove holding company applications solely on grounds of financial or managerial unsoundness, even when that unsoundness is not caused or exacerbated by the proposed transaction.[241] In dissenting from that opinion, the minority urged that the "in every case" provision mandates consideration of financial and managerial unsoundness only insofar as such unsoundness is a consequence of the proposed transaction.[242]

The majority replied to this portion of the dissent by adding footnote 18 to the Court's holding.[243] In that footnote, Justice Marshall noted first that the Court disagreed with the basic premise of the dissent's argument, but that, even if the Court accepted the dissent's premise, it would be possible to say that the proposed transaction did have a negative financial effect that was not pre-existing—the creation of an unsound bank holding company.[244] Defending the Court's holding, Justice Marshall concluded that "the Board's attempt to prevent this effect and to induce respondent to form an enterprise that met the Board's standards of financial soundness was entirely consistent with the language the dissent cites."[245] The majority attempted thereby to recharacterize the effect of the transaction to meet the objections of the dissenters.

Responding to the majority's re-characterization, Justice Stevens, author of the dissent, added footnote 6 at the end of the dissenting opinion.[246] In it, he remarked that

> [w]hat purports to be a broad holding . . . is significantly qualified by n. 18 . . . . In that footnote the Court limits its holding to a case in which the effect of the transaction is the formation of a financially unsound bank holding company. So limited, this case involves nothing more than a dispute over whether this particular holding company was financially unsound—a dispute that hardly merits this Court's attention.[247]

Justice Stevens thus read the majority decision as saying that the Board must approve any transaction where the bank holding company is not made un-

---

[240] *Id.* at 252.
[241] *Id.*
[242] *Id.* at 254-55.
[243] *Id.* at 252 n.18.
[244] *Id.*
[245] *Id.*
[246] *Id.* at 258 n.6.
[247] *Id.*

sound after it acquires the unsound bank. Presumably this would be the case where the holding company has other assets substantial enough to allow it to remain stable, even after acquiring an unstable bank.

The dissent's interpretation of footnote 18 and its contention that it significantly limits the majority holding are untenable for a number of reasons. First, Justice Marshall began by stating that he disagreed with the dissent's basic premise—that the financial unsoundness must result from the proposed transaction.[248] He then attempted to show that, even if the Court had not rejected the dissent's position, its decision would still be the same.[249] To try to limit the Court's holding, as the dissent did,[250] would be to conclude that the majority accepted the dissent's premise, which it did not.

Second, the significance attached to footnote 18 by the dissent is minimized by an earlier footnote of the majority opinion, footnote 15.[251] There, Justice Marshall referred to the Seventh Circuit's rejection of the Board's contention that the transaction would weaken the Bank's capital position.[252] The court of appeals seized on "the Board's concession during oral argument before the original panel that operation of the bank through a holding company 'might in fact be financially sounder' as a result of the tax advantage . . . ."[253] Justice Marshall, however, observed that, since the Court held that the Board had the authority to disapprove First Lincolnwood's application regardless of the transaction's effect on the Bank's capital position, the Court did not have to express an opinion on this issue.[254] Hence, not only is Justice Marshall saying that the proposed transaction need not create or exacerbate any financial unsoundness; he is also implying that the Board could reject the proposal even if it would improve the bank's capital structure, if it would not improve it enough to meet the Board's standards.

Third, the dissent's contention regarding the impact of footnote 18 is undercut by another part of the majority opinion in which the Court indicates that it perceives no "present-effect" limitation on the Board's power.[255] The Court stated that the "in every case" paragraph of section 3(c) even covers cases in which the proposed transaction would not weaken the bank *or* the holding company.[256] Therefore, the majority states its holding in terms so broad that they cannot support the dissent's interpretation of footnote 18.

Fourth, the dissent's argument lacks merit because it fails to recognize the signficance of the fact that *First Lincolnwood* involves a one-bank holding company. When a one-bank holding company "acquires" a bank, the transaction is in substance a "paper transaction"; there is little, if any, change in management.[257] If such a holding company's operations are confined to

[248] *Id.* at 252 n.18.
[249] *Id.*
[250] *Id.* at 258 n.6.
[251] *Id.* at 249 n.15.
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 249-50.
[256] *Id.*
[257] Brief for the Petitioner at 22-23.

