broad a limitation upon the investigatory powers of the IRS. The preferable approach would be to analyze each case upon self-incrimination and privacy grounds.[129]

In conclusion, the majority's reliance upon an analysis which focused upon the concepts of possession and constructive possession did not establish a clear test for determining the ability of an individual under IRS investigation to assert his privilege against self-incrimination. While Justice Brennan's opinion did present a clearer analysis, it, as well as the majority's opinion, did not give adequate weight to the taxpayer's needs for privacy in light of the extensive investigatory capabilities of the IRS. The thrust of the *Couch* opinion indicates that the Court may be moving toward the adoption of the required records doctrine. If this doctrine is accepted, it will mean that the constitutional right to privacy envisioned by Justice Douglas and by the 1886 *Boyd* decision will be destroyed, and the privilege against self-incrimination, at least in the tax area, will be devitalized. The Court's apparent rejection of an evidentiary accountant-client privilege, on the other hand, will allow a more flexible, case-by-case analysis of the important issue of individual privacy present in third party possession cases.

MARILYN B. CANE

Banks and Banking—Incidental Powers of National Banks Under the National Bank Act—Authority of National Banks to Operate Travel Agencies—Judicial Review of Administrative Regulations —*Arnold Tours, Inc. v. Camp.*[1]—Plaintiffs, Arnold Tours, Inc. and forty-one other independent travel agents of Massachusetts, brought a class action against defendants William B. Camp, Comptroller of

[129] C. McCormick, supra note 116, § 77. It may be interesting to note that in *Couch* petitioner-taxpayer had her accountant transfer her records to her attorney after the summons had been issued. Petitioner might then have claimed that an attorney-client privilege was the only evidentiary privilege asserted by petitioner. Although the Court did not go into depth on the issue of attorney-client privilege in the *Couch* situation, the concept is an intriguing and significant one. An attorney-client privilege may exist in tax cases where the nature of the material requested constitutes a privileged confidential communication. See, e.g., Boucher v. United States, 316 F.2d 451 (8th Cir. 1963); In re Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). However, the courts distinguish between books and records given to the attorney and workpapers made in confidence for the purpose of obtaining legal advice. See Note, The Attorney and His Client's Privileges, 71 Yale L.J. 539 (1965). The latter comes under the protection of the attorney-client privilege while the former fits into the "preexisting document rule." The "pre-existing document rule" is an exception to the attorney-client privilege which excludes from the privilege documents created prior to the establishment of the attorney-client relationship or those created during the attorney-client relationship but not intended to be confidential. See id. at 544. Since the records in question in the *Couch* case were created prior to the attorney-client relationship, they fell within the "pre-existing document rule" and as such were not privileged. Therefore Mrs. Couch's transfer of the records from her accountant to her attorney was futile if viewed as an attempt to utilize the attorney-client privilege.

[1] 472 F.2d 427 (1st Cir. 1972).

the Currency of the United States (the Comptroller), and South Shore National Bank (South Shore), a national banking association chartered by the United States Government. South Shore had been engaged in the travel agency business since November 1966, when the bank bought out the fourth largest travel agency in New England and continued its operation as a department of the bank.[2] Plaintiffs sought declaratory and injunctive relief against the defendants, asking (1) a declaration that the Comptroller's regulation[3] authorizing national banks to provide travel agency services is invalid and exceeds the Comptroller's powers under the National Bank Act,[4] and (2) an injunction which would force South Shore out of the travel agency business. The district court granted the declaratory and injunctive relief sought and ordered additionally that South Shore divest itself of its travel department.[5] The Court of Appeals for the First Circuit affirmed the district court decision and HELD: it is illegal for a national bank to operate a full-scale travel agency since such an operation is not an exercise of incidental powers under the National Bank Act, and to the extent that the Comptroller's regulation in 12 C.F.R. § 7.7475 (1973) is construed as authorizing a national bank to operate a full-scale travel agency, said regulation is invalid.[6]

The *Arnold Tours* opinion is significant in that it consolidates and reaffirms, but does not explicitly embrace, the narrow construction of the incidental powers of national banks historically advanced by federal courts, a construction which has taken on a renewed importance in the late 1960's.[7] By construing incidental powers as those which are directly related to the express powers of national banks, *Arnold Tours* strikes down the last surviving ruling of a series of "bold and radical" expansionary rulings promulgated by the Comptroller of the Currency in 1963 and designed to create " 'new

[2] Protracted litigation was had on the question of plaintiffs' standing to sue, and the question was finally resolved in favor of plaintiffs. See Arnold Tours, Inc. v. Camp, 286 F. Supp. 770 (D. Mass. 1968), aff'd, 408 F.2d 1147 (1st Cir. 1969), vacated and remanded, 397 U.S. 315 (1970); Arnold Tours, Inc. v. Camp, 428 F.2d 359 (1st Cir.), rev'd and remanded, 400 U.S. 45 (1970). The principles advanced by the Supreme Court in the *Arnold Tours* "standing" cases have a definite bearing on the subject matter of this note. See text at notes 111-15 infra.

[3] Originally set out in 12 C.F.R. § 7.1 (1959), now superseded by 12 C.F.R. § 7.7475 (1973).

[4] 12 U.S.C. § 24, Seventh (1970).

[5] Arnold Tours, Inc. v. Camp, 338 F. Supp. 721, 724-25 (D.Mass. 1972). The divestiture was to be accomplished "within six months from the date of the filing of this order." Id. at 725.

[6] 472 F.2d at 438. The court of appeals modified the district court's order of divestiture by requesting the district court to entertain any factual presentation South Shore may wish to make in the direction of lengthening the time for divestiture. Id.

[7] See, e.g., Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1150 (1st Cir. 1969) (dictum); Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1014 (5th Cir. 1968) (national banks may not enter insurance business); Investment Co. Institute v. Camp, 274 F. Supp. 624, 638 (D.D.C. 1967), rev'd, 420 F.2d 83 (D.C. Cir. 1969), rev'd, 401 U.S. 617 (1971) (national banks may not operate mutual funds).

avenues of exploration for national banks.' "[8] In its interpretation of the incidental powers clause of the National Bank Act, the *Arnold Tours* court makes it clear that the Comptroller of the Currency will not be permitted to issue regulations and to promote policies inconsistent with the federal judiciary's construction of the statutory language of Congress.[9]

The first emphasis of this note will be a discussion of the tests applied by the district court and the court of appeals in holding the Comptroller's regulation illegal. Second, attention will be given to the question whether the court of appeals adequately explained the policy basis on which its statutory interpretation was grounded and whether a deeper analysis of the possible relationships between travel agency services and the business of banking would have been helpful in forming a cogent policy rationale. Finally, an effort will be made to reformulate the issues raised and decided by *Arnold Tours* in the broader context of recent developments in related areas of banking law such as antitrust and the Bank Holding Company Act Amendments of 1970.[10] This reformulation will focus on the federal courts' interpretation of the incidental powers clause of the National Bank Act, with the *Arnold Tours* opinion illustrating the difficulties the federal courts face in applying the broad language of the National Bank Act to the discrete complexities of banking.

