1982

Extension of the Most Favored Lender Doctrine under Federal Usury Law: A Contrary View

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EXTENSION OF THE MOST FAVORED LENDER DOCTRINE UNDER FEDERAL USURY LAW: A CONTRARY VIEW

I. INTRODUCTION

The generally high level of interest rates during recent years has expanded the importance of federal statutes as a source of usury law. In states which have been slow in raising interest rate ceilings in response to increases in the lenders' cost of funds, preemptive federal legislation has become essential to the maintenance of an adequate supply of credit. The most extreme form of legislative action—complete preemption of state interest rate ceilings—has thus far been taken only with respect to residential first mortgage loans. A less drastic type of statute, which


(1077)
establishes an increment over the federal reserve discount rate as an alternative to the rate allowed by state law, has long been applicable to all loans made by national banks. Under the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDAMCA), an alternative federal rate is temporarily provided for business and agricultural loans made by any person. Under permanent provisions of DIDAMCA, an alternative federal rate is available for loans made by state-chartered federally insured banks, by all federally insured savings and loan associations, and by all federally insured credit unions.

4. The Federal Reserve discount rate is the rate charged by the Federal Reserve Bank for short-term loans to its member banks. BLACK'S LAW DICTIONARY 418 (rev. 5th ed. 1979). See also notes 69-71 and accompanying text infra.


8. DIDAMCA, supra note 6, § 521 (state-chartered, federally insured banks, savings banks, and branches of foreign banks), § 522 (federally insured savings and loan associations), § 523 (federally insured credit unions) (codified respectively at 12 U.S.C. §§ 1831d, 1730g, 1785g (Supp. IV 1980)). The parallel language of these sections accords the respective lending institutions an alternative rate of one percent over the federal reserve discount rate. Id. For a discussion of the additional preemptive aspects of these sections, see notes 156-61, 194-95 and accompanying text infra. For the text of § 521, see text accompanying note 140 infra. A state override option with no expiration date applies to each of these statutes. DIDAMCA, supra note 6, § 525. As of March 31, 1982, six states had overridden §§ 521-523. See COLORADO REV. STAT. § 5-13-104 (Supp. 1981); Ch. 1156, § 32 Iowa Stats. of 1980; MAINE REV. STAT. ANN. tit. 9A § 1-110 (Supp. 1981); MASS. GEN. LAWS ANN. ch. 183, § 63 (note)
The federal rates, however, do not always provide an attractive alternative to lenders.9 Primarily in the area of consumer loans, national banks have invoked judicial and regulatory interpretations of section 85 of Title 12 of the United States Code (section 85)10 to avail themselves of two privileged applications of state interest rate ceilings. Under the "most favored lender" doctrine, a national bank may charge interest at the highest rate permitted by state law to any competing lender for the same class of loan.11 And under the Supreme Court's holding in Marquette National Bank v. First of Omaha Service Corp.,12 a national bank which extends credit across state lines is bound only by the usury law of the state where it is located, without regard to otherwise applicable choice of law rules.13 There has recently developed a clear consensus among regulatory agencies that the most favored lender doctrine and the Marquette holding apply not only to national banks under section 85, but also to other federally insured lenders under sections 521 to 523 of DIDAMCA (sections 521 to 523).14 This comment will trace the development of the most favored lender doctrine15 and analyze the Supreme Court's holding in Marquette.16 It will examine the language and legislative history of sections 521 to

9. See Samuels, supra note 1, at 904-05. Ironically, the Federal Reserve Board itself has strongly advised against utilizing the discount rate as a basis for interest rate ceilings. See To Authorize Loans at Interest Rates in Excess of Certain State Usury Ceilings and To Amend the Depository Institutions Deregulation and Monetary Control Act of 1980: Hearings on S. 963 and S. 1406 Before the Subcomm. on Banking, Housing, and Urban Affairs, 97th Cong., 1st Sess., 485-86 (1981) (statement of Nancy H. Teeters, Member, Bd. of Governors, Federal Reserve System).


11. See notes 82-99 and accompanying text infra.


13. See notes 178-87 and accompanying text infra.

14. See notes 156-61, 194-95 and accompanying text infra.

15. See notes 20-99 and accompanying text infra.

16. See notes 178-87 and accompanying text infra.
523 and evaluate alternative interpretations of the statutes' provisions. Finally, it will conclude that in augmenting federal usury law under sections 521 to 523, Congress did not contemplate extension of the most favored lender doctrine, but that it did intend to expand the scope of the Marquette decision to cover loans made by all federally insured depository institutions.

II. DEVELOPMENT OF THE MOST FAVORED LENDER DOCTRINE

A. The Statutory Structure

Federal usury law originated during the Civil War, when legislation was enacted to establish and regulate a network of federally chartered banks. In 1863, Congress initially determined the maximum interest rates that would be available to national banks by deferring completely to the legal rate established under state law. A year later, after rejecting a proposal for a uniform rate limitation of seven percent, Congress adopted section 30 of the National Bank Act of 1864 (section 30). The wording of section 30 has survived with only minor changes, although the current version in section 85 contains an additional provision which allows an alternative rate of one percent over the federal reserve discount rate.

17. See notes 136-55 and accompanying text infra.
19. See notes 194-216 and accompanying text infra.
20. See generally Hackley, Our Baffling Banking System, 52 VA. L. REV. 565, 570-73 (1966). The immediate purpose of the Currency Act of 1863 was to finance the Civil War by facilitating the sale of Government securities. Id. at 570. Prior to that time, national banks were individually enfranchised by Congress, and the permissible interest rates were specified in their charters. See, e.g., Fleckner v. United States Bank, 21 U.S. (8 Wheat.) 338, 349 (1823).
21. Act of Feb. 25, 1863, ch. 58, § 46, 12 Stat. 665, 678-79. Section 46 of the Currency Act of 1863 permitted national banks to charge the rate of interest "as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several states." Id.
22. CONG. GLOBE, 38th Cong., 1st Sess. 2123 (1864).
24. See note 4 and accompanying text supra. Section 85 now reads as follows:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per
The majority of the following discussion relates to the first sentence of section 85, which can be divided into an “Allowance Clause” and an “Exception Clause.” The references will be as follows:

centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (Supp. IV 1980). The statute has undergone the following changes since its enactment:

(a) When § 30 was codified in the Revised Statutes of 1878, the word “District” was added to the first sentence, ostensibly to include the District of Columbia. See Revised Statutes of 1878, tit. LXII, ch. 3, § 5197. Also, the words “or existing” were added to the latter part of the first sentence. Id. The meaning of “organized or existing” has been a factor in litigation under § 85, but has not yet been resolved. See note 132 infra.

(b) In the Banking Act of 1933, a clause was added to permit an alternative federal rate of 1% over the federal reserve discount rate. Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191. At the same time, the words “of issue” were deleted from the first sentence. Id. For a discussion of the significance of this deletion, see notes 69-81 and accompanying text infra.

(c) In the Banking Act of 1935, a provision was added to § 85 to govern interest rates charged at foreign branches of national banks. Act of Aug. 23, 1935, ch. 614, § 314, 49 Stat. 711.

(d) From 1974 through 1979, § 85 was amended several times to reflect provisions for a variable federal rate on business and agricultural loans. See note 7 supra.

25. For the full text of § 85, see note 24 supra. The second sentence of § 85 does not warrant extended discussion, since this provision has been so narrowly and authoritatively construed as to render it virtually meaningless. See Daggs v. Phoenix Nat'l Bank, 177 U.S. 549 (1900); Hiatt v. San Francisco Nat'l Bank, 361 F.2d 504 (9th Cir.), cert. denied, 385 U.S. 948 (1966). These cases hold that the phrase “[w]hen no rate is fixed by the laws of the state ...” refers only to circumstances where no rate is “allowed” by state law, i.e., where state law prohibits the taking of any interest at all. See 177 U.S. at 555; 361 F.2d at 507. See Shanks, Special Usury Problems Applicable to National Banks, 87 Banking L.J. 483, 488 (1979) (suggesting that “for all practical purposes” the second sentence of § 85 may be ignored). See also Office of the Comptroller of the Currency, Interpretive Letter No. 158 (John E. Shockey, Chief Counsel),
The Allowance Clause

Any association may . . . charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be greater, and no more (the italicized wording was added in 1933).

The Exception Clause

except that where by the laws of any State a different rate is limited for banks [of issue] organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter (the bracketed wording was deleted in 1933).

These terms will be utilized as the context requires for reference to the first sentence of either the current version of section 85 or the original language in section 30.

B. Tiffany and the Legislative History of Section 30

Less than ten years after the National Bank Act became law, the Supreme Court was called upon to interpret both the Allowance and Exception Clauses in Tiffany v. National Bank. At issue in Tiffany was the application of Missouri usury law which permitted non-bank lenders to extend credit at ten percent, while limiting state banks to eight percent. The defendant national bank had charged nine percent, which was alleged to be usurious.

In affirming a judgment for the bank, the Tiffany Court construed the Allowance Clause broadly and held that "the rate allowed by the laws of the state" referred not to the rate allowed for state banks, but

30. See note 24 supra.
31. 85 U.S. (18 Wall.) 409 (1873).
32. Id. at 411.
33. Id. at 410.
to the rate allowed for lenders in general.\textsuperscript{34} In interpreting the Exception Clause, the Court acknowledged that if read literally, that clause would apply whenever a "different rate" (a rate higher or lower) was permitted for state banks.\textsuperscript{35} The \textit{Tiffany} Court nevertheless held that the Exception Clause applied only where the rate for state banks was higher than that allowed for lenders in general.\textsuperscript{36} The Court noted that the phrase "and no more" modified the Allowance Clause only, and that the Exception Clause was strictly an enabling provision, not intended to restrict national banks to a rate lower than was generally permitted.\textsuperscript{37} Under \textit{Tiffany}, the Exception Clause operates only where state banks are entitled to charge a special rate that is unavailable to lenders generally.\textsuperscript{38}

The holding in \textit{Tiffany} seems to comport with section 30's limited legislative history.\textsuperscript{39} The record of substantive discussion and debate indicates that the Senate declined to adopt a version of the statute that would have placed national and state banks "on an equal footing" by restricting national banks to the rate permitted for state banks.\textsuperscript{40} Senator Sherman, who ultimately drafted the final version of section 30,\textsuperscript{41} clearly

