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FROM NATIONAL CREDIT UNIONADMINISTRATION V FIRST NATIONAL BANK & TRUST TO THE REVISED FEDERAL CREDIT UNION ACT: THE DEBATE OVER MEMBERSHIP REQUIREMENTS IN THE CREDIT UNION INDUSTRY

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FROM *NATIONAL CREDIT UNION ADMINISTRATION V. FIRST NATIONAL BANK & TRUST* TO THE REVISED FEDERAL CREDIT UNION ACT: THE DEBATE OVER MEMBERSHIP REQUIREMENTS IN THE CREDIT UNION INDUSTRY

I. INTRODUCTION

For nearly a century, credit unions, the newest and smallest participants in our nation's financial system, have played an important role in bringing financial services to the average American.[1] Their image has been particularly unsophisticated,[2] traditionally offering only the most basic savings products to low net-worth customers, such as passbook savings accounts and holiday club accounts.[3] On the lending side, credit unions used to be known for lending in such low denominations that other financial institutions would not consider these loans either profitable or worth their time.[4] But the credit union industry, on the whole, has "matured" and expanded substantially over the past few decades.[5] Credit unions are now poised to seriously and effectively compete with other more-established financial intermediaries.[6]

The credit union's increased ability to compete has not come without costs.[7] For nearly a decade, credit unions and other financial intermedi-

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1. *See* KERRY COOPER AND DONALD R. FRASER, BANKING DEREGULATION AND THE NEW COMPETITION IN FINANCIAL SERVICES 10 (Ballinger Publishing Co. 1984).

2. *See* HERMAN E. KROOS AND MARTIN R. BLYN, A HISTORY OF FINANCIAL INTERMEDIARIES 122 (Random House 1971).

3. *See generally* ALAN GART, REGULATION, DEREGULATION, REREGULATION: THE FUTURE OF THE BANKING, INSURANCE, AND SECURITIES INDUSTRIES 14 (John Wiley & Sons 1994) (discussing the early business activities of banks, thrifts, and brokerage houses).

4. *See* KROOS & BLYN, *supra* note 2, at 122.

5. *See* Caroline Wilson, *Credit Union Battle Update*, AMERICA'S COMMUNITY BANKER, Feb. 1998, at 16; *see also* Linda Greenhouse, *Credit Union Lose To Banks In High Court*, N.Y. TIMES, Feb. 26, 1998, at D1.

6. See Kenneth Gilpin, *Piggy Banks With Muscles; As Credit Unions Boom, Financial Rivals Cry Foul*, N.Y. TIMES, Feb. 26, 1997, at D1.

7. *See generally American Banking: Unco-operative*, THE ECONOMIST, Oct. 11, 1997, at 99-102 (discussing the fact that as cooperative financial institutions grew larger and more competitive, other financial institutions have taken issue).

aries have been embroiled in a fierce debate.[8] This debate centers primarily on certain statutorily-granted advantages unique to the credit union" corporate form, that permit credit unions to compete in ways many feel are unfair to other, more-heavily-regulated financial intermediaries.[9]

This Note generally discusses the credit union industry in America, as well as the debate over and impact of credit union membership requirements. Part II of this Note provides an overview of the credit union industry in the United States and looks at the history and development of the industry, the regulatory framework established to oversee the credit union industry, and the current prominence of credit unions in America. This section also discusses the pertinent economic and competitive advantages credit unions have obtained. Part III explores the background of and current debate over credit union membership requirements. Part IV analyzes the Supreme Court's decision in *National Credit Union Administration v. First National Bank & Trust*,[10] the Court's most recent, potent, and potentially damaging decision from February of 1998. Part IV(A) hypothesizes about the potential effects the Court's ruling in *National Credit Union Administration* would have had on the credit union industry had Congress not stepped in. Part IV(b) argues that the Supreme Court should have afforded more deference to the National Credit Union Administration's ("NCUA") policy interpretation of the membership issue. Finally, Part V discusses recent amendments to the Federal Credit Union Act as imposed by Congress' H.R. 1151;[11] how these amendments cure any problems created by the Court's ruling in *National Credit Union Administration*,[12] and the effects this revised legislation may have on the industry.

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8. *See generally* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S.Ct. 927, 930-31 (1998) (rejecting the basis for plaintiff's claims); *See also* Dean Foust, *Clipping the Wings of Credit Unions*, BUS. WK., Aug. 26, 1996, at 56-57.

9. *See* Dean Foust, *Clipping the Wings of Credit Unions*, BUS. WK., Aug. 26, 1996, at 56-58.

10. 118 U.S. 927 (1998).

11. *See generally* H.R. 1151, 105th Congress (1998).

12. 118 U.S. 927 (1998).