The court of appeals in *Arnold Tours* took the language of the National Bank Act as the point of departure for its opinion. In pertinent part, the Act states: "[A national banking association shall have power] to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . ."[11] The Comptroller had relied upon this statutory language in his 1963 ruling that national banks could engage in the travel agency business. Thus, paragraph 7475 of the Comptroller's Manual for National Banks (1963) reads:

> § 7.7475 National banks acting as travel agents
>
> Incident to those powers vested in them under 12 U.S.C. [§] 24, national banks may provide travel services for their customers and receive compensation therefor. . . .

---

[8] 472 F.2d at 435-36 & n.12. The latter quoted phrase is apparently taken by the court from the plaintiffs' brief. Id. at 435-36 n.12. For a statement of the expansionist policy underlying the 1963 rulings, see Saxon, Bank Expansion and Economic Growth: A New Perspective, 8 Antitrust Bull. 597 (1963). See also Camp, The Controller of the Currency: A Report from Washington, 23 Bus. Law. 67 (1967).

[9] 472 F.2d at 435-37 & nn.12 & 15.

[10] 12 U.S.C. §§ 1841 et seq. (1964), as amended, 12 U.S.C. §§ 1841-43, 1849 (1970).

[11] 12 U.S.C. § 24, Seventh (1970). The quoted passage continues by enumerating the following functions as "necessary to carry on the business of banking":

> by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.

Id.

> In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.[12]

Thus, the *Arnold Tours* case turns on whether South Shore's operation of a travel agency can be legitimately considered as an exercise of an incidental power necessary to carry on the business of banking. If the answer to this question is no, then consideration must be given to the question whether the Comptroller's regulations provide sufficient authority to justify South Shore's travel agency operations.

In interpreting the incidental powers clause of the National Bank Act, the court of appeals rejected the contention that the phrase "necessary to carry on the business of banking" be construed as meaning "convenient or useful to the business of banking." The Comptroller and South Shore had argued that Chief Justice Marshall's celebrated opinion in *McCulloch v. Maryland*[13] established a broad principle that the word "necessary" should be given a liberal construction and that implied powers are to be generously construed. The court of appeals stressed that the *McCulloch* opinion was an exposition of organic constitutional principles which could not properly be regarded as controlling the construction of discrete statutory language.[14] Moreover, the court pointed out that a virtually identical argument, urging a broad interpretation of the incidental powers of national banks on the authority of *McCulloch,* had been before the Supreme Court in the case of *Texas & Pacific Ry. v. Pottorff.*[15] The Supreme Court was apparently unpersuaded by this contention, as it failed to mention the *McCulloch* argument and went against the proponent on the very point at issue.[16]

Although the court of appeals was decidedly of the opinion that a broad interpretation of incidental powers based on *McCulloch* was untenable, the court had considerably more difficulty in formulating its own test as to the proper scope of incidental powers. Indeed, it would appear that the court of appeals advanced three distinct tests in its efforts to apply the incidental powers clause to the activities challenged in the instant case. First, the court held that permissible national bank activities under the incidental powers provision "have been those *directly related* to one or another of a national bank's express powers."[17] Second, the court stated that an incidental power is authorized "if it is *convenient* or *useful* in connection with the performance of one of the bank's established activities pursuant to its express powers . . . ."[18] Third, the court urged that acceptable

[12] 12 C.F.R. § 7.7475 (1973).

[13] 17 U.S. (4 Wheat.) 316 (1819).

[14] 472 F.2d at 431.

[15] 291 U.S. 245, 249 (1934).

[16] Id. at 253.

[17] 472 F.2d at 431 (emphasis added). The express powers of national banks are set out at note 11 supra.

[18] Id. at 432 (emphasis added).

travel services were those "closely related to a bank's *normal functions* under its express powers."[19] While the three tests above are similar in that all refer to the express powers of national banks, it is submitted that the differences in emphasis between the three could allow for substantial variation of result. For example, a "direct relationship" between an incidental and express power requires an inquiry into the nature and substance of the powers being related.[20] "Convenience or usefulness" plainly demands an analysis based on the utility of the power asserted as it may bear upon the bank. "Normal functions" of a bank as a basis for incidental powers suggest an historical or empirical approach to discern what has been the customary or what is the actual role of the incidental power asserted.[21] The divergence—and potential conflict—of the three tests advanced by the court of appeals makes not only for conceptual untidiness but for practical uncertainty.

The *Arnold Tours* court discusses a number of cases in which incidental powers asserted by national banks have been upheld as in furtherance of and in direct relation to the express powers of national banks.[22] In addition, the Supreme Court has also dealt with some of the difficulties of the "direct relation" test. In *Clement National Bank v. Vermont*[23] the state of Vermont levied a tax on depositors with accounts above a certain sum in national banks. The statute provided, however, that national banks, at their election, could pay the tax on behalf of their depositors and deduct the tax paid from these accounts. The bank contested the validity of the statute on the ground that it had no power to collect and pay out

[19] Id. at 434 (emphasis added).

[20] See Federal Reserve Bank v. Malloy, 264 U.S. 160, 167 (1924).

[21] The court of appeals in effect adopts this approach in its opinion when it reasons that since only 122 national banks out of 4700 are engaged in the travel agency business, said business is not a function of normal banking services. 472 F.2d at 435. The logic of such a rigidly numerological approach would deter a national bank from innovation among its incidental powers, for seemingly an innovation would not be permissible if its novelty denied it a place as an empirically normal banking function. Indeed, the *Arnold Tours* court has been faulted for basing its substantive answer to the incidental powers question on "an historically static definition" of the business of banking. See Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 688 n.167 (1973). It should be noted, however, that the *Arnold Tours* court only partially bases its holding on a static or numerical definition of banking powers.

[22] See note 11 supra. The cases and incidental powers discussed by the court of appeals are: Merchants' Bank v. State Bank, 77 U.S. (10 Wall.) 604 (1870) (certification of checks incidental to express power to discount and negotiate bills of exchange); First Nat'l Bank v. National Exch. Bank, 92 U.S. 122, 127 (1875) (acquirement of stock in settlement of legitimate transaction an incidental power); Wyman v. Wallace, 201 U.S. 230, 243 (1906) (borrowing money incidental to express power of creating debtor-creditor relationship); Miller v. King, 223 U.S. 505, 510-11 (1912) (incidental power to collect judgment on behalf of depositor); First Nat'l Bank v. Hartford, 273 U.S. 548, 559-60 (1927) (sale of mortgages an incidental power acquired through express power to loan money); Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 49 (1940) (safe deposit business incidental to express authority to accept special deposits); Franklin Nat'l Bank v. New York, 347 U.S. 373, 375-77 (1954) (use of word "savings" in advertisement incidental to express power to receive deposits).