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\textsuperscript{34} \textit{Id.} at 411. The court used the terms "natural persons" and "lenders generally" interchangeably in recognition of the prevalence during that period of individuals operating as private bankers. See \textit{id.} at 411-12; F. \textsc{Redlich}, \textsc{The Molding of American Banking} 67-70 (1951).
\textsuperscript{35} 85 U.S. (18 Wall.) at 411-12.
\textsuperscript{36} \textit{Id.} The Court observed that the statute "speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to state banks shall be the maximum rate allowed to National banks." \textit{Id.} at 412.
\textsuperscript{37} \textit{Id.} This construction has been criticized for effectively substituting "higher" for "different" in the Exception Clause. See Comment, \textsc{National and State Bank Interest Rates Under the National Bank Act: Preference or Parity?}, 58 Iowa L. Rev. 1250, 1259 (1973). See also First Nat'l Bank v. Nowlin, 509 F.2d 872, 879-80 n.18 (8th Cir. 1975). On the other hand, as noted in the \textit{Tiffany} opinion itself, the alternative construction, under which "different" would mean either higher or lower, would read into the Exception Clause the phrase "and no more," which does not appear there at all. \textit{Tiffany} v. National Bank, 85 U.S. (18 Wall.) at 412.
\textsuperscript{38} See 85 U.S. (18 Wall.) at 413.
\textsuperscript{39} \textit{See generally} \textsc{Cong. Globe, supra} note 22, at 1254, 1257, 1352-54, 1373-76, 1411-12, 1431, 1451-53, 1531, 1680-81, 1697, 1771, 1871, 2123-27, 2145, 2206-07, 2450, and 2664 (1864). For the most informative substantive discussion, see \textit{id.} at 2123-27 (Senate debates). For a thoughtful but strained analysis of the Senate debates which suggests a conclusion contrary to \textit{Tiffany}, see Comment, \textit{supra} note 37, at 1250-60.
\textsuperscript{40} See \textsc{Cong. Globe, supra} note 22, at 2126 (statement of Sen. Doolittle). An amendment to this effect was proposed by Senator Henderson, but was withdrawn before the results of a roll call vote on its adoption were announced. \textit{See id.} This development in the Senate has been interpreted by the Court of Appeals for the Sixth Circuit as a defeat for the concept of competitive equality between national and state banks. \textit{See Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.}, 464 F.2d 855, 862 (6th Cir. 1972).
\textsuperscript{41} See \textsc{Cong. Globe, supra} note 22, at 2145.
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indicated that he would have supported the approach taken in Tiffany. The Senator stated that “[m]y own preference . . . is to establish a uniform rate of interest by our law; but having been overruled on that point, I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the state by its laws.” 42 Unfortunately, the final version of section 30, in which the Exception Clause appeared for the first time, was introduced following an apparent off-the-record Senate conference, and it is unclear to what extent, if at all, Senator Sherman's views may have been compromised.43 No explanation of the Exception Clause was ever provided.44

Perhaps in recognition of the fact that the legislative history offered only an attenuated basis for interpretation of the Exception Clause, the Tiffany opinion focused on an assessment of the statute's overall purpose:

It was expected that [national banks] would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the state impossible. A rate of interest might be prescribed so low that banking could not be carried on except at a certain loss.45

42. Id. at 2126 (statement of Sen. Sherman) (emphasis added). The debate between the pro-national proponents (Sens. Sherman, Fessenden, and Trumbull) and the pro-state faction (Sens. Grimes, Henderson, and Doolittle) was eventually narrowed to the question of whether “allowed” or “established” would become the operative word in what is now the Allowance Clause. Id. at 2127-28. It was apparently understood that use of the word “established” would have urged a construction of the Allowance Clause under which national banks were restricted to the “legal rate” of interest as in the Currency Act of 1863. See id. at 2125 (statement of Sen. Grimes). For a discussion of the Currency Act of 1863, see note 21 and accompanying text supra.

43. See Cong. Globe, supra note 22, at 2127, 2145. If the Tiffany Court's interpretation is correct, then it follows that Senator Sherman was able to sustain his “preference” without any compromise, or at least without compromise discernible from the final version of §30. See text accompanying note 42 supra. For an argument that total victory for Senator Sherman and his pro-national supporters would have been improbable, and that the interpretation adopted in Tiffany should therefore be rejected, see Comment, supra note 37, at 1256-58.

44. See Cong. Globe, supra note 22, at 2127, 2145.

This analysis has been criticized for suggesting that state legislatures would irrationally prescribe interest rate ceilings for bank loans that were so low as to drive out of operation all banking institutions in the state. But even so characterized, the Court's hypothesis does not seem outlandish in light of the historical perspective from which it was written. In his opinion in Tiffany, Justice Strong observed that "National banks have been National favorites" and that "much has been done to insure their taking the place of State banks . . . [t]he latter hav[ing] been substantially taxed out of existence." By 1873, when Tiffany was decided, conversion from state to national charters had led to a precipitous decline in the vitality of state banking. A prohibitive tax had caused the virtual disappearance from circulation of bank notes issued by state-chartered institutions, and national banks outnumbered state banks by more than seven to one. When faced with the prospective "nationalization" of their locally chartered banking institutions, it is not inconceivable that states would enact retaliatory usury laws so that profitable loans could be made only by non-bank lenders.

**C. The Post-Tiffany Period**

Soon after Tiffany was decided, the Supreme Court's grim prognosis for state-chartered banking began to prove dramatically incorrect. As a result of the unanticipated growth in the popularity of demand de-

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46. See Comment, supra note 37, at 1259. The author observes that "[s]etting interest rates at a level calculated to drive all banks out of business, however, would seem to be a particularly unavailing means for state legislatures to choose as a way of favoring their state banks." Id. (emphasis in original).

47. See notes 48-52 and accompanying text infra.

48. 85 U.S. (18 Wall.) at 413. In referring to the favored status of national banks, Justice Strong noted that national banks were established to provide a uniform currency and create a market for loans to the federal government. Id. This reference to "national favorites" has been erroneously associated with the most favored lender doctrine. See notes 110-12 and accompanying text infra.

49. T. ANDERSON, FEDERAL AND STATE CONTROL OF BANKING 75-78 (1934). See also Hackley, supra note 20, at 573. The author notes that the number of state banks dropped from 1,492 in 1862 to 247 in 1868. Id.

50. Act of March 3, 1865, ch. 78, § 6, 13 Stat. 484. The ten percent tax had been increased from two percent so as to more effectively eliminate the issuance of circulating bank notes by state-chartered banks. H. PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS 21 (1951). A constitutional challenge to a subsequent reenactment of the tax was unsuccessful. See Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (constitutionality of Act of July 13, 1866, ch. 184, § 9, 14 Stat. 146, upheld as valid exercise of congressional taxation power).

51. G. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION: A HISTORICAL APPROACH 67 (1968). Tiffany was decided at the approximate height of this trend. See notes 53-56 and accompanying text infra.

52. See notes 45-51 and accompanying text supra.

53. See note 48 and accompanying text supra.
posits, most banks found themselves able to fund loans and investments without relying on the issuance of bank notes. The rate of conversions to national charters dropped sharply, and state-chartered banking became revitalized. By 1895 the number of state banks had increased ten-fold and was running slightly ahead of the total for national banks. But despite the somewhat lowered profile of the "national favorites," there was never any direct challenge to the holding in Tiffany that national banks could charge the highest rate available to lenders in general or, if higher, the rate permitted for state banks of issue.

A few years after Tiffany, an issue arose in the lower federal courts as to how the Exception Clause should be construed in the context of the banking scheme in Pennsylvania. In First National Bank v. Duncan, it was noted that certain Pennsylvania banks had been specially authorized to charge interest at any rate agreed to by the borrower. This special authority, however, was granted by the banks' charters rather than by any statute of general application. The defendant borrowers argued that since there was no general law which permitted state-chartered banks of issue to charge more than the rate available to lenders in general, national banks should not be permitted to charge the higher rates.

54. See Hackley, supra note 20, at 573.
57. See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313 (1978). In Marquette, the Supreme Court cited the Tiffany opinion: "§ 30 and its descendants have been interpreted for over a century to give advantages to national banks over their State competitors." Id. at 314, quoting 85 U.S. (18 Wall.) at 415. For a further discussion of Marquette, see notes 178-87 and accompanying text infra. Nearly sixty years prior to Marquette, three dissenting Justices of the Supreme Court had adopted the precise interpretation of § 30 that was expressly rejected in Tiffany. See Evans v. National Bank, 251 U.S. 108, 117-18 (1919) (Pitney, J., dissenting). In his dissenting opinion, in which he was joined by Justices Brandeis and Clarke, Justice Pitney stated:

[T]he purpose of Congress was to place national banks upon a precise equality in this respect with banks of issue organized under state laws, and that where local law places a higher or lower limit upon such banks of issue than upon other lenders of money the same limit should be imposed upon national banks.

Id. (Pitney, J., dissenting) (emphasis added). For a discussion of the holding in Tiffany to the contrary, see notes 31-52 and accompanying text supra. It should be noted that the quotation from Evans would have been dictum even if it had appeared in the majority opinion, since no issue had been raised as to whether the usury ceiling in question applied solely to state banks or to lenders in general. See Evans, supra, at 112. There was an uncontroverted allegation that the loans involved, if usurious under state law, would have been usurious if made by either an individual or a state bank. Id.

58. 9 F. Cas. 91 (C.C.W.D. Pa. 1878) (No. 4,804).
59. Id. at 92.
60. Id.
to invoke the Exception Clause in Pennsylvania to charge any rate agreed to by their borrowers. Justice Strong, sitting as a Circuit Justice, quoted extensively from his opinion in Tiffany, and flatly rejected the defendants' argument by explicating the Exception Clause as follows:

[The Exception Clause] declares that where, by the laws of any state, a rate of interest different from the general rate shall be limited, or allowed, for state banks of issue, national banks shall be allowed the same. It says not a word of allowance to the banks by general law. Charters offered by special law, granting special privileges to those who accept the offer, are as clearly laws of the state as are the most general enactments.

Less than five months after Duncan was decided, the Supreme Court of Pennsylvania was presented with a factually similar case in First National Bank v. Gruber. Although the court unanimously decided the narrow evidentiary issue before it, Chief Justice Agnew wrote a lengthy and strongly worded concurring opinion in which he disagreed with the Duncan court's liberal application of the Exception Clause. He criticized Duncan on technical grounds, and because it accentuated unnecessarily the competitive advantage enjoyed by national banks under Tiffany. It should be noted, however, that Chief Justice Agnew stopped short of taking issue with Tiffany's interpretation of section 30.