banking, the holding company probably serves as a "corporate shell," an organization formed for the purpose of realizing tax savings. If the holding company has no other assets besides the bank, as in *First Lincolnwood*, the holding company will become unsound when it acquires the unsound bank. It is possible, however, for the holding company to own only one bank but to have other non-banking assets; a sound holding company may thus own an unsound bank. Such holding companies, however, usually are acquiring the bank for diversification purposes. They probably would not be interested in acquiring a "problem" bank, one in need of financial or managerial improvement. It is improbable then that a one-bank holding company with substantial assets would want to acquire an unsound bank, and it is impossible to have a sound holding company and an unsound bank when the holding company has no other assets besides the bank. Justice Stevens suggests that the majority's holding does not extend to the case of a sound one-bank holding company owning an unsound bank. Even if this extension were true, such a situation is unlikely.

Fifth, in the area of multi-bank holding companies, Justice Stevens' contention—that footnote 18 limits the Court's holding—is equally without merit. Such a limitation would mandate automatic Board approval of applications from bank holding companies which own other banks whose assets would enable the holding company to remain stable after acquiring an unstable bank. In such a case, however, the owners of the holding company probably would be different from the owners of the bank to be acquired, and the Board would be faced with the usual issue of anticompetitive effect. The issue of anticompetitive effect would arise because a multi-bank holding company acquisition increases the strength and market share of that company, reduces the number of independent banking organizations in the relevant banking market, and, due to the newly-acquired bank's increased lending power, may pose a threat to the bank's smaller competitors. Thus, the Board's decision usually would not rest solely on the issue of financial and managerial resources,[258] and the transactional issue presented in *First Lincolnwood* would not arise.

Finally, the dissent's assertion runs counter to the thrust of the Court's holding which recognizes the broad discretionary powers granted to the Board by Congress.[259] These powers were construed to allow the Board to deny bank holding company applications on any one of several grounds, including anticompetitive effect, financial unsoundness, managerial unsoundness, and poor future prospects.[260] The Bank Holding Company Act does not specify that all these grounds must be present, nor that any combination must exist, before an application can be denied approval,[261] and the Court certainly did not read it that way. Accordingly, the Court probably would not reverse a Board denial even if it were shown that the holding company acqui-

---

[258] In such a case, however, the stable holding company would be a source of strength to the unstable bank and the Board probably would approve the transaction anyway. See text at note 49 *supra*.

[259] 439 U.S. at 250.

[260] *Id.* at 250-52.

[261] 12 U.S.C. § 1842(c) (1976).

sition would improve the bank's financial condition. Clearly then, footnote 18 merely seeks to rebut the rationale of the dissenting opinion but does not limit the Court's holding.

CONCLUSION

First Lincolnwood involved a seemingly routine application by a newly-organized bank holding company to acquire an already-existing bank in order to realize substantial tax savings by utilizing certain tax provisions. In reviewing the Federal Reserve Board's denial of the application, however, the Supreme Court was confronted with the problem of interpreting section 3(c) of the Bank Holding Company Act. Faced with the questions whether the Board can disapprove a holding company application solely on the grounds of financial or managerial unsoundness, and whether such a denial is limited to situations where the unsoundness is either caused or enhanced by the proposed transaction, the Court construed the statute broadly to protect the discretionary powers granted by Congress to bank regulatory agencies. Supported by the legislative history, judicial precedent, and principles of statutory construction, the Court affirmed the Board's order and held that the Board can deny holding company applications solely on grounds of financial or managerial unsoundness, even when there would be no anticompetitive effect and the unsoundness would be neither created nor exacerbated by the proposed transaction.[262] This decision is desirably consistent with the overall purpose of federal banking legislation, the prevention of bank failures and the protection of individual depositors and the national economy.

JOHN O. CHANG

---

[262] On March 31, 1980, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132. Section 713 of the new law amended section 3(c) of the Bank Holding Company Act by adding a provision regarding one-bank holding company formations that involve bank stock loans. *Id.* § 713, 94 Stat. at 190. Although the amendment did not alter the other provisions of section 3(c), it does state that the amendment itself should "not be construed to prohibit the Board from rejecting any application solely because the other financial arrangements are considered unsatisfactory." *Id.* Also, the new provision's concluding sentence directs the Board to disapprove any transaction "involving bank stock loans for the formation of a one-bank holding company having a maturity of twelve years or more . . . if the Board believes the safety or soundness of the bank may be jeopardized." *Id.* This language indicates that Congress approves of the Supreme Court's interpretation of the Bank Holding Company Act in *First Lincolnwood*.