[23] 231 U.S. 120 (1913).

taxes for the benefit of its depositors. The Supreme Court noted that the bank had the express power to receive deposits. Since the deposits were subject to the taxing power of the state, the state could have compelled the bank to secure the collection of a valid tax either by garnishment or by trustee process. Thus, reasoned the Court, it was "highly appropriate that . . . the bank should be free to make reasonable arrangements, and thus promote the convenience of its business. . . ."[24] The incidental power in question was required to meet the legitimate demands of the authorized business and to enable the bank to conduct its affairs safely and prudently.[25] It may be noted, however, that the incidental power was not upheld by reason of an abstract "direct relation" to an express power. Rather, the Supreme Court weighed the legitimacy of the state policy expressed by the tax and concluded as a practical matter that it was reasonable and convenient for the bank to participate in the statutory scheme. Thus, the application of the term of art "incidental power" was grounded on a policy judgment as to the proper role of a national bank under the given circumstances.

A similar conclusion follows from a full discussion of the *Pottorff*[26] case, which was considered by the court of appeals in *Arnold Tours,* but only as it related to the *McCulloch* argument advanced by the defendants for liberal construction of incidental powers. *Pottorff* warrants more serious discussion. In *Pottorff* a national bank had pledged its assets to secure a deposit. The bank failed. Thereupon the depositor sought to claim the assets pledged; the bank's receiver resisted, arguing that the pledge was beyond the powers of the bank and was therefore invalid. The Supreme Court affirmed the receiver's position. In so doing, the Court declared that the National Bank Act constitutes the complete expression by Congress of the system of governance under which national banks are organized.[27] Consequently, the measure of bank powers is the statutory grant, and powers not conferred by Congress are to be denied.[28] After examining the depositor's contention that the power to pledge assets is incidental to the express power of national banks to receive deposits, the Court held that this function was not "necessary," because there was evidence of only one or two other cases where a similar pledging had occurred. Moreover, the Court continued, even if the practice were commonly pursued, that still would not make it a necessary one.[29] The Court felt that the National Bank Act demanded the uniform treatment of depositors throughout the country.[30] The effect of the bank's pledge was to withdraw

[24] Id. at 139-40.

[25] Id.

[26] See text at notes 15-16 supra.

[27] 291 U.S. at 253.

[28] Id.

[29] Id. at 255. The Court's remark might be compared with the discussion in note 21 supra.

[30] Id., citing Cook County Nat'l Bank v. United States, 107 U.S. 445, 450 (1882).

funds for the benefit of one depositor; thus, part of the general funds to which all depositors look for protection was removed, and the legitimate expectations of all depositors were thereby defeated. The net result was that confidence in the fairness and sound administration of the national banking laws remained impaired.

It has been suggested in one commentary that the aforementioned policy argument is the true *ratio decidendi* of *Pottorff* and that the language urging a narrow construction of incidental powers should be read accordingly as of lesser importance.[31] The Supreme Court, however, thought otherwise, for in *Yonkers v. Downey*[32] it restated the *Pottorff* rule that incidental powers not conferred by Congress in the statutory grant are denied. The rule has since been followed by many courts.[33] While obviously a general rule cannot single-handedly decide complex issues it is surprising that the *Arnold Tours* court did not choose to elaborate on the rule of narrow construction propounded in *Pottorff.* For while *Pottorff,* like *Clement National Bank,* reflected the Court's concern about the effect of national bank activities on public policy pursuant to the National Bank Act, the *Pottorff* Court went rather far in its effort to circumscribe incidental powers. In a footnote the Court stated: "A practice is not within the incidental powers of a corporation merely because it is convenient in the performance of an express power."[34] It would appear, then, that an emerging incidental power must not be merely convenient to an express power, but must further and enhance a fundamental banking policy which the express power represents.[35]

The opinion of the district court in *Arnold Tours* made a more determined analytical effort to come to grips with the proper functions of a national bank, of which the enumerated powers of 12 U.S.C. § 24, Seventh are the specific legislative expression. The district court stated that for any travel services to be permissible as incidental powers, the services must be "financial transactions" involving "money or substitutes therefor."[36] Such services would be bank functions "within the normal traditional range of monetary activities of a national bank."[37] The basic emphasis of the district court's test is that the implied power asserted be essentially monetary. It is the financial or monetary quality of the incidental power

[31] Note, Diversification of National Banks, 21 Stan. L. Rev. 650, 657-58 (1969).

[32] 309 U.S. 590, 596 (1940).

[33] Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1013-14 (5th Cir. 1968); Kimen v. Atlas Exch. Nat'l Bank, 92 F.2d 615, 617 (7th Cir. 1937), cert. denied, 303 U.S. 650 (1938); Investment Co. Institute v. Camp, 274 F. Supp. 624, 638 (D.D.C. 1967), rev'd, 420 F.2d 83 (D.C. Cir. 1969), rev'd, 401 U.S. 617 (1971). Contra, Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 48 (1940) (only "assumes" that rule is narrow construction against incidental powers).

[34] 291 U.S. at 255 n.7.

[35] First Nat'l Bank v. Missouri, 263 U.S. 640, 659 (1924). See Federal Reserve Bank v. Malloy, 264 U.S. 160, 167 (1924).

[36] 338 F. Supp. at 723.

[37] Id.

that is deemed to make it suitable for a national bank. The premise of this viewpoint appears in the observation that the express powers of national banks are uniformly monetary or financial in nature.[38] Consequently, as the district court implies, the policy underlying the express powers is not a simplistic restriction of national banks to their historical or traditional functions, but rather a requirement that incidental powers manifest a monetary aspect.[39]

In support of this view, the district court referred to *Cockrill v. Abeles*,[40] wherein it was held that while a national bank had the implied power to acquire a mill in satisfaction of a debt,[41] the bank had no power "to engage directly in a manufacturing or business enterprise" such as an attempt to operate the mill for profit.[42] The district court in *Arnold Tours* did not discuss the *Cockrill* case except to indicate that the operation of a mill is not a monetary activity and is thus forbidden to national banks. Actually, the *Cockrill* case is one of a series of cases denying implied authority for national banks to engage in or promote purely speculative businesses or adventures.[43] No policy has been articulated by the courts as the basis for the proscription of independent, speculative enterprises, but it is logical to conclude that prudence in bank operations and the protection of the bank's creditors and depositors are cardinal aims of the National Bank Act.[44]

The argument against national banks embarking upon independent enterprises was given full expression in *Atherton v. Anderson*,[45] wherein the Sixth Circuit rejected a national bank's claim that the operation of a wagon company was a permissible incidental power. The court ruled that although the bank could operate such a venture for a short period of time, to save its debt, it

---

[38] The reader is invited to form his own opinion as to the validity of this observation. See note 11 supra. One commentator argues that the express powers enumerated in 12 U.S.C. § 24, Seventh (1970) do not set limits to the incidental powers of national banks but are of "co-ordinate value." In this view, the setting off of the clauses of 12 U.S.C. § 24, Seventh by semi-colons implies that the clauses are of equivalent functional import. Thus, it is reasoned, the incidental powers of national banks refer to an a priori notion of the "business of banking" unlimited by the enumerated express powers. The commentator minimizes the impact of his argument, however, by stating that the incidental powers must "mobilize money resources . . . by making credit available" and that the incidental power asserted must be "fundamental" and not peripheral to the business of banking. Thus, it is submitted that the commentator's ultimate criteria for testing incidental banking powers are substantially identical to those of the district court in *Arnold Tours*. See Huck, What Is the Banking Business?, 23 Bus. Law. 537, 538-40, 542-44 (1966).