61. Id.
62. Id. at 93. Under Justice Strong's characterization, although the banking charters themselves were special charters, they were issued upon acceptance of the conditions of a general offer. Id. Justice Strong noted that if the borrowers' argument were accepted, states would be able to confer powers upon their own banks that were unavailable to national banks. Id.
63. 87 Pa. 468 (1878).
64. Id. at 468-70. The court held that it was not bound to take judicial notice of the existence of specially chartered banks unless their charters were produced and proven. Id. at 470.
65. Id. at 470-76 (Agnew, C.J., concurring).
66. Id. at 474 (Agnew, C.J., concurring). The Chief Justice noted that the state banks in question were not within the Exception Clause because, having been authorized to do business under special charter, they were not organized under the "laws" of the state. Id. He also noted that a bank permitted to charge any rate agreed to by the borrower was not subject to a rate that was "limited" for state banks. Id.
67. Id. at 475-76 (Agnew, C.J., concurring). The Chief Justice commented:
Congress did not intend to place [national banks] on a vantage ground over the state banks. To say that all national banks in a state can adopt an exceptional rate allowed to a single bank in a state, or even two or three, is to place them above the state banks as a class . . . .
Id. at 476.
68. See generally id. at 470-76.
In 1933, the Allowance Clause was amended to incorporate a federal alternative rate of one percent in excess of the discount rate. The purpose of this additional provision was to preserve the economic viability of the discounting process during periods when the federal reserve discount rate approximated or exceeded the state usury ceiling otherwise applicable under section 85. Concurrently with the addition of the federal rate in the Allowance Clause, the Exception Clause was amended to delete the words “of issue.” While no explanation for this deletion appears in the legislative history of the Banking Act of 1933, it seems likely that it was merely a cosmetic change in recognition of the fact that state banks no longer issued circulating bank notes. Nevertheless, the meaning of the statute was undeniably changed. While under the prior version of the Exception Clause, courts had little difficulty discerning what was intended by the term “banks of issue,” the more general reference to “banks” left room for interpretation.

An illustration of this problem appears in the federal district court opinion in United States v. Palmer. The court took the position that the amended Exception Clause did not necessarily apply to any institution that was called a bank. In concluding that a national bank

69. See Act of June 16, 1933, supra note 24.

70. See note 4 and accompanying text supra. The process by which a member bank “discounts” its customers’ notes at the Federal Reserve Bank is the functional equivalent of pledging the notes as collateral for a loan or advance which bears interest at the Federal Reserve discount rate. See id.; 12 C.F.R. § 201.4 (1981).

71. See Operation of the National and Federal Reserve Banking Systems: Hearings BEF. a Subcomm. of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess., 507-08 (1931) (statement of Sen. Glass). If the Federal Reserve discount rate were higher than the maximum lawful rate of interest on the underlying customer notes, utilization of the discounting process would necessarily result in an incremental loss to the member bank. See id.; note 70 supra.


73. See S. REP. NO. 77, 73d Cong., 1st Sess. 17 (1933); H.R. REP. NO. 150, 73d Cong., 1st Sess. 4 (1933).

74. See note 50 and accompanying text supra.

75. See notes 58-68 and accompanying text supra.

76. 28 F. Supp. 936 (S.D.N.Y. 1939). The United States, as assignee through the Federal Housing Administrator, argued that a note taken by a national bank was not usurious under the Exception Clause. Id. at 937-38.

77. Id. The court made no reference to the original version of the Exception Clause. Id.
located in New York was not entitled to charge the same rate of interest as an "industrial bank," the court determined that the Exception Clause applied only to banks and trust companies whose powers were derived from the state's general banking laws. The court's reasoning was that industrial banks were not "banks" in either the "common acceptance of the term" or within the meaning of the Exception Clause.

After noting that Tiffany referred specifically to interest rate parity between national banks and "similar state institutions," the Palmer court opined that commercial and industrial banks were not "similar.

E. The Comptroller's Interpretive Rulings

In the 1948 edition of its Digest of Legal Opinions, the Office of the Comptroller of the Currency issued an interpretation of section 85 which squarely rejects the Palmer court's construction of the Exception Clause. In paragraph 9510 of the Digest, the Comptroller stated that national banks were entitled to the same interest rate privileges as "any competing state banking institution," observing that both commercial and industrial banks were "banking institutions."

In 1960, the lan-

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78. An industrial bank or morris plan company is a privately owned organization which makes personal loans to wage earners and obtains financing from the public in the form of interest-bearing investment certificates. See BLACK'S LAW DICTIONARY 910 (rev. 5th ed. 1979); 1 CONSUMER CREDIT GUIDE (CCH) 560 (Mar. 3, 1982).

79. 28 F. Supp. at 938.

80. Id. at 937-38.

81. Id. at 938, quoting Tiffany v. Nat'l Bank, 85 U.S. (18 Wall.) 409, 412-13 (1873). For the text of the pertinent portion of the Tiffany opinion, see text accompanying note 45 supra.


83. Id. at ¶ 9510. For a discussion of Palmer, see notes 76-81 and accompanying text supra.

84. Comptroller of the Currency, Digest of Legal Opinions at ¶ 9510 (1948) (emphasis in original). The full text is as follows:

9510. Charging interest at highest rates permitted to competing institutions

R.S. 5197 (12 U.S.C. 85) limits the interest which a national bank may charge to "the rate allowed by the laws of the State ... where the bank is located ... except that where by the laws of any State a different rate is limited for banks organized under State laws," national banks located in that State may also charge such higher rate.

In enacting R.S. 5197, Congress intended that, with respect to interest charges, national banks shall have the same powers as any competing State banking institution. State commercial banks and industrial banks both constitute competing elements among banking institutions. Therefore, national banks are empowered to charge interest at the maximum rate permitted by State law to either State commercial banks or industrial banks. Where State law permits a higher-than-ordinary interest rate on specified classes of loans (for example, small loans), a national bank which makes loans at such special rate is subject to all limitations of substance with respect to
guage of paragraph 9510 was amended to accord interest rate parity with any "competing lending institution." 85 In 1966, the opinion was reworded to permit charging interest at the highest rate allowed to any competing state-chartered or licensed lending institution, whether or not the national bank was licensed under state law. 86 The 1966 text was promulgated as an interpretive ruling in 1971 87 and has remained unchanged since its codification in 1972. 88 The Comptroller's ruling now reads as follows:

A national bank may charge interest at the maximum rate permitted by State law to any competing State chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national size, maturity of the loan, and the like, which are prescribed by the State statute authorizing the higher rate.

Id. (emphasis in original). The opinion implicitly reasons that if commercial and industrial banks compete with each other in making similar types of loans, they should be given the same status for purposes of the Exception Clause. See id.

85. See Office of the Comptroller of the Currency, 2 Comptroller's Interpretive Rulings: Changes in Text, 1948-77 [hereinafter cited as Changes in Text] ¶¶ 7310, 9510 (undated publication; no uniform pagination). The chronology of changes through 1965 is as follows:

(a) When the Digest was reprinted in 1960, the word "banking," which appears twice in the 1948 version of ¶ 9510, was changed to "lending." Id. at 9510. For the text of the 1948 version of ¶ 9510, see note 84 supra.

(b) In June, 1963, ¶ 9510 was deleted and replaced by ¶ 7310, which carried the identical title and read as follows:

A National Bank may charge interest at the maximum rate permitted by applicable state law to any competing state lending institution, including industrial banks. Where state law permits a higher than ordinary interest rate on specified classes of loans (for example, small loans), a National Bank which makes loans at such special rate is subject to all the limitations of substance with respect to such factors as size, maturity, and the like, prescribed by the state statute authorizing the higher rate.

Id. at ¶ 7310.

(c) In June, 1964, reference to industrial banks was eliminated and the "all limitations of substance" wording was replaced by "only to such limitations relating to the class of loans as are material to the determination of the rate of interest." Id. See also United States Comptroller of the Currency, Manual for National Banks, ch. VI, ¶ 7310 (1964).

86. Changes in Text, supra note 85, at ¶ 7310. For the text of the 1966 version as currently codified, see text accompanying note 89 infra.


bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.80

Within two years of its promulgation, the Comptroller's ruling successfully withstood challenges to its validity in both federal and state courts.90 In Northway Lanes v. Hackley Union National Bank and Trust Co.,91 the Sixth Circuit held that national banks in Michigan could charge their borrowers for closing costs on mortgage loans, notwithstanding the fact that the right to assess such costs was exclusively reserved to savings and loan associations under applicable Michigan statutes.82 The court deferred to the reasonableness of the Comptroller's ruling and the legislative history of section 85.83

In Commissioner of Small Loans v. First National Bank,94 the Court of Appeals of Maryland held that national banks which made cash advances to their credit card customers could charge interest at the advantageous rate provided in the state's small loan act, even though all banks were statutorily barred from becoming licensees under the act.95 The court observed that since Congress had not amended section 85 in response to the Comptroller's ruling, congressional acquiescence therein

89. 12 C.F.R. § 7.7310(a) (1982). The substance of the 1971 ruling, insofar as it relates to the effect of state licensing statutes, was apparently foreshadowed as early as 1936. See Interpretive Letter from J.F.T. O'Connor, Comptroller of the Currency (May 2, 1936). In that letter the Comptroller cautiously opined that national banks located in Iowa could charge rates authorized by the state's small loan statute, notwithstanding the statute's prohibition against licensing of banks. Id. For a discussion of the importance of the licensing aspect of the Comptroller's ruling, see notes 168-77 and accompanying text infra. Twenty years after Mr. O'Connor's interpretive letter, an unequivocal opinion to the same effect was issued. See Interpretive Letter from W.M. Taylor, Deputy Comptroller of the Currency (April 11, 1956). See also Interpretive Letter from James J. Saxon, Comptroller of the Currency (Sept. 20, 1965) noted in 44 TEX. L. REV. 547 (1966).

90. See notes 91-97 and accompanying text infra.

91. 464 F.2d 855 (6th Cir. 1972). In Northway Lanes, the United States filed a brief as amicus curiae in support of the Comptroller's ruling and its application in that case. Id. at 855-56.

92. Id. at 863. The court also held that under Evans v. National Bank, a national bank's right to take interest in advance arises under federal law and is therefore independent of state-imposed restrictions. 464 F.2d at 860-61, citing Evans v. National Bank, 251 U.S. 108 (1919). This aspect of the court's holding has generally been criticized. See, e.g., First Nat'l Bank v. Nowlin, 509 F.2d 872, 878-79 (8th Cir. 1975). See also Herstein, Michigan Usury Law, 27 WAYNE L. REV. 435, 478-86 (1981).