II. AN OVERVIEW AND HISTORY OF THE CREDIT UNION INDUSTRY

Credit unions, which were originally developed in Germany,[13] first appeared in the United States in the early twentieth century.[14] They are cooperative[15] not-for-profit[16] institutions in that each person, upon joining the credit union by establishing a savings account or drawing a loan, must pay a small entrance fee.[17] Customers are referred to as "members" of the institution.[18]

Credit unions have historically been characterized, in general, as taking a conservative, lending-oriented approach to their operations.[19] This approach did much to promote the growth and expansion of credit unions throughout the early part of the twentieth century.[20] In 1922, credit union funds accounted for only 11 million dollars in assets, or .016% of the total funds held by all financial intermediaries.[21] Surprisingly, from 1931-1933, during the worst years of the Great Depression, the credit union industry actually continued to grow.[22] By 1933, credit unions held, in approximately 2,000 institutions, 40 million dollars in funds.[23]

Greater stability was required in the financial industry.[24] The stock market crash in the late 1920's,[25] staggering unemployment,[26] and the failure of many financial institutions[27] contributed to this need. The credit unions' small-scale lending practices, suggestion of systematic

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13. *See* KROOS & BLYN, *supra* note 2, at 124.

14. *See id.*

15. *See id.* at 123.

16. *See* JAMES B. LUDTKE, THE AMERICAN FINANCIAL SYSTEM: MARKETS AND INSTITUTIONS 305 (Allyn and Bacon 1967).

17. *See id.*

18. *See id.*

19. *See generally* KROOS & BLYN, *supra* note 2, at 122-24 (discussing the growth of the credit union industry in America).

20. *See id.*

21. *See id* at 122.

22. *See id.* at 193.

23. *See id.*

24. *See* GART, *supra* note 3, at 14.

25. *See id.* at 34-35.

26. *See id.*

27. *See id.*

savings, aggressive advertisement, competitive rates, and an image of a home-town, personable, helpful institution, served the American public well.[28]

Growth in the credit union industry did not end with demise of the Great Depression.[29] During the decades to follow, credit union membership and the complexity of the services offered to their members continued to rise exponentially.[30] Although in 1945, there were 8,683 credit unions in the United States holding 435 million dollars in funds,[31] by 1966, this was increased to 23,000 institutions holding more than 11.5 billion dollars in funds.[32] In 1988, assets increased throughout approximately 15,700 institutions to 196 billion dollars.[33] Today, credit unions continue to grow in number and popularity.[34]

The services and products offered by credit unions used to be fairly simple and traditional.[35] They offered various types of savings accounts, and made simple mortgage, consumer, and personal loans.[36] Today, however, credit unions have much more to offer their members. Their menus have expanded significantly and are fully competitive with many savings and commercial banking institutions.[37] For example, credit unions now provide to their members investment and financial planning services; ATM, debit and credit cards; retirement funds, checking accounts, money orders, and travelers checks; and wire transfer services.[38] Notably, there has been a marked increase in the number of credit unions entering the auto leasing arena.[39]

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28. *See* KROOS & BLYN, *supra* note 2, at 122-24.

29. *See id.* at 241.

30. *See id.* at 242.

31. *See id.* at 241.

32. *See id.* at 242.

33. *See* MONA J. GARDNER AND DIXIE L. MILLS, MANAGING FINANCIAL INSTITUTIONS 318 (Dryden Press 1991).

34. *See* Joan Goldwasser, *Bank Beating Deals at Credit Unions*, KIPLINGER'S PERSONAL FINANCE MAGAZINE, Oct. 1995, at 62.

35. *See* GART, *supra* note 3, at 14.

36. *See* LUDTKE, *supra* note 16, at 307.

37. *See generally* GARDNER & MILLS, *supra* note 33, at 316 (discussing the variety of services offered by modern credit unions).

38. *See id.*

39. See Nicole Biondi, CREDIT REPORT: AGGRESSIVE TACTICS: GROWTH OF AUTO LOANS DRAWS COMPLAINTS ABOUT CREDIT UNIONS, AUTOMOTIVE NEWS, Aug. 14, 1995, at 161.

The variety of services and products offered to consumers increases as the size of the credit union increases.[40] Generally speaking, the larger the credit union, the more sophisticated the products offered will be.[41] Also, the converse of this is generally true.[42] The majority of credit unions in existence today are of the smaller type.[43]

Credit unions are restricted from accessing traditional capital markets.[44] Unlike savings and loans, savings banks, and commercial banks, a credit union cannot raise capital by issuing debt or equity securities.[45] Consequently, credit unions operate in the most traditional means, collecting savings funds from members' accounts and distributing them in the form of interest-earning loans and other investments.[46] A credit union's "earnings," which are typically interest rather than fee-based,[47] are either reinvested into the institution or distributed to the members in the form of a dividend.[48]

A number of governmental and industry-supported organizations exist to regulate, facilitate, and insure credit unions.[49] The NCUA, and particularly the National Credit Union Administration Board ("the Board") are broadly empowered by the Federal Credit Union Act[50] to both interpret the Act and regulate the industry.[51] In particular, the Board's powers include, but are not limited to, prescribing rules to administer the Federal Credit Union Act[52] and to "suspend or revoke char-

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40. *See* GARDNER & MILLS, *supra* note 33, at 315-17.