[39] 338 F. Supp. at 723.

[40] 86 F. 505 (8th Cir. 1898).

[41] Id. at 511-12. See First Nat'l Bank v. Hartford, 273 U.S. 548, 559-60 (1927).

[42] 86 F. at 512.

[43] First Nat'l Bank v. Converse, 200 U.S. 425, 439 (1906); Birdsell Mfg. Co. v. Anderson, 104 F.2d 340, 342 (6th Cir. 1939); Cooper v. Hill, 94 F. 582 (D. Colo. 1899); John A. Roebling Sons' Co. v. Richmond First Nat'l Bank, 30 F. 744 (D.W. Va. 1887).

[44] See Grindley v. First Nat'l Bank, 87 F.2d 110, 112 (6th Cir.), cert. denied, 301 U.S. 696 (1937).

[45] 86 F.2d 518 (6th Cir. 1936), rev'd on other grounds, 302 U.S. 643 (1937).

could not continue such a speculative enterprise merely in expectation of future profits.[46] This holding by the *Atherton* court provides a helpful approach to the question presented in *Arnold Tours* regarding the justification of a travel agency as an incidental power. Still, the ruling sheds little light on the underlying policy which courts are to invoke as a guide to judicial construction of the congressional purpose of the National Bank Act. If monetary activities are taken to be the special competence of national banks, as is suggested by the district court in *Arnold Tours,* then the *Cockrill* and *Atherton* line of reasoning can be seen as an effort to protect the public against banking losses by confining banks to their special, statutory province—the management of money and not of commerce. Thus, attention should be given to the travel agency business to see whether, measured against these tests, it is monetary and incidental or independent and commercial.

The Comptroller and South Shore contended that travel agencies primarily engage in the procurement of carrier passage and travel accommodations for travellers. Also, travel agencies provide information to prospective travellers. The Comptroller and South Shore reasoned that these basic travel agency functions are logical extensions of the good will informational services which banks traditionally offer their customers.[47] The court of appeals was unpersuaded by this argument. The court looked to the factual description of the travel agency operated in the instant case and concluded that the travel agency was not engaged in the provision of incidental services but was a full-scale agency, operated for profit, and thus wholly apart from the bank's normal banking functions.[48] As strong as this condemnation may seem, however, the court of appeals did qualify its determination by limiting its proscription only to *full-scale* travel agencies.[49] That such a qualification was necessary indicates the difficulty in framing the factual questions before the court.

A travel agency is an amalgamation of functions. For example, it could certainly be argued that a travel agency department could stimulate the making of loans or encourage the receipt of deposits for travel purposes; this would link the travel agency to express

[46] 86 F.2d at 525.

[47] As set forth by the court in 472 F.2d at 433.

[48] Id. Two facts unique to the instant case may well have facilitated the court's arriving at this conclusion. First, the affidavit offered by the bank to describe the operation of its travel department does not appear aptly designed to meet the logical needs of the case. The description emphasizes the independent, exotic and arcane functions of the travel agency —from "bike rentals in Bermuda . . . to a houseboat in Kashmir." Id. at 429 n.4. Such a grandiose schema is not likely to commend itself as "incidental" to the rather sober express powers that constitute the business of banking. See note 11 supra. Second, in embarking upon this purportedly incidental enterprise, South Shore bought out the fourth largest travel bureau in New England. Id. at 428. While the purchase is not condemned per se by the court, such an overt acquisition belies the contention that a travel department is a natural concomitant and outgrowth of banking as historically practiced.

[49] Id. at 438.

national bank powers. Or, the procurement of tickets and passage might be regarded as financial activities of a monetary nature compatible with traditional banking functions. The court of appeals acknowledges that banks perform many useful services that are important for the cultivation and retention of customer good will. Such services might include the sale of travelers' checks and foreign currency, the making of travel loans, issuance of letters of credit, and the occasional procurement of carrier passage or accommodations.[50] But in attempting to draw a line of demarcation between permissible and impermissible incidental powers as they relate to a travel agency, the court of appeals fails to attain a practicable distinction. The court states that mere travel services, largely uncompensated and oriented toward good will, are permissible incidental powers because they "are germane to the financial operations of the bank in the exercise of its express powers."[51] A modern travel agency business or a full-scale travel agency, on the other hand, is an impermissible incidental power, according to the court, because it is not "directly related" to the business of banking, as set out in the express powers of 12 U.S.C. § 24, Seventh.[52]

It is submitted that the vagueness inherent in a term of art like "directly related" could have been avoided in the instant case if the court of appeals had preserved the ground of decision advanced by the district court. As previously discussed,[53] the district court stated that the basic test of incidental powers is their monetary quality and cited to one of a line of cases prohibiting national banks from entering into independent, sustained commercial enterprises. Such an approach would appear quite serviceable for application to travel agencies. To the extent that travel agency functions pertain to the use of money or substitutes therefor, such as loans, letters of credit, travellers' checks or foreign exchange, travel services by banks are permissible incidental powers. As the travel agency partakes of independence, profit-orientation and self-promotion—the attributes of a "going concern"—it runs afoul of the *Cockrill* and *Atherton* principles by assuming an independent and speculative aspect that could subvert sound banking practices.

This is not to say that the district court test is the last word on the subject. The subtlety of the legal imagination should not be underestimated, and gray areas will almost inevitably emerge. For example, some non-monetary services, such as the procuring of tickets or reservations for a favored customer, are acceptable as de minimis exceptions necessary to develop customer relations. Perhaps there will be travel departments or travel bureaus within banks (unlike the external acquisition in *Arnold Tours*) that will expand by

---

[50] Id.

[51] Id. at 433.

[52] Id. at 432-33.