93. 464 F.2d at 864. The Sixth Circuit noted that a reasonable interpretation of a statute by the agency charged with its administration is entitled to judicial deference. Id., citing Udall v. Tallman, 380 U.S. 1, 7 (1965).


95. Id. at 315, 300 A.2d at 690.
could be inferred. The Commissioner opinion also noted that national banks have long been considered inherently immune from state interference with their functions as "federal instrumentalities." Several cases decided after Northway Lanes have focused on the application of the most favored lender doctrine after presuming or confirming the validity of the Comptroller's ruling. Most of the recent controversies have arisen in the context of credit card transactions and have centered on construction of the phrases "a specified class of loans" and "the provisions of state law . . . that are material to the determination of the interest rate," as those phrases appear in the Comptroller's ruling.

III. ANALYSIS OF THE COMPTROLLER'S RULING

A. Consistency With Tiffany's Underlying Policy

The Comptroller's ruling has been criticized on the grounds that it interferes with the states' power to establish their own usury ceilings and that it results in a competitive advantage for national banks over their state-chartered competitors. While these observations are ana-

96. Id. at 315, 300 A.2d at 690-91, citing Inland Waterways Corp. v. Young, 309 U.S. 517, 524-25 (1940); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84 (1932).

97. 268 Md. at 317, 300 A.2d at 691-92. The Maryland court quoted the Supreme Court as follows:

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and . . . frustrates the purpose of the national legislation . . . .


100. See Comment, supra note 37, at 1267. In Commissioner of Small Loans v. First Nat'l Bank, 268 Md. 305, 500 A.2d 685 (1973), it was argued that:
lytically correct, it should be recognized that the ruling leads to such results only where a state has statutorily created its own privileged class of lender in the first instance. For example, in the unique situation which exists in Arkansas—where all lenders are limited by that state's constitution to an interest rate ceiling of ten percent—there are no "favored lenders" at all, and the Comptroller's ruling will not permit national banks to charge more than ten percent. The ruling is similarly inoperative under any statutory scheme in which the usury laws are functionally classified, i.e. differentiated solely with respect to their characteristics as loans and without considering the identity or legal status of the lender. It is only where the state has itself established a special class of "favored" lender that the Comptroller's ruling will peremptorily allow a national bank to share the privilege and obtain an interest rate advantage that may be unavailable to certain competitors. And where the federal advantage does become a factor, the result can be justified on the basis of Tiffany's caveat that national banks must be protected against unfriendly state legislation.

101. See, e.g., United Mo. Bank v. Danforth, 394 F. Supp. 774, 783-84 (W.D. Mo. 1975). In Danforth, it was held that Missouri's credit sales act, which mandated a relatively low interest rate for all retail credit sales, would have applied to national banks making such extensions of credit, were it not for the fact that the state's small loan companies were definitionally excluded from coverage under the statute. Id. at 784. Because of the single exclusion from the restrictive rate ceiling of the credit sales act, a "favored" lender was created, and national banks were therefore entitled to avail themselves of the exclusion as well. Id. at 784-85.


103. See note 101 and accompanying text supra. In Danforth, had there been no exemption under the credit sales act for small loan companies, no lender would have been favored with respect to the "specified class of loan" (retail credit sales) covered by that statute. See id.; 12 C.F.R. § 7.7310(a) (1982). Courts have not always recognized this aspect of the Comptroller's ruling. See Equitable Trust Co. v. Sachs, A-60063/120-1/Fol. 713 at 37-38 (Cir. Ct. of Baltimore City, Md., Jan. 28, 1981), appeal argued, No. 128, Sept. Term, 1981 (Ct. App. Md. May 6, 1982).

104. See notes 101-03 and accompanying text supra.

105. See note 45 and accompanying text supra. Were it not for the most favored lender doctrine, an extremely "unfriendly" state could theoretically create a special class of non-bank licensees, and then enact a statute to reserve exclusively for such licensees the authority to make profitable loans in any given category. See id. This entitlement to protection against adverse state legislation has traditionally been accorded national banks on the basis of their status as "federal instrumentalities" and is grounded in the supremacy clause. See
B. Technical Inconsistency With the Statutory Language

Some courts have overstated the relationship between Tiffany and the Comptroller's ruling by suggesting that the most favored lender doctrine is directly attributable to Tiffany's construction of section 30. More than a century after Tiffany, in First National Bank v. Nowlin, the district court stated: "As this court construes Tiffany, . . . the purpose of section 85 is to put a national bank as far as interest is concerned in as good a position as the most favored lender operating in the state where the bank is located." This quotation is particularly significant because it is the first judicial usage of the "most favored lender" terminology and because the Comptroller's ruling, which had been promulgated three years earlier, was not mentioned in the opinion.

A few years after Nowlin, the Eighth Circuit stated even more directly that "[t]his 'most favored lender' doctrine was recognized by the Supreme Court in [Tiffany]." And in the Marquette opinion in 1978, the Supreme Court itself noted in dictum that "[t]he 'most favored lender' status for national banks under Tiffany has since been incorporated into the regulations of the Comptroller of the Currency."

Rohner, Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I, 29 Cath. U.L. Rev. 1, 32-34 (1979), citing U.S. Const. art. VI, cl. 2; Wille, State Banking: A Study in Dual Regulation, 31 Law & Contemp. Pros. 733, 742-43 (1966), citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). The "federal instrumentality" doctrine has been held to exempt national banks from state law which conflicts with the provisions of a federal statute, frustrates its purposes, or impairs the bank's function as an instrumentality of the federal government. Franklin Nat'l Bank v. New York, 347 U.S. 373, 375-78 (1954); Farmer's & Mechanic's Nat'l Bank v. Dearing, 91 U.S. 29, 33-34 (1875). See also note 97 and accompanying text supra. In the context of our modern banking system, judicial application of this doctrine to national banks exclusively has been cogently criticized. See note 218 and accompanying text infra.

106. See notes 107-25 and accompanying text infra.

107. 374 F. Supp. 1037 (E.D. Ark. 1974), aff'd, 509 F.2d 872 (8th Cir. 1975). The controversy in Nowlin was resolved against a national bank that had attempted to apply a nominally lawful interest rate on a consumer discount basis and thereby obtain an effective yield that would be usurious under state law. Id.

108. Id. at 1041.

109. Id. at 1037-41. No opinion predating Judge Henley's opinion in Nowlin utilizes the phrase "most favored lender." See cases cited at note 98 supra. See also Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972); Commissioner of Small Loans v. First Nat'l Bank, 268 Md. 305, 300 A.2d 685 (1973). For a discussion of Northway Lanes and Commissioner, see notes 90-97 and accompanying text supra.


It is submitted, however, that *Tiffany's* commentary on section 30 cannot support the substance of the most favored lender doctrine without the essential link provided by the Comptroller's ruling.112 There is simply no language in *Tiffany* or in any judicial opinion prior to *Northway Lanes* which suggests that national banks may charge the *highest* rate available to *any* competing lender.113 *Tiffany* unmistakably describes the Allowance Clause as permitting interest at the rate allowed for "lenders generally." 114 This is a reference to *all* lenders; it is not equivalent to the maximum rate allowed to *any* category of lender.115 Only in reference to the Exception Clause does *Tiffany* discuss charging interest at a rate that may be higher than the rate allowed for lenders in general, and that is where a higher rate is provided for state-chartered banks.116

Moreover, there is nothing in the legislative history of section 30 which can reasonably be viewed as incorporating the most favored lender doctrine into *Tiffany's* construction of the statute.117 During the Senate debates, there was an unsuccessful attempt to limit the Allowance Clause so as to permit no rate in excess of the state's "legal rate"—the maximum rate available in the absence of special statute.118 It was noted that in some states an exemption from the legal rate was available to *all* lenders where the interest rate was expressed in a written contract, and it was ultimately decided that this exemption should be available to national

112. For a discussion of the *Tiffany* opinion, see notes 31-38 & 45-52 and accompanying text *supra*. In *Marquette*, the Court was attempting to draw a linguistic connection between the "National favorites" quotation from *Tiffany* and the most favored lender doctrine, ostensibly to illustrate that national banks are still considered national favorites by the federal agency primarily responsible for their supervision. See 439 U.S. 299, 314 & n.26 (1978). The verbal nexus is specious, because the most favored lender doctrine refers not to national banks as favorites under federal law, but to the favored status of competing lenders under state law. See notes 82-99 and accompanying text *supra*.

113. See notes 31-81 and accompanying text *supra*. Commentators have generally avoided direct attribution of the most favored lender doctrine to *Tiffany*. See Arnold & Rohner, *supra* note 99, at 6 & n.14 (most favored lender terminology "grew from language in *Tiffany*"); Burke & Kaplinsky, *supra* note 99, at 1096 ("*Tiffany* left unanswered" the question of how §85 applies to special classes of non-bank lenders).


115. See notes 34-38 and accompanying text *supra*.

116. See notes 45-52 and accompanying text *supra*. In discussing the Exception Clause, the Court stated that national banks "were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions." *Tiffany* v. National Bank, 85 U.S. (18 Wall.) 409, 412 (1873).

117. See notes 118-20 and accompanying text *infra*.

banks under the Allowance Clause. There is no mention whatever of an interest rate that might be available to any special category of lenders, other than as delineated in the Exception Clause.

The opinion in Commissioner addressed the disparity between Tiffany and the Comptroller's ruling by making the following observation:

"We have carefully considered, but find no merit in appellants' argument that the provisions of § 85 must be construed so as to limit national banks to charging rates of interest allowed, in the language of Tiffany, to "state banks" or "lenders generally." This argument, based on their restricted reading of Tiffany, overlooks the factual context of that case which made "state banks" and "lenders generally" the only categories considered.

The discrepancy is more fundamental than the quotation from Commissioner indicates. Not only were "state banks" and "lenders generally" the only categories considered in Tiffany, they were the only categories considered when section 30 was drafted and the only categories considered in the state laws to which the Allowance Clause referred. The Commissioner court thus implicitly theorized that if special interest rate privileges had been accorded certain categories of non-bank lenders at the time Tiffany was decided, then Tiffany would have expressly embraced the most favored lender doctrine. The theory may well be a reasonable one, but it is based on extrapolation of Tiffany's underlying policy rather than interpretation of statutory language.