41. *See id.*

42. *See id.*

43. *See* GARDNER & MILLS, *supra* note 33, at 315 (stating that approximately 60 percent of all the credit unions in the United States have less than 5 million dollars in assets).

44. *See id.* at 314-17.

45. *See id.*

46. *See id.*

47. *See id.* at 319-20.

48. *See id.*

49. *See* GARDNER & MILLS, *supra* note 33 at 315-16.

50. *See generally* Federal Credit Union Act § 102, 12 U.S.C. § 1752(a) (1998) (discussing the composition, purpose, and powers of the National Credit Union Administration and the National Credit Union Administration Board).

51. *See id.*

52. *See id.* at § 1766(a).

ters [of individual credit unions] . . . for violating the provisions of its charter, its bylaws, this chapter, or any regulations issued thereby."[53]

The NCUA established numerous organizations to promote efficiency and safety for the credit union industry.[54] For example, the National Credit Union Share Insurance Fund operates in a similar fashion to the Federal Deposit Insurance Corporation[55] and provides deposit insurance to the industry.[56] Additionally, liquidity, which is the cash necessary to meet day-to-day operations, is provided by the Central Liquidity Facility.[57] Other independent trade associations, which provide services such as operational support, management advice, industry information and statistics, and up-to-date relevant news, are the Credit Union National Association, the Corporate Credit Union Network, and the U.S. Central Credit Union.[58]

Credit unions have other advantages over savings and commercial banks. Since credit unions are not-for-profit institutions, they enjoy tax advantages and cost-savings that are not available to other financial intermediaries.[59] For example, credit unions are exempt from all state, local, and federal income taxes.[60] They need not pay income taxes to the state, federal, or local government on any amount of income they realize.[61]

This tax-exempt status becomes a very powerful, competitive tool when compared to the corporate tax rates that burden other financial intermediaries.[62] It allows credit unions, generally, to provide higher rates

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53. *Id.* at § 1766(b)(1).

54. *See, e.g., id.* at § 1783(a); *See, e.g., id.* at § 1795(b) (discussing the establishment of the National Credit Union Share Insurance Fund and the Central Liquidity Facility to promote industry operations).

55. *See* EMMANUEL N. ROUSSAKIS, COMMERCIAL BANKING IN AN ERA OF DEREGULATION 237-38 (Praeger 1997).

56. *See* 12 U.S.C. § 1783(a).

57. *See id.* at § 1775.

58. *See* GARDNER & MILLS, *supra* note 33, at 315.

59. *See* Joseph W. Sinkley, Jr., *Level the Playing Field*, BANKING STRATEGIES, July/Aug. 1998, at 6-12.

60. *See* Federal Credit Union Act §122, 12 U.S.C. §1768 (1998); *See also,* Phil Britt, *The Credit Union Challenge*, SAVINGS & COMMUNITY BANKER, Aug. 1994, at 17-30.

61. *See id.*

62. *See* Phil Britt, *The Credit Union Challenge*, SAVINGS & COMMUNITY BANKER, Aug. 1994, at 17-30.

on their savings products,[63] slightly lower rates on their loan products,[64] and thus, survive on a more narrow "spread." "Spread" is the difference between interest income and interest expense.[65] It is estimated that non-tax-exempt institutions would need to earn 40% more than a credit union to achieve the same level of retained earnings due to this tax advantage.[66] Many consumers who are eligible to become credit union members, by virtue of their employment with a member organization or by residing in a geographic area served by a credit union, may be attracted to the credit unions by even a small advantage in the rates they offer over a competing savings or commercial bank.[67] Additionally, fees charged by credit unions are typically lower than those charged by other institutions.[68]

Another advantage that credit unions share is that they typically do not pay director's fees to members of their board of directors,[69] whereas in other types of corporations, the director's fee is commonplace and expected.[70] Although this advantage, in comparison to the tax-exempt savings, is minimal, it contributes to the means by which credit unions remain competitive.[71]

The potency of the advantages credit unions enjoy as well as the burdens of the restrictions imposed upon them, make credit unions a formidable competitor of alternative financial intermediaries.[72] Some commentators argue that "the playing field should be leveled," and that credit unions should be made to comply with regulations more akin to those of commercial and savings banks.[73] As Congress, and as many as

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63. *See* Goldwasser, *supra* note 34, at 62