[53] See text at notes 36-46 supra.

gradual degrees without ever assuming independent entrepreneurial status.[54] Banks might impose nominal charges for travel services and so, at some point, transform a service into a business.[55] The central problem is the determination of the proper rationale for judicial construction of the incidental powers clause at a time when bankers and bank agencies are exhibiting expansionist tendencies.[56] The "directly related to an express power" test is admirably flexible, but vague, and provides no guide to those who must rely on it. The test of the district court—"financial transactions [involving] money or substitutes therefor"—is somewhat more concrete and arguably refers to a consistent policy underlying the express powers of national banks.[57] *Pottorff* and the cases following it call for a narrow construction of incidental powers generally under 12 U.S.C. § 24.[58] The court of appeals in *Arnold Tours* based its decision on the "directly related" test; the court was not wrong, even if its analysis is at times unclear, because the asserted incidental power arose in an extreme factual context. However, the district court standards for incidental powers are superior to those of the court of appeals because they are more precise and can serve as reasoned guides to decision when evolving banking practices are presented to the courts as incidental powers. The courts are especially in need of such a reasoned basis for analysis and decision when administrative agencies, such as the Comptroller of the Currency in *Arnold Tours,* lay claim to a coordinate power to determine the extent of the authority granted to them by congressional enactments.[59]

The Comptroller of the Currency is "charged with the execution of all laws passed by Congress" relating to the regulation of national currency and Federal Reserve notes.[60] Additional functions are assigned to the Comptroller by various statutes, including the National Bank Act.[61] It has been stated as a cardinal principle that while the Comptroller is entrusted with general oversight of the

[54] One characteristic that could indicate the attainment of independent entrepreneurial status in these instances would be an advertising or holding out to the public of the "incidental power" *eo nomine* (e.g., as a "travel department"). The *Arnold Tours* court notes that the Comptroller himself has disapproved such a "holding out" in the past. 472 F.2d at 434-35 & n.11.

[55] The court of appeals emphasized that the travel services it anticipated as permissible were those that were "without additional compensation," id. at 433, or "limited and largely uncompensated," id. at 434. At some point the size of the fee in relation to the travel service might defeat the good will basis on which the travel services are justified.

[56] See id. at 435-36 n.12; Beatty, What Are the Legal Limits to the Expansion of National Bank Services?, 86 Banking L.J. 3, 24 (1969). See also the articles cited in note 8 supra.

[57] See text at notes 40-46 supra.

[58] See text at notes 26-35 supra.

[59] See 472 F.2d at 435. One commentator has stated that the incidental powers clause is "meaningless" and that its statutory history provides no "guiding principle" for its construction. The suggestion follows that courts avoid a policy decision and leave elucidation of the clause to agency and legislative development. See Scott, supra note 21, at 688.

[60] 12 U.S.C. § 1 (Supp. 1973).

[61] See, e.g., 12 U.S.C. §§ 26, 36 (Supp. 1973).

National Bank Act, the Comptroller's own authority must remain within the statutory confines of the Act.[62] And, this being so, it follows that in the absence of explicit direction from Congress to the contrary, the courts and not the agencies have the ultimate responsibility to construe the language of Congress.[63] Thus while an agency may construe its enabling statutes by way of interpretation, the courts are empowered to strike down rulings that are in excess of the statutory authority.[64] As an agency draws closer to impinging upon what has been called the "clear statutory purpose" or the "intention of the statute,"[65] courts regard the authority of the agency as correspondingly weakened, for construction of statutes is not within the special competence of agencies but rather of the courts.[66]

Nevertheless, the rulings and interpretations of agencies, including the Comptroller, are to be given great weight as an expression of the accumulated wisdom of the agency's regulatory experience.[67] The Comptroller's practices, exemplified over a long period of time, can lend authority to rulings when the intent of Congress is not clear.[68] This would be especially so when the rulings are supported by reasoned principles consistent with the policy expressed by Congress in its statutes.[69] Also it should be noted that the Comptroller's discretion will vary according to the language and policy of the underlying enabling statute. Thus the Comptroller is granted broad discretion in the granting of national bank charters to applicants[70] and in the determination of the propriety of establishing branch banks.[71] Because of the technicality and specificity of these statutory functions assigned to the Comptroller, courts are reluctant to interfere with the Comptroller's decisions and will do so only on the grounds of abuse of discretion or blatant discrimination by the Comptroller.[72] It does not follow, however, that the Comptroller's special competence in the appraisal of bank charter applications pervades his every act so as to justify a ruling that significantly expands the practical application of the incidental powers clause. When the Comptroller seeks a substantial alteration of the scope and effect of statutory language, the Comptroller is moving away from

---

[62] Inland Waterways Corp. v. Young, 309 U.S. 517, 524 (1940).

[63] Zuber v. Allen, 396 U.S. 168, 192-93 (1969).

[64] For a full discussion of this principle in the context of the Federal Trade Commission, see Note, 14 B.C. Ind. & Com. L. Rev. 368, 376-77 (1972).

[65] L. Jaffe, Judicial Control of Administrative Action 572-73 (1965).

[66] Barlow v. Collins, 397 U.S. 159, 166 (1969).

[67] Investment Co. Institute v. Camp, 401 U.S. 617, 627-28 (1971).

[68] Inland Waterways Corp. v. Young, 309 U.S. at 524-25.

[69] See Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

[70] 12 U.S.C. § 26 (Supp. 1973); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387-88 (8th Cir. 1966).

[71] 12 U.S.C. § 36 (Supp. 1973); Ramapo Bank v. Camp, 425 F.2d 333, 340-41 (3d Cir. 1970).

[72] See, e.g., Webster Groves Trust Co. v. Saxon, 370 F.2d at 387 (Comptroller subject to restraint by the courts "if he acts in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates").

discretionary action or mere interpretation; the Comptroller must submit to the judgment of the courts as to the proper construction of the statutes involved and the policies which Congress thereby intended to further.[73]

In *Arnold Tours,* the Comptroller contended that the regulation authorizing national banks to act as travel agents was properly promulgated pursuant to the incidental powers clause of 12 U.S.C. § 24.[74] In support of this position, the Comptroller argued that the 1963 ruling, codified as 12 C.F.R. § 7.7475 and at issue in the instant case, was merely the culmination of a long series of rulings by the Comptroller that national banks could properly perform travel agency functions. Therefore the Comptroller urged that its construction of incidental powers be approved by reason of its venerable origins and, accordingly, afforded great weight.[75] The court of appeals rejected this argument. The court pointed out that the earlier "rulings" to which the Comptroller alluded were actually tentative opinions and even, in one case, a denial of the power of national banks to operate travel agencies as an incidental power.[76] Concerted approval of travel agency operations by the Comptroller could only be traced, at the earliest, to 1959. The Comptroller's position could not, therefore, be said to be one either of great consistency or great tradition.[77] Moreover, the court of appeals pointed out that the Comptroller set forth his ruling without any supporting authority or reasoning. While the court did not make the Comptroller's lack of cogent exposition an exclusive ground of decision, the court did refer to a Supreme Court opinion that faulted the Comptroller for shirking his "responsibility for elaborating and enforcing statutory commands."[78] The court of appeals specially emphasized its desire to prevent the Comptroller from being "a freewheeling agency dispensing federal favors."[79] The court plainly implied that a reasoned basis for administrative rulings will give

---

[73] See materials cited in notes 62-65 supra.

[74] See 12 C.F.R. § 7.7475 (1973), the substance of which is set out in the text at note 12 supra.

[75] As stated by the court in 472 F.2d at 435.

[76] Id. at 434-35 & n.11.