119. Id. Senator Sherman spoke of granting national banks the same interest rate privileges as "other associations and individuals." CONG. GLOBE, supra note 22, at 2126 (emphasis added). See also Marquette Nat'l Bank v. First of Omaha Serv. Corp., where the Court referred to the Allowance Clause as permitting the rate allowed "for lenders generally." 439 U.S. 299, 308 n.19 (1978).

120. See notes 45-52 and accompanying text supra.


122. See notes 118-20 and accompanying text supra.


124. See note 121 and accompanying text supra. It has been noted that at that time, the type of finance company which tends to find itself a "favored lender" under modern state laws simply did not exist. See G. Robertson, supra note 51, at 144-46.

125. See note 45 and accompanying text supra. The court in Commissioner viewed Maryland's exclusive licensing statute as the kind of "unfriendly State legislation" that Tiffany saw as a threat to national banks. See id.; notes 121-24 and accompanying text supra. In Commissioner, however, the competitive advantage had been granted to a particular category of non-bank lenders, rather than to non-bank lenders in general as in Tiffany. See notes 34-44, 112-24 and accompanying text supra.
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The fact that the Comptroller's ruling is only partly grounded in the words of the statute probably explains the lack of consensus as to which clause in section 85 it was intended to interpret. In the 1948 version of paragraph 9510, it appears that the opinion was intended to interpret the Exception Clause by construing the term "bank" to include both commercial and industrial banks.126 But as the Comptroller's definition of a "competing institution" became increasingly more inclusive, the ruling could no longer be associated solely with the Exception Clause.127 In Northway Lanes, after the current version of the ruling had been formulated, the Comptroller successfully argued in a brief amicus curiae that the ruling was an interpretation of the Allowance Clause.128 However, five years later in Fisher v. First National

126. See notes 84-85 and accompanying text supra. While both the 1948 and 1960 versions of ¶ 9510 quote both the Allowance and Exception Clauses, they discuss only the Exception Clause. See Changes in Text, supra note 85, at ¶ 9510. See also Interpretive Letter from A.J. Mulroney, Deputy Comptroller of the Currency (Feb. 7, 1941) ("the phrase 'banks organized under state laws' [in § 85] includes both commercial and industrial banks"). For a description of an industrial bank, see note 78 supra.

The conclusion that ¶ 9510 was intended to interpret the Exception Clause exclusively is fortified by a discussion of the Allowance Clause which appears in another paragraph of the Digest. See Comptroller of the Currency, Digest of Legal Opinions ¶ 9520 (1948). This opinion entitled "Charging additional fee for credit reports or investigation of borrower," contains the following paragraph:

Under [§ 85], a national bank is permitted to charge the interest rate allowed by the laws of the state where it is located. Many states have statutes which permit an increased rate of interest on such loans, but if they do, they are subject to the limitations of the small loan law with respect to fees or other additional charges.

Id. This appears to refer only to statutes which permit an increased rate on small loans made by any lender, i.e. by "lenders generally," since it does not invoke a most favored lender concept by either its language or its context. See id. Furthermore, if the Comptroller's interpretation of the Allowance Clause had been considered integral to the most favored lender doctrine, the foregoing quotation would have been included in ¶ 9510. See Changes in Text, supra note 85, at ¶ 9510; note 84 and accompanying text supra.

127. For a chronology of the changes in the Comptroller's ruling, see notes 82-89 and accompanying text supra.

128. See Brief for the United States as Amicus Curiae at 20, Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d at 862. The court adopted the Comptroller's argument by concluding that the Allowance Clause was not "limited to a state's general usury rate, but was meant to include any exceptions to that rate established for special transactions or special classes of lenders." For an argument that the reference to "special transactions" is within Tiffany's construction of the Allowance Clause but the reference to "special classes of lenders" is not, see notes 112-25 and accompanying text supra. For a general discussion of the controversy in Northway Lanes, see notes 91-99 and accompanying text supra.

The notion that the most favored lender doctrine is an interpretation of the Allowance Clause specifically may be partly attributable to the language of the following unofficial headnote which precedes the district court opinion in First Nat'l Bank v. Nowlin:
Bank of Chicago, the Seventh Circuit noted that “[t]he courts have interpreted the allowance clause and the exception [clause] together to permit national banking associations to charge the highest rate charged by any person or entity in the state under like conditions.”

Apart from its failure to attract broad subscription in the courts, the proposition that the most favored lender concept is embodied within the Allowance Clause cannot withstand examination under ordinary principles of statutory construction. If the Allowance Clause is construed to fully contain an authorization to charge the highest rate permitted to any competing lender, then the Exception Clause, which permits the rate allowed for state banks (a special class of competing lender) is superfluous. It is generally recognized, however, that a

Purpose of provision of National Bank Act authorizing bank to receive interest at rate allowed by laws of state where bank is located is to put a national bank, as far as interest is concerned in as good a position as the most favored lender operating in the state in which the bank is located.


129. 538 F.2d 1284 (7th Cir. 1976).
130. Id. at 1290 (citations omitted).
131. See notes 132-33 and accompanying text infra.
132. See note 128 and accompanying text supra. The Exception Clause would be redundant with the Allowance Clause unless, during the period when § 80 was enacted and Tiffany was decided, a bank could have been “located” (under the Allowance Clause) in one jurisdiction, while being “organized or existing” (under the Exception Clause) in another. For the text of the two clauses, see text accompanying notes 27 & 29 supra.

The Supreme Court has concluded that Congress, in enacting § 30, proceeded on the assumption that a national bank would be located where it was organized. Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 310 (1978), citing Cong. Globe, supra note 22, at 2123-27. In dicta, three Circuit Courts of Appeals have attempted to distinguish “located” from “existing” by suggesting that a national bank can be “existing” under the Exception Clause in any state in which it is extending credit. See FDIC v. Lattimore Land Corp., 656 F.2d 139, 149-50 n.18 (5th Cir. 1981); Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255, 257-58 (8th Cir. 1977); Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284, 1290-91 & nn.11 & 12 (7th Cir. 1976). The dicta are clearly erroneous, because in order to come within the ambit of the Exception Clause, the bank must be “organized or existing . . . under this chapter.” See note 29 and accompanying text supra. This obvious reference to “existence” in a strictly statutory sense was apparently overlooked by the Seventh Circuit, which cited the ordinary meaning of the word. See Fisher v. First Nat'l Bank of Chicago, 538 F.2d at 1291 n.12. The subsequent Fifth and Eighth Circuit opinions simply state their agreement with the Seventh Circuit and would
statute should be construed so as to give effect to each clause, and not in such a way as to render any of its provisions meaningless or insignificant.133

In summary, it may be said that the relationship between the Comptroller’s ruling and the language and legislative history of section 85 is an attenuated one.134 It seems clear that the courts have adopted a benign attitude toward technical inconsistencies in the formulation of the Comptroller’s ruling in order to effectuate the policy of protecting national banks against antagonistic state legislation, which was perceived by Tiffany as the underlying purpose of the statute.135

IV. EXTENSION OF THE MOST FAVORED LENDER DOCTRINE UNDER DIDAMCA

A. The Statutory Language

Sections 521 to 523 of DIDAMCA provide for a limited preemption of state usury laws for state-chartered federally insured banks (section 521),136 federally insured savings and loan associations (section 522),137 apparently follow the same rationale. See FDIC v. Lattimore Land Corp., 656 F.2d at 149-50 n.18; Fisher v. First Nat’l Bank of Omaha, 548 F.2d at 257-58. A more cogent explanation of the term “existing” as it appears in the Exception Clause was provided by one of the litigants in the Supreme Court case consolidated with Marquette. See Brief for Petitioner at 31, Minnesota v. First of Omaha Serv. Corp., 439 U.S. 299 (1978). The State of Minnesota suggested that the word “existing” was added to § 30 to account for the national banks that were originally organized under state laws, but had converted to national charters. See id.; note 24 supra. These converted state banks were “existing” under the National Bank Act, but not “organized” under it. See Brief for Petitioner, supra at 31. Except in this purely technical sense, the terms “organized” and “existing” may therefore be considered synonymous with each other and, for purposes of historical analysis, with the term “located” in the Allowance Clause. See id.; Marquette Nat’l Bank v. First of Omaha Serv. Corp., 439 U.S. at 310. For a discussion of the possibility that a distinction between the terms “organized” and “located” might be appropriate in the context of modern interstate lending transactions, see note 181 and accompanying text infra.


134. See notes 82-133 and accompanying text supra.

135. See notes 45 & 105 and accompanying text supra.


137. See note 8 supra. Section 522 amends the National Housing Act by adding a new § 414 (codified at 12 U.S.C. § 1730g (Supp. IV 1980)). See note 140 and accompanying text infra.
and federally insured credit unions (section 523).\textsuperscript{138} Except for a prefatory clause which appears only in section 521,\textsuperscript{139} the wording of these sections is substantially identical and reads as follows (italicized wording appears only in section 521):

\begin{quote}
(a) In order to prevent discrimination against State-chartered insured banks, including insured savings banks and insured mutual savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate [an insured institution] would be permitted to charge in the absence of this subsection, such [insured institution] may, notwithstanding any State constitution or statute which is hereby preempted for purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 percent in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such [insured institution] is located or at the rate allowed by the laws of the State, territory, or district where the [insured institution] is located, whichever may be greater.\textsuperscript{140}
\end{quote}

It may be noted initially that the latter portion of sections 521 to 523 corresponds almost precisely with the wording of the Allowance Clause in section 85.\textsuperscript{141} Based on a plain language reading, three preliminary observations can be made as to how the preemptive provision operates. First, the insured institution is permitted to charge a federal rate of one percent over the federal reserve discount rate whenever it is advantageous to do so.\textsuperscript{142} Second, the insured institution has available an

\textsuperscript{138} See note 8 supra. Section 523 amends the Federal Credit Union Act by adding a new § 205g (codified at 12 U.S.C. § 1785 (Supp. IV 1980)). See note 140 and accompanying text infra.

\textsuperscript{139} For the text of the prefatory clause, see italicized wording in text accompanying note 140 infra. The introductory clause reflects the fact that the benefits of § 521 are already available to national banks under § 85. See notes 6-8 and accompanying text supra.

\textsuperscript{140} See DIDAMCA, supra note 6, §§ 521-523. It must be recognized that each section is subject to state override at any time, and the preemptive effect of these sections must be so qualified. See DIDAMCA, supra note 6, § 525. As of March 31, 1982, six states had overridden §§ 521-523. See note 8 supra.

\textsuperscript{141} For the text of § 85, see note 24 supra. Sections 521-523 reverse the order in which the alternative federal rate appears and paraphrase the words "and no more." Compare text accompanying note 140 supra with note 24 supra.

\textsuperscript{142} See text accompanying note 140 supra. The preemption operates only when it provides a rate higher than the otherwise applicable rate. See id. This, of course, is the only situation in which it would be of any help to the lender. See id.
additional preemptive alternative which is equal to "the rate allowed by the laws of the State . . . where the [insured institution] is located." 143 And third, the additional alternative is available whenever it exceeds both the federal rate and the rate that would be applicable in the absence of the entire provision. 144 The question which cannot be immediately answered is how the alternative rate is determined, or more specifically, what meaning was intended by the "rate allowed" wording. 145

B. The Lack of Definitive Legislative History

The language of sections 521 to 523 is virtually identical to that of companion bills introduced by the Arkansas delegations to the Senate and House of Representatives on November 7, 1979 and February 13, 1980 respectively. 146 The statutory wording was adopted without either of these bills actually being reported out of committee, 147 and despite hearings on the Senate bill in December, 1979,148 the legislative history is generally thought to be inconclusive on the meaning of the "rate allowed" language. 149

There are a number of references in the Congressional Record to the establishment of interest rate parity or competitive equality between national banks and other insured lenders, but these comments appear to refer only to the federal rate. 150 The uncertainty created by lack of a succinct explanation of the "rate allowed" language is compounded by the House Conference Report on the final version of DIDAMCA. 151

143. See id.
144. See id.
145. See id. If §§ 521-523 are read quickly, the "rate allowed" language appears to refer back to "the rate the institution would be permitted to charge in the absence of this section." See id. The structure of the sentence, however, clearly indicates that this is not the case. See id.
That report describes the effect of sections 521 to 523 by stating that “state usury ceilings ... will be permanently preempted subject to the right of affected states to override at any time and a ceiling of 1 percentage point above the appropriate Federal Reserve discount rate will apply. ...”  

This analysis deprives the “rate allowed” language of any meaning at all by referring to the federal rate as a ceiling instead of an alternative. It simply cannot be reconciled with the statutory wording which includes the phrase “whichever may be greater.” Either the House Conference Report is erroneous, or the “rate allowed” language in each of the three sections must be considered meaningless.

C. Federal Agency Interpretations of Sections 521 to 523

Three federal regulatory agencies have discounted the House Conference Report and have separately issued interpretive opinions that the “rate allowed” language accords most favored lender privileges to the respective categories of insured depository institutions. These interpretations were issued within a few months of each other and within thirteen months of DIDAMCA’s effective date by the Federal Deposit...
Insurance Corporation (FDIC), the Federal Home Loan Bank Board (FHLBB), and the National Credit Union Administration (NCUA). They essentially adopt the same rationale: because the “rate allowed” language in sections 521 to 523 is virtually identical to the Allowance Clause in section 85, Congress must have intended to reenact the Allowance Clause, along with the recognized interpretations thereof, for the benefit of the insured institutions under DIDAMCA.10 Each opinion then cites Tiffany’s construction of the Allowance Clause as the genesis of the most favored lender doctrine, although discussion of the interpretive history of section 85 since Tiffany is presented in varying detail.101

D. Analysis of the Agency Opinions

As noted in the earlier analysis of the Comptroller’s ruling, it is inconsistent with the language of section 85 to suggest that the substance


159. NCUA Statement of Interpretation and Policy, 46 Fed. Reg. 24,153 (April 24, 1981) (to be codified in 12 C.F.R. § 741, amending 45 Fed. Reg. 78,624 (Nov. 26, 1980). The NCUA’s original interpretation, which attempted to reconcile the House Conference Report with the language of the statute, contained a “trigger mechanism” for the preemptive provisions, which commenters and commentators found confusing and inconsistent with the statute. See NCUA Statement, supra at 24,154; Note, supra note 149, at 1243 n.36.

160. See FDIC Interpretive Letter, supra note 157, at 4; FHLBB Final Interpretative Rule, supra note 158, at 13,987-88; NCUA Statement of Interpretation and Policy, supra note 159, at 78,624.


In January, 1981, a Maryland trial court held that state-chartered banks are entitled to most favored lender privileges under § 521. See Equitable Trust Co. v. Sachs, No. A-60063/Fol. 713, slip op. at 35-37 (Cir. Ct. of Baltimore City, Md., Jan. 28, 1981). The court’s opinion concludes that § 521, because of the similarity between its language and that of § 85, was intended to extend to state banks the competitive advantages enjoyed by national banks. Id. The decision has been appealed on other grounds. See note 103 supra.

161. See FDIC Interpretive Letter, supra note 157, at 3-4. The FDIC seems to acknowledge that Tiffany is inadequate authority for the most favored lender doctrine and cites Northway Lanes, Fisher v. First Nat’l Bank of Omaha, and the Comptroller’s ruling. Id. The FDIC letter asserts that its conclusion “is the only interpretation consistent with the Congressional intent to provide parity for national and insured state banks.” Id. at 4. But see notes 104-95 and accompanying text infra. The FHLBB Rule cites Tiffany and the Comptroller’s ruling as the source of the most favored lender doctrine. See FHLBB Interpretative Rule, supra note 158, at 13,988. The NCUA notes in its original statement that the Supreme Court in Marquette had cited Tiffany as the source of the most favored lender doctrine. See NCUA Statement of Interpretation and Policy, supra note 159, at 78,625. See notes 110-11 and accompanying text supra.
of the most favored lender doctrine is contained within the Allowance Clause, and in any case, there exists no weight of authority to support this contention. But even assuming that the corresponding "rate allowed" language in sections 521 to 523 can be said to embrace the most favored lender doctrine, it seems unreasonable to conclude that Congress chose to reenact the doctrine without any concrete indication in the legislative history that it so intended.

162. See notes 131-33 and accompanying text supra.

163. See notes 126-30 and accompanying text supra. One commentator has noted this inconsistency, but ultimately discounted it. See Bartlett, Savings Associations and the New Depository Institutions Deregulation and Monetary Control Act, 14 Akron L. Rev. 377, 182-83 (1981).

164. For a discussion of the legislative history of §§ 521-523, see notes 145-55 and accompanying text supra. In support of their most favored lender analyses, two of the agencies have suggested expansive interpretations of certain remarks in the Congressional Record. See FDIC Interpretive Letter, supra note 157, at 2. The FDIC quoted Senator Proxmire as making the general statement that "[s]tate chartered depository institutions are given the benefits of 12 U.S.C. 85." Id., citing 126 Cong. Rec. S3170 (daily ed. Mar. 27, 1980). The quoted sentence is preceded, however, by a reference to § 85 which refers exclusively to the federal rate of one percent over the discount rate. See 126 Cong. Rec. S3170 (daily ed. Mar. 27, 1980). The NCUA interpretation states that Senator Bumpers "indicated that he supported the change [in the law under §§ 521-523] because it would remove the competitive advantage national banks have by virtue of the most favored lender status they enjoy under 12 U.S.C. 85." See NCUA Statement of Interpretation and Policy, 45 Fed. Reg. 78,624 (1980), amended by 46 Fed. Reg. 24,153 (1981). Senator Bumpers' actual remarks were as follows:

Mr. President, I am pleased that the conference report includes a provision permitting State-chartered insured banks, Federal- and State-chartered insured savings and loan associations, small business investment corporations, and Federal- and State-chartered insured credit unions to charge 1 percent over the Federal Reserve discount rate—or the rate permitted by State law if that is higher—on all loans, notwithstanding State usury statutes.

This provision is almost identical to legislation which Senator Pryor and I introduced last year. It is similar to a provision found in section 85 of title 12 of the United States Code which governs the rate of interest that national banks may charge on loans, National banks have been able to charge 1 percent over the Federal discount rate on all loans since 1933. State banks and all savings and loans have been at a distinct competitive disadvantage with national banks during this period of exorbitant interest rates.

126 Cong. Rec. S3177 (daily ed. Mar. 27, 1980). The FHLBB more conservatively observed that "the Congressional sponsors focused on the clause allowing affected lenders to charge one percent above the Federal Reserve ninety-day discount rate." See FHLBB Interpretative Rule, supra note 158, at 15,988.

Recent commentary supporting the agencies' interpretations of §§ 521-523 notes only a single direct reference to the most favored lender doctrine in the legislative history of DIDAMCA. See Arnold & Rohner, supra note 99, at 4 n.10. In hearings on S. 1988, the bill that provided the wording ultimately adopted in §§ 521-523, a representative of the Credit Union National Association quoted the Comptroller's ruling and presented an example of the manner in which it allows national banks to charge finance company interest rates. See Hearings on S. 1988, supra note 148, at 64-65 (statement of Joseph N. Cugini, Chairman Elect of the Credit Union National Ass'n and Chairman of the
Furthermore, there is no apparent reason why sections 521 to 523
could not have been drafted to extend the most favored lender concept
by means of less esoteric statutory wording. With only a few addi-
tional words, the "rate allowed" language could have read: "the highest
rate allowed to any competing lender under the laws of the state where
the [insured institution] is located." Such a plain language formul-
ation would not have conflicted with the structure of sections 521 to 523.

Apart from the dubious statutory construction on which they are
based, the agencies' interpretations are rendered less persuasive by their
failure to uniformly preempt state licensing statutes in the same manner
as the Comptroller's ruling. Where an insured institution invokes
one of the agencies' interpretations to charge a rate available under
state law to small loan companies exclusively, a question arises as to
whether the institution must comply with the licensing and procedural
requirements imposed by the state's small loan statute. Under the
Comptroller's ruling, it is clear that a national bank is not subject to
any non-substantive state-imposed licensing restrictions. Under sections
521 to 523, however, while neither the FDIC nor the NCUA have
addressed this question, the FHLBB has ruled that licensing and procedural
requirements are preempted only for federally chartered
savings and loan associations. Under the FHLBB ruling, "[t]he

Governmental Affairs Committee). However, Mr. Cugini's remarks indicate
he believed that § 523 would not fully establish parity between national banks
and credit unions, because § 523 would not allow credit unions to avail
themselves of most favored lender privileges. Moreover, after his ex-
planation of the most favored lender doctrine, Mr. Cugini made the following
remarks:

Mr. Chairman, credit unions are not asking that they be permitted
to charge the high rates charged by finance companies. However,
credit unions do need the right to charge rates which recognize the
realities of consumer credit and permit payment of realistic rates of
return on the savings of their members.