[77] The district court was more outspoken in condemning the Comptroller's contention that the courts were dealing with "an unbroken series of consistent administrative rulings." 338 F. Supp. at 724. The court stated that on its view of the evidence the travel agency operations approved by the Comptroller and embarked upon by South Shore were "radical departures" from past administrative rulings. Id. Consequently, the court reasoned, the rulings "have a correspondingly weakened precedential value." Id.

[78] See Investment Co. Institute v. Camp, 401 U.S. 617, 628 (1971), cited in 472 F.2d at 436 n.13. It is interesting to note that the failure of the Comptroller to provide clear and cogent explanation for his rulings has been held in a recent case to be sufficient grounds, in and of itself, to vacate and remand the ruling, even in an area where the Comptroller exercises his broadest statutory discretion. See Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (granting of charters).

[79] 472 F.2d at 435 n.12, quoting Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 428 (1965) (dissenting opinion).

"some assurance that [the Comptroller] will render principled decisions within the rule of law laid down by Congress."[80]

Thus, while the issues of administrative history and administrative explanation were important to the outcome of the case, the heart of the matter remained the construction of the statutory language of Congress. The Comptroller urged that since amendments to prohibit the exercise of travel agency functions by national banks had been offered in Congress, and since these amendments to the National Bank Act were not passed, the failure to pass is expressive of an intent by Congress to permit the activity promoted by the Comptroller in 12 C.F.R. § 7.7475.[81] The court of appeals was unpersuaded by this attempt to spin a congressional policy out of congressional inaction. The court indicated that an argument based on legislative silence could not be authoritative for statutory construction.[82] Unless the Congress has considered the proposals on their merits and has taken full and final action, it is hard to see what significance would attach to the matter's simply being before Congress and unacted upon.[83] Indeed, in a highly regulated industry such as banking, where Congress has manifested much concern regarding the soundness of banks and the importance of public confidence in the banking system,[84] a completely opposite inference might obtain: that an attempt to undertake new banking ventures as incidental powers is disfavored unless the approval of Congress is secured.[85] This is little more than a restatement of the *Pottorff* case that incidental powers are to be narrowly construed,[86] except that in this context it is radical banking ventures that are checked by a negative inference drawn from the silence of Congress.

Nevertheless, the argument is made that courts lack the capability to pass judgment on the complicated economic problems presented by the rapid expansion of banking functions.[87] Even the crucial policy of bank soundness, conceded to be a purpose of Congress in the National Bank Act,[88] is, in this view, too difficult

[80] 472 F.2d at 435 n.12, quoting 379 U.S. at 428 (dissenting opinion).

[81] 472 F.2d at 436 & n.14.

[82] Id. at 436-37 & n.15, citing Zuber v. Allen, 396 U.S. 168, 185-86 & n.21 (1969). The court noted that a pattern of silence might be significant in an area of traditional year-by-year supervision, e.g., taxation. 472 F.2d at 437 n.15, citing Girouard v. United States, 328 U.S. 61, 69 (1946).

[83] "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." Zuber v. Allen, 396 U.S. at 185-86 n.21.

[84] See the general discussion of the banking market and the regulatory apparatus in Note, Diversification by National Banks, 21 Stan. L. Rev. 650, 659-60 (1969).

[85] An example of the need for special legislation is the acquisition of the stock of certain kinds of corporations by national banks. Congress considered it necessary to enact special legislation even though the corporations involved were engaged in businesses in which national banks could engage directly. See Hackley, Our Baffling Banking System, 52 Va. L. Rev. 565, 610 (1966).

[86] See text at notes 26-35 supra.

[87] See Note, supra note 84, at 655-58.

[88] Id. at 653. See Comment, Approaches to Regulation of One Bank Holding Com-

for the courts to handle, involving as it does such recondite concepts as fixed cost outlays and long term profits.[89] Fortunately, the Supreme Court has not "abdicated its ultimate responsibility to construe the language employed by Congress."[90] In *Investment Co. Institute v. Camp,*[91] the Supreme Court denied national banks the power to enter the mutual fund business. The expansionary practice at issue was not asserted under the incidental powers clause; rather the statutory context was section 16 of the Glass-Steagall Banking Act of 1933.[92] While the Court was able to find a clearer statement of congressional intentions under Glass-Steagall than is bequeathed by the history of the incidental powers clause, the Court nevertheless framed its policy reasoning quite broadly. This policy included the following objections to the asserted activity:

> (1) the placing of new promotional and other pressures on the bank;
> (2) the temptation of unsound loans or a too free use of credit facilities;
> (3) the linkage of the quality of the new function with public confidence in the bank, and the danger of loss of good will resulting from customer dissatisfaction;
> (4) the diversion of bank talent and resources to the affiliated activity;
> (5) the possible undermining of the disinterested quality of a bank's financial advice.[93]

It is not suggested that these considerations are dispositive of the issues raised in *Arnold Tours.* But they are suggestive of appropriate policies and factors to which courts may look in the area of incidental powers. Indeed, the points raised in *Investment Co.* are complementary to the narrow construction held in *Pottorff* and to the proscription of independent speculative enterprises in *Cockrill* and *Atherton.*[94]

panies, 55 Va. L. Rev. 952, 955-61 (1969). See also text at note 35 supra and at notes 91-94 infra.

[89] Note, supra note 84, at 655.

[90] Zuber v. Allen, 396 U.S. at 193.

[91] 401 U.S. 617 (1971).

[92] 48 Stat. 162 (codified in scattered sections of 12 U.S.C.).

[93] 401 U.S. at 630-39 passim.

[94] The five "fiduciary" services approved by the Supreme Court in *Investment Co.* as legitimate national bank functions are described generally as follows:

> These activities . . . do not give rise to a promotion or salesman's stake in a particular investment; they do not involve an enterprise in direct competition with aggressively promoted funds offered by [others]; they do not entail a threat to public confidence in the bank itself, and they do not impair the bank's ability to give disinterested service as a fiduciary or managing agent. In short there is a plain difference between the sale of fiduciary services and the sale of investments.

Id. at 638. Though the Court's statutory authority differs from that of the instant case and though the language above is general, still it is submitted that the logic and policy of each and every statement in the above passage is salient reinforcement to the doctrine of the *Pottorff, Cockrill* and *Atherton* cases.