Id. at 65 (emphasis added). It thus appears that Mr. Cugini not only believed
that § 523 would not accord most favored lender privileges to credit unions,
but he was of the opinion that such privileges were not needed. Id. at 64-65.

165. See notes 126-30 and accompanying text supra.

166. See 12 C.F.R. § 7.7310(a) (1982). Alternatively, there might have been
a direct reference to the Comptroller's ruling. Id.

167. See notes 136-45 and accompanying text supra.

168. See note 89 and accompanying text supra.

169. For the text of the Comptroller's ruling, see text accompanying note
89 supra. See also notes 94-97 and accompanying text supra.

170. See FDIC Interpretive Letter, supra note 157; NCUA Statement of
Interpretation and Policy, supra note 159.

171. See FHLBB Interpretative Rule, supra note 158, at 13,988. The rule
reads, in pertinent part, as follows:
degree to which state-chartered insured institutions must comply with such restrictions will be determined by their state supervisors." 172 Although sections 521 to 523 may arguably be read as preempting all conflicting state law,173 the FHLBB apparently took the position that it would be inappropriate to preempt state licensing and procedural control over state-chartered insured institutions without a more definitive statutory authorization than is provided in section 522.174 If the FHLBB's position is correct, it would apply also to the FDIC under section 521 and to the NCUA under section 523.175 State-chartered insured institutions would thus be subject to the cost and administrative burden of complying with licensing and procedural regulations from which their federally-chartered counterparts have been exempted.176 It is submitted that the competitive inequality thereby promoted is clearly inconsistent with the express legislative intent of sections 521 to 523.177

Federally-chartered insured institutions would not be required to submit to state most-favored-lender restrictions that are primarily procedural or regulatory in nature. Such restrictions would include licensing, bonding, and reporting to state authorities. The degree to which state-chartered institutions must comply with such restrictions will be determined by their state supervisors.

172. Id. Under the FHLBB Rule, it is unclear what result obtains where a most favored lender rate is available only to licensees under a state statute, and the statute expressly prohibits licensing of state-chartered savings and loan associations. See id.

173. See text accompanying note 140 supra. Sections 521-523 recite that their provisions operate “notwithstanding any State constitution or statute, which is hereby preempted for purposes of this section.” DIDAMCA, supra note 6, §§ 521-523.


175. See id. There is no general preemption of state supervisory authority over state-chartered insured institutions under either the Federal Deposit Insurance Act or the Federal Credit Union Act. See 12 U.S.C. §§ 1811-1832, 1751-1795i (Supp. IV 1980).

176. See notes 171-75 and accompanying text supra. The extent of this regulatory burden is ironically determined by state agencies, whose control over state usury ceilings has been preempted in the first instance. See id.

177. See note 150 and accompanying text supra. It is surprising that more attention has not been focused on the anomaly of extending most favored lender privileges in the absence of statutory avoidance power over state licensing and procedural requirements, particularly since this issue was at the core of the Comptroller's original 1936 opinion letter in this area, See Letter from J.F.T. O'Connor, Comptroller, supra note 89. In that letter, after citing Tiffany and subsequent decisions, the Comptroller stated:
V. The Impact of the Marquette Decision

A. The Supreme Court's Holding

In Marquette, a unanimous Court squarely held that the Allowance Clause in section 85 applies to interstate credit transactions. The underlying controversy involved the terms of a credit card agreement between a national bank organized in Nebraska and cardholders who were residents of Minnesota. The cardholders had agreed to pay interest at rates permitted under Nebraska law but usurious in Minnesota. After concluding that a bank was normally located in the state where it is organized, the Court held that it could not be "deprived" of that location even where its out-of-state customers had been acquired through an intensive mail solicitation program. The Court thus held, under a literal application of the Allowance Clause, that "interest rates of one State [can be] 'exported' into another" without regard to common law or statutory choice of law rules that would apply in the absence of section 85.

It is conceded that none of these decisions precisely cover the situation submitted by you, namely a situation where a single class of lenders such as those in the small loan business are permitted to charge a rate of interest greater than the rate generally applicable to other lenders in the State. However, it is our opinion that since National Banks have the power to engage in the small loan business without subjecting themselves to the licensing powers of the States, in the light of the statements made in the Tiffany case, supra, National Banks will be deemed entitled to charge the same rate of interest as may be charged by others in the State in competition with the National Bank in the small loan business.


179. Id. at 302-03.

180. Id. at 310-13.

181. Id. at 310. It should be noted that the Court did not hold that a bank would always be located where it was organized. See id. The Court observed that the transactions in question were handled by mail and that credit decisions, assessment of finance charges, and application of payments all took place in Nebraska. Id. at 310-12. These facts are too narrow to establish a broad general rule, particularly with respect to business loans. See Nassberg, Loan Documentation: Basic but Crucial, 36 Bus. L.A.W. 843, 869-70 (1981). Nevertheless, the factual predicate in Marquette is broad enough to cover most interstate consumer transactions under current restrictions on interstate branching. See 439 U.S. at 309-13 & n.20.

182. Id. A holding that the bank was "located" in Minnesota would have "deprived" it of the right to charge the higher Nebraska rate under the Allowance Clause. See id. at 302-03; 12 U.S.C. § 85 (Supp. IV 1980).

183. 439 U.S. at 314. Choice of law rules were not discussed in the Marquette opinion, since the holding clearly preempted their application. See id. at 318 n.31 ("[t]o the extent the enumerated federal rates of interest
It was argued in Marquette that because state-chartered banks would normally be restricted to rates allowed by the state in which the borrower resides, permitting national banks to engage in exportation would place them at a competitive advantage. The Court rejected this argument by noting that national banks had enjoyed a competitive interest rate advantage over state banks since Tiffany. The Court adopted the position that absent evidence of contrary legislative intent, the Allowance Clause must be held to apply, as its language indicates, to “any loan,” including those transacted across state lines.

B. Legislative Proposals to Reverse Marquette

At the time of the Supreme Court’s decision in Marquette, the Seventh and Eighth Circuits had already held that national banks could export interest rates under section 85. In response to these decisions, a Senate bill was introduced to prohibit interest rate exportation where rates are greater than permissible state rates, state usury laws must, of course, give way to the federal statute”). In the absence of § 85, the choice of law rule would have been provided by a Minnesota statute under which any credit card agreement with a Minnesota resident was subject to that state’s usury ceiling. Id. at 302 n.4. Where no such statute applies, the trend is to accord the consumer borrower the usury law protection of the state of his residence. See Note, Bus. Law. 1311, 1313 (1980). For a bank located in a state with liberal usury laws, the ability to export interest rates can prove valuable. See generally Pederson & Cox, Choice of Law and Usury Limits Under Texas Law and the National Bank Act, 34 Sw. L.J. 755, 779-87 (1980). See also note 210 and accompanying text infra.

184. See note 183 supra.

185. 439 U.S. at 313-14.

186. Id. at 314. The Court then cited the most favored lender doctrine as an example of such favoritism. Id. at 314 n.26. For a discussion of Marquette’s reference to the most favored lender doctrine, see notes 111-12 and accompanying text supra. The Court also observed that its holding discriminates more acutely against all banks located in states where interest rate ceilings are relatively low. 439 U.S. at 314.

187. 439 U.S. at 308. The Court’s decision not to depart from the plain meaning of the statutory phrase “on any loan” was reached after it was unable to find evidence of contrary intent in the legislative history of § 30 or in the economic setting in which the statute was enacted. Id. at 314-17. Assuming the plain meaning of “on any loan” applies with equal force to the remaining portions of § 85’s first sentence, the result in Marquette might have been reached on the basis of the Exception Clause. For the text of the Exception Clause, see text accompanying note 29 supra. The Nebraska bank could have argued that even though it might be “located” in Minnesota for purposes of transactions with Minnesota residents, it was immutably organized in Nebraska. See id. Therefore, under the Exception Clause, the “different,” i.e. higher, rate available to banks organized in Nebraska should be available for exportation into Minnesota. See id.

tween national banks and their credit card customers. Six months after Marquette, a similar bill was introduced in the House of Representatives. Although the proposed legislation appears to have been directed primarily at limiting federal interference with the operation of state usury law, commentary written while the latter bill was pending viewed it as a partial remedy for the competitive imbalance recognized by the Supreme Court in Marquette and amplified by the holding in that case. Both anti-exportation bills died in committee and in light of other legislation then under consideration or recently enacted, that result is not surprising. As is clearly indicated by the scope of the interest rate preemption provisions in DIDAMCA and its predecessor statutes, the sentiment in Congress ran directly contra to the preservation of state control over interest rate ceilings.

VI. THE Marquette HOLDING AND THE MOST FAVORED LENDER DOCTRINE UNDER SECTIONS 521 TO 523—A COMPARATIVE ANALYSIS

The FDIC and the FHLBB have issued interpretive letters in which they conclude that sections 521 to 523 authorize interest rate exportation. The soundness of this conclusion, as well as the underlying weaknesses in the most favored lender interpretation, can be confirmed by examining the “rate allowed” language in light of Marquette and the legislative activity it precipitated.

In Marquette, the Supreme Court unequivocally deferred to the plain meaning of the “rate allowed” language as it appears in the Allowance Clause of section 85. The Court held that notwithstanding the obvious friction with longstanding choice of law principles, the “rate allowed” wording means exactly what it says, even when applied to interstate credit. The identical language, introduced in the Senate...
less than a year after \textit{Marquette} was decided\textsuperscript{198} can only be construed as a succinct authorization of interest rate exportation when enacted in the linguistic context of sections 521 to 523\textsuperscript{199}.

The most favored lender doctrine, on the other hand, is only indirectly derived from a century-old Supreme Court decision\textsuperscript{200}. It is grounded primarily in the Comptroller's ruling and validating case law which preceded DIDAMCA's enactment by several years\textsuperscript{201}. The nexus between the most favored lender doctrine and the "rate allowed" language can be discerned only by reference to these sources of authority which are extrinsic to the legislative history of DIDAMCA and to the wording of sections 521 to 523\textsuperscript{202}.

The chronological proximity of DIDAMCA's enactment and the rejection of the legislative proposals to reverse \textit{Marquette} is an indication that the exportation issue had the attention of Congress when sections 521 to 523 were drafted and considered, and that congressional sentiment during this period strongly favored preemption of state usury law\textsuperscript{203}. It reasonably follows that sections 521 to 523 were intended in

\textsuperscript{198} See note 146 supra. S. 1988, which contained the text ultimately adopted as §§ 521-523, was introduced on November 7, 1979. \textit{See id. Marquette} was decided on December 19, 1978. 439 U.S. 299 (1978).

\textsuperscript{199} See note 187 and accompanying text supra. It is submitted that familiarity with the \textit{Marquette} decision is not necessarily required to reach the conclusion that the "rate allowed" language authorizes interest rate exportation. \textit{See text accompanying note 140 supra}. That conclusion follows from the plain meaning of the words, once it is recognized that "the rate that the [insured institution] would be permitted to charge in the absence of [§§ 521-523]" is determined with regard to choice of law principles. \textit{See id.}

\textsuperscript{200} For a discussion of the relationship between \textit{Tiffany} and the most favored lender doctrine, see notes 100-25 and accompanying text supra.

\textsuperscript{201} See notes 82-99 and accompanying text supra.

\textsuperscript{202} See notes 136-55 and accompanying text supra.

\textsuperscript{203} See notes 189-90 and accompanying text supra. H.R. 4208 was introduced and referred to the House Committee on Banking, Finance and Urban Affairs in May, 1979. \textit{See note 190 supra}. During the previous month, that Committee had held hearings on H.R. 2515, the bill enacted as a temporary measure on November 5, 1979 as Pub. L. No. 96-104 and ultimately reenacted by DIDAMCA §§511-512. \textit{See note 7 supra}; \textit{State Usury Ceilings: Hearings on H.R. 2515 Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 1st Sess. (1979)}. During those hearings, the Comptroller of the Currency offered the following statement:

The United States Supreme Court was first asked to interpret section 30 in the \textit{Tiffany} case. That landmark decision held that Congress intended the statute to give "advantages to national banks over their state competitors."

Congress created an even greater advantage in 1933 when it enacted the current provision entitling national banks to elect to peg interest to the Federal Reserve discount rate in lieu of the applicable state limit. The principal sponsor of that amendment, Senator Glass, argued persuasively that when the discount rate exceeded the state
part to allow all insured institutions to share the privilege which Marquette confirmed for national banks and which Congress was unwilling to revoke.\textsuperscript{204}

In contrast, the absence of congressional focus on the most favored lender doctrine can be deduced from the remarks of Senator Anderson upon his introduction of the Senate bill (prior to Marquette) to prohibit exportation.\textsuperscript{205} The Senator referred generally to "several court decisions [which] have concluded that out-of-state banks may charge Minnesota credit card customers the higher rate allowed by the state where the bank is located." \textsuperscript{208} Two of the decisions to which Senator Anderson was undoubtedly referring contained in their opinions extensive and deferential discussions of the Comptroller's ruling in which the "competitive equality" ramifications of the most favored lender doctrine were prominently mentioned.\textsuperscript{207} Although no reference to the Comptroller's

interest rate ceilings, national banks had to be the instrumentalities to permit businesses to borrow money to avoid possible collapse.

This past December these advantages were again reaffirmed as the Supreme Court echoed the words of Tiffany. In the Marquette National Bank case, perhaps its most significant decision on usury since 1873, the Court held that the law allows a national bank to provide credit anywhere, in any state, subject exclusively to the interest rate ceiling of its home state or the alternative formula in the federal statute.

\textit{Hearings on H.R. 2515, supra}, at 150-51 (statement of John G. Heimann, Comptroller of the Currency). The Comptroller's statement is remarkable because it refers vaguely to the "advantage" conferred by Tiffany while awkwardly avoiding any mention of the most favored lender doctrine and the Comptroller's own ruling. \textit{Id.} It also emphasizes rather forcefully the significance of the competitive advantages created by \textit{Marquette}. \textit{Id.}

The impact of the Comptroller's statement was not lost on the state banking authorities whose interests are predominantly local and anti-exportation. See \textit{Hearings on S. 1988, supra} note 148, at 153-54 (statement of E.D. Dunn, Commissioner of Banking, State of Georgia, Representing the Conference of State Bank Supervisors). In December, 1979, Mr. Dunn proposed that both S. 1988 (ultimately enacted as §§ 521-523) and § 85 be amended so that (a) after two years, the provisions of S. 1988 would automatically expire, and (b) upon expiration of S. 1988, interest rate exportation would no longer be permitted under § 85. See \textit{id.} at 154. This proposal indicates that authorization of interest rate exportation was clearly understood to comprise a material component of S. 1988. See \textit{id.} at 153-54.

\textsuperscript{204} See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. at 319. The Court clearly mandated a congressional policy determination by ending its opinion with the observation that "[t]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court." \textit{Id.}


\textsuperscript{206} \textit{Id.} at 10,928.

\textsuperscript{207} See Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255, 259-61 (8th Cir. 1977); Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284, 1288-90 (7th Cir. 1976). The Senator would also have been referring to the decision of the Minnesota Supreme Court, later affirmed in \textit{Marquette}, which was essentially
ruling or to the most favored lender doctrine appears in the Senator's remarks, the bill itself addressed the competitive inequalities which may result from interest rate exportation. The bill would have amended section 85 by adding the following sentence:

Notwithstanding any other provision of this section, an association may not . . . charge a credit card customer who is a resident of a State other than the State in which the association is located a rate of interest on credit extended by the use of such card which exceeds the rate which a bank organized under the laws of that other State may charge such a customer.

It must also be recognized that interest rate exportation is more likely to have been under consideration by Congress because it can be authorized only by a federal statute. Extension of the most favored lender doctrine, however, can be accomplished at the state level. Moreover, as indicated in the previous analysis of the agencies' interpretations, where licensing and procedural regulations impact the application of the most favored lender doctrine, effective extension of the doctrine to state-chartered institutions under sections 521 to 523 may depend on the cooperation of state regulators.

Finally, it should be noted that the wording of sections 521 to 523 originated in Senate and House bills introduced by the two Senators and four Representatives from Arkansas. Since that state has a blanket interest rate ceiling of ten percent, there are no "favored lenders" under


210. See Note, supra note 183, at 1311-12 & 1311 n.2. State statutes which prohibit exportation of interest rate ceilings into a particular state, such as the Minnesota statute in Marquette, have repeatedly withstood constitutional challenges in the absence of preemptive federal law. Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir.), cert. denied, 439 U.S. 860 (1978); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir.), cert. denied, 434 U.S. 880 (1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), cert. denied sub nom., Aldens, Inc. v. Kane, 425 U.S. 943 (1976). Similarly, state statutes such as Delaware's Financial Center Development Act, which allows out-of-state bank holding companies to establish Delaware-located banks for interest rate exportation purposes, would be generally ineffective in the absence of § 85 per Marquette or DIDAMCA § 521. See 63 Del. Laws, ch. 2, §§ 2-23 (1981); 6 DEL. J. CORP. LAW 104, 105 nn.3 & 7 (1981).


212. See notes 168-77 and accompanying text supra.

213. See note 146 and accompanying text supra.
Arkansas usury law.\(^{214}\) It hardly seems likely, therefore, that the state's entire congressional delegation would have taken the initiative to sponsor legislation aimed at extending the most favored lender doctrine.\(^{215}\) On the other hand, the Arkansas delegates would unquestionably have had a keen interest in allowing all federally insured lenders to export the higher interest rates of other states into Arkansas, thereby expanding the supply of credit available to Arkansas residents.\(^{216}\)

**VII. Conclusion**

DIDAMCA's extension of the alternative federal rate of one percent over the discount rate to all federally insured lenders is an acknowledgement of the anachronism of "national favorite" status for national banks.\(^{217}\) It would arguably have been logical for Congress to have enacted a parallel extension of the most favored lender doctrine as well.\(^{218}\) In concluding that Congress actually did so, however, three federal agencies have erroneously construed sections 521 to 523.\(^{219}\) They

\(^{214}\). See note 102 and accompanying text **supra**.

\(^{215}\). See *id.* It is particularly unrealistic to conclude that the Arkansas Congressmen would have jeopardized enactment of the alternative federal rate provision, which they considered crucial to their state's economy, in order to sponsor an ancillary provision that would not affect their constituency. *See* 126 *Cong. Rec.* SS177-80 (daily ed. Mar. 27, 1980) (remarks of Sen. Bumpers).

\(^{216}\). See *notes* 178-87 and accompanying text **supra**. Moreover, if the "rate allowed" language was intended to incorporate both the most favored lender doctrine and interstate exportation, as the FDIC and FHLBB have suggested, it is not apparent why the legislative initiative for §§ 521-523 came exclusively from the Arkansas Senators and Representatives. *See* notes 146 & 194 and accompanying text **supra**.

\(^{217}\). See note 150 and accompanying text **supra**.

\(^{218}\). Limiting a federal privilege to national banks can no longer be justified. *See* First Agricultural Nat'l Bank *v.* State Tax Comm'n, 392 U.S. 339, 358 (1968) (Marshall, J., dissenting). In arguing against broad immunity from state taxation, three Justices subscribed to the following assessment:

> Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors. Any federally insured bank, state or national, may be a government depository. The principal checking accounts of the Government are carried today, not by national banks, but by the Federal Reserve banks. When a new issue of government securities is offered, the Federal Reserve banks receive the applications of purchasers. When government securities are to be redeemed or exchanged, the transactions are handled by the Federal Reserve banks. Those banks administer for the Treasury the tax and loan deposit accounts of the banks in their respective districts.

*Id.* (Marshall, J., dissenting) (citations omitted). Congress has very recently recognized that federal insurance of depository institutions is now a critical structural component of our modern banking system. *See* House Pledges "Full Faith and Credit" of U.S. for Federal Deposit Insurance, [Jan.-June] *WASH. FIN. REP.* (BNA) No. 12, at A-19 (Mar. 22, 1982).

\(^{219}\). See *notes* 162-216 and accompanying text **supra**.
have adduced a congressional intent that is neither manifest in the legislative history, nor discernible by reasonable inference. They have failed to recognize the underlying inconsistency between their interpretations of sections 521 to 523 and the continuing applicability of state licensing and procedural requirements. And they have not considered the possibility that the statutory language they have interpreted is exclusively accounted for by a more reasonable construction which allows interest rate exportation under Marquette. It is therefore submitted that the agencies' interpretations are vulnerable to court challenge, even under a deferential standard of judicial review.

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220. See notes 156-67 and accompanying text supra.
221. See notes 168-77 and accompanying text supra.
222. See notes 178-216 and accompanying text supra.
223. See General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976). The Court referred to the following quotation as "'[t]he most comprehensive statement of the role of interpretative rulings . . . .":"

We consider that the rulings, interpretations and opinions of the [administrative agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control.

Id. at 141-42, quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944).