Even if it is accepted that the Comptroller has no claim to a far-reaching expertise that sustains his approval and creation of incidental powers, still the argument is made that the enforcement of the antitrust laws is an adequate restraint on the Comptroller's actions, and that the courts, hobbled by amorphous terms of art, should not purport to define or limit national bank powers but should defer to the Comptroller's judgment and the antitrust laws.[95] The theory is that antitrust enforcement will look to the total market effect of banking practices, whereas judicial efforts to define incidental powers may be inflexible limits on creative banking practices.[96] There is no doubt that antitrust has significant application to the market structure and organization of national banks.[97] And there is no doubt that the evils which antitrust laws seek to control may well result from untoward bank expansion under a liberal construction of incidental powers by the Comptroller. For example, there would be manifest temptation for banks to tie their fiduciary services to patronage of their affiliated or "incidental" enterprise.[98] Or, there could develop refusals to deal, as where a bank exercised "lender's discretion" by refusing to extend loans or credit to an entity, say a travel agency, competing with the bank's own subdivision.[99] A more general difficulty might ensue from undue judicial deference to the Comptroller—a snowball effect in which banks would rush lemming-like in unseemly competition to embrace some novel commercial practice that they fancy as an incidental power.[100] The antitrust laws would not deter this, because the hypothetical expansion could well be procompetitive, even if hypothetically disastrous.[101] But the realization that judicial construction of the incidental powers clause will apply a monetary transaction test and will look askance at speculative enterprises could well have a sobering effect on hasty expansion. Also, one must consider the burdens that exclusive enforcement would place on the limited resources of the Department of Justice. In effect, judicial abdication of statutory construction of incidental powers would result in increased independence for the Comptroller at just the time when the *Arnold Tours* court holds he is exceeding his statutory authority and, impliedly, is in need of principled decisions to contain inherent free-wheeling tendencies.[102] In short, antitrust law is not

[95] See Note, supra note 84, at 653-56. See also the discussion in note 38 supra.

[96] Id. at 656-58.

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

[98] See Comment, supra note 88, at 971, 977.

[99] Id. at 978.

[100] Id. at 976.

[101] The results might be unfavorable even if the "incidental" commercial enterprise were sound. Since banks are an oligopoly, the pressure to conform would be strong, and the competing banks might end up at a lower level with similar shares of the market. See Note, supra note 84, at 660.

[102] See text at notes 78-80 supra.

enough: it neither ensures bank safety nor promotes reasoned and consistent administration.

In addition, Congress has in recent years provided alternate statutory routes for national bank expansion other than the incidental powers clause. The Bank Holding Company Act (BHCA) Amendments of 1970[103] delegates to one agency, the Federal Reserve Board (FRB), the authority to approve acquisitions by bank holding companies of enterprises or concerns "so closely related to banking or managing or controlling banks as to be a proper incident thereto."[104] While this provision pertains only to bank holding companies and thus affords no basis for direct bank expansion, formation of a bank holding company is not so onerous as to be beyond the capability of an expansion-minded national bank.[105] For the purposes of this note, it is relevant to point out that the BHCA retains a "proper incident" test that bears a superficial resemblance to the incidental powers clause. The FRB has classified certain activities as fitting the statutory standard.[106] As of this writing, travel agencies are not among the proper incidents of managing or controlling banks. In a statement before Congress during hearings on the 1970 Amendments, Dr. Arthur Burns, then Chairman of the FRB, stated that "authorized subsidiaries might well include those . . . acting as travel agents or issuing travelers checks."[107] It is noteworthy that in this statement Dr. Burns equivocates between uncompensated travel services and a travel agency business—the very distinction that so troubled the district court and the court of appeals in *Arnold Tours*. It is significant, however, that the FRB will not approach the travel agency problem in the same way that the courts have, as an incidental power to be construed from statutory language. Rather, the BHCA, with the 1970 Amendments, will apply an explicit public interest test according to the mandate of statute.[108] Public interest will be determined by an administrative balancing of such positive effects of expansion as greater convenience, increased competition, or gains in efficiency that flow from the desired asquisition. Adverse consequences to be considered are undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices.[109] Through these

---

[103] 12 U.S.C. §§ 1841 et seq. (1964), as amended, 12 U.S.C. §§ 1841-43, 1849 (1970).

[104] 12 U.S.C. § 1843(c)(8) (1970).

[105] See Kintner & Hansen, supra note 97, at 260-61. Indeed, formation of a bank holding company under the BHCA rendered pointless any attempt to impose a direct limitation on national bank expansion into data processing services in the aftermath of the *Data Processing* case. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). See Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 688 n.167 (1973).

[106] 12 C.F.R. §§ 225.1 et seq. (1973).

[107] S. Rep. No. 91-1084, 91st Cong., 2d Sess. 13 (1970).

[108] 12 U.S.C. § 1843(c)(8) (1970).

[109] Id. It should be noted, however, that even under the tests to be applied by the Federal Reserve Board the travel agency acquisition in *Arnold Tours* remains suspect. The

enumerated factors the Federal Reserve Board will be able to formulate an explicit public interest test,[110] a test that eluded the courts construing the incidental powers clause, since those courts could not superimpose a public interest test on complex congressional legislation specifically regulating national banks.[111]

The public interest test brings the themes of this note full-circle to *Arnold Tours*. The *Arnold Tours* case arose only because the issue of plaintiffs' standing was intensely litigated.[112] The *Arnold Tours* standing cases made it clear beyond peradventure that would-be plaintiffs had only to show injury in fact and an arguable connection with the zone of interests protected by the statute under which they assert their rights.[113] Thus, in a complex society, it is safe to say there will be no shortage of plaintiffs, injured by multifarious developments, who yet wish to assert their arguable rights under an appropriate statute. Thus, to some degree, the liberal standing requirements presage a form of public interest test, whereby those affected by bank expansion under the incidental powers clause may assert their economic interests.[114] These cases, properly presented, will call for declaratory rulings by the courts, and it is the solemn duty of the courts to respond to them. It is beside the point to say that the courts are not equipped to set broad policy under the incidental powers clause.[115] The ancient and honorable tradition of the courts is to decide the case properly before them. The liberal standing principles in *Arnold Tours* ensure that the federal courts shall have an active role in reconciling bank expansion under the incidental powers clause with the adverse effect of such expansion on various sectors of the public.

The upshot of the federal court activity in strictly construing the incidental powers clause is to thwart rapid bank expansion

FRB is authorized to distinguish between de novo entry by banks into related markets, which is prima facie procompetitive, and acquisitions, which are by implication disfavored. See Kintner & Hansen, supra note 97, at 264.

[110] Such a test, since it is authorized and identified by statute, may not be lightly overturned by the courts. Such a public interest determination may be compared, from the vantage of judicial review, with the discretion afforded the Comptroller in the areas of bank charters and branches. See text at notes 69-73 supra.

[111] The courts in the *Pottorff* and *Clement* cases considered the effect of their holdings on public convenience and public policy. But primarily the Court's emphasis was on furthering the congressional policy expressed in the statute, which is not necessarily congruent with a public interest test. See text at notes 22-35 supra.

[112] The case history is given in note 2 supra.

[113] Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970). For a summary of and a brief commentary on the cases immediately leading up to the *Arnold Tours* "standing" decisions, see Note, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 32, 177-85 (1970). See also Scott, supra note 105, at 665.

[114] "Certainly he who is 'likely to be financially' injured . . . may be a reliable private attorney general to litigate the issues of the public interest in the present case." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970) (citation omitted).

[115] See text at notes 87-89 supra.

—whether indigenous or under the aegis of the Comptroller.[116] This is not to say that bank expansion is stifled in the aftermath of *Arnold Tours*. It appears more likely, though, that if banks do not obtain special permissive legislation from Congress,[117] they will have to go the holding company route and submit to rigid FRB scrutiny.[118] In either case, national banks will have to fight their battle on the grounds of public interest.

The *Arnold Tours* opinion was not without weaknesses: it did not enunciate a primary test,[119] it did not discuss congressional banking policy,[120] and it did not consider in depth the gradations of independence that travel agent operations might assume as incidental powers in future cases.[121] Even so, *Arnold Tours* reaffirmed the supervisory role of the federal courts as the guardians of the statutory language of Congress. And by entering into some substantive judgment on banking policy as the basis for its holding, the *Arnold Tours* court vindicated the role assigned to federal courts in the aftermath of the liberal standing decisions.

DOUGLAS M. MYERS

---

[116] See text at notes 8-9 supra.

[117] See text at notes 83-86 supra.

[118] In this regard it would be quite unrealistic not to point out that, historically, the Comptroller has been notoriously lenient in his approval of bank expansion, while the Federal Reserve Board has been much more exacting. See Hackley, Our Discriminatory Banking Structure, 55 Va. L. Rev, 1421, 1446-47 (1969).

[119] See text at notes 17-21 supra.

[120] See text at notes 23-26 supra.

[121] See text at notes 55-59 supra.

CAUGHT IN THE FLOOD?

With today's torrent of legal literature in fields relevant to corporate practice it's not at all surprising. The volume and the variety of reporters, binder and looseleaf services, special volumes, digests and finders can quickly sweep past you to their places on the shelves. Though you resolve to sort them through for a thread of unity, moment and development, you often simply humanly cannot.

The *Boston College Industrial & Commercial Law Review* cannot stem the flood. But it certainly can help the corporate practitioner stay afloat by giving him a sense of perspective, currency and an organized survey of his fields. Like all excellent law reviews the *Boston College Industrial & Commercial Law Review* presents carefully selected scholarly thought on legal developments. But, unlike any other law review in the nation, it publishes only material having an impact in industrial and commercial areas. That means six yearly issues zeroing in on securities law, labor law, antitrust and trade regulations, taxation, banking, environmental law, commercial law, corporate law, and other fields that may have special ramifications in the industrial and commercial sector. It means a thorough *Annual Survey of Labor Law,* as well as frequent special issues, such as our recent issues "The Revenue Act of 1971" and "Recent Developments in Environmental Law," both published this year. In the year to come the *Boston College Industrial & Commercial Law Review* will continue to bring sensitivity, organization and thoroughness to the specific and certain corporate fields of law. In the forthcoming volume there will be two special issues. One will focus on environmental law, including an examination of S.E.C. registration statements – new regulations concerning environmental impact disclosure. Our other special issue will examine developments in labor relations law, and will include the *Review's* thirteenth annual labor law survey, as well as discussion of the Occupational Safety and Health Act and pending pension reform legislation. Aside from these special issues, there will be a number of articles relevant to corporate practice, for example, an article by Earl Kintner on international aspects of American antitrust laws, and a detailed examination of the National Labor Relations Board's back pay remedy by N.L.R.B. Regional Director, Robert F. Fuchs.

The *Boston College Industrial & Commercial Law Review* doesn't hope to stem the daily decisional flood. Yet we are sure that it can chart corporate counsel a thoughtful way through the waters.

The Boston College Industrial & Commercial Law Review
Boston College Law School
Brighton, Mass. 02135

Please enter my one year subscription for $10.50.

☐Check enclosed ☐Bill me

Name ______________________
Address ______________________
City ______________________
State ____________ Zip ________

U. S. POSTAL SERVICE

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Act of August 12, 1970: Section 3685, Title 39, United States Code)

SEE INSTRUCTIONS ON PAGE 2 (REVERSE)

1. TITLE OF PUBLICATION
Boston College Industrial and Commercial Law Review

2. DATE OF FILING
Sept. 25, 1973

3. FREQUENCY OF ISSUE
Six issues per year

4. LOCATION OF KNOWN OFFICE OF PUBLICATION *(Street, city, county, state, ZIP code) (Not printers)*
38 Commonwealth Avenue, Newton, Mass. 02167

5. LOCATION OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS *(Not printers)*
Same as 4

6. NAMES AND ADDRESSES OF PUBLISHER, EDITOR, AND MANAGING EDITOR

PUBLISHER *(Name and address)*
Boston College Law School, Brighton, Massachusetts 02135

EDITOR *(Name and address)*
Prof. Mary Ann Glendon, Boston College Law School, Brighton, Ma. 02135

MANAGER EDITOR *(Name and address)*
Dean Richard G. Huber, Boston College Law School, Brighton, Ma. 02135

7. OWNER *(If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 percent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual must be given.)*

NAME	ADDRESS
Trustees of Boston College	140 Commonwealth Avenue, Chestnut Hill, Ma. 02167

8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES *(If there are none, so state)*

NAME	ADDRESS
None	

9. FOR OPTIONAL COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES (Section 132.121, Postal Service Manual)

39 U. S. C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates."

In accordance with the provisions of this statute, I hereby request permission to mail the publication named in Item 1 at the reduced postage rates presently authorized by 39 U. S. C. 3626.

(Signature and title of editor, publisher, business manager, or owner)

10. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES *(Section 132.122, Postal Manual)*

(Check one)

The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes ☐ Have not changed during preceding 12 months ☐ Have changed during preceding 12 months *(If changed, publisher must submit explanation of change with this statement.)*

11. EXTENT AND NATURE OF CIRCULATION	AVERAGE NO. COPIES EACH ISSUE DURING PRECEDING 12 MONTHS	ACTUAL NUMBER OF COPIES OF SINGLE ISSUE PUBLISHED NEAREST TO FILING DATE
A. TOTAL NO. COPIES PRINTED *(Net Press Run)*	1700	1781
B. PAID CIRCULATION 1. SALES THROUGH DEALERS AND CARRIERS, STREET VENDORS AND COUNTER SALES	50	50
2. MAIL SUBSCRIPTIONS	900	927
C. TOTAL PAID CIRCULATION	950	977
D. FREE DISTRIBUTION BY MAIL, CARRIER OR OTHER MEANS 1. SAMPLES, COMPLIMENTARY, AND OTHER FREE COPIES	150	151
2. COPIES DISTRIBUTED TO NEWS AGENTS, BUT NOT SOLD	0	0
E. TOTAL DISTRIBUTION *(Sum of C and D)*	1100	1128
F. OFFICE USE, LEFT-OVER, UNACCOUNTED, SPOILED AFTER PRINTING	600	653
G. TOTAL *(Sum of E & F—should equal net press run shown in A)*	1700	1781

I certify that the statements made by me above are correct and complete.

(Signature of editor, publisher, business manager, or owner)

Richard G. Huber

PS Form 3526 July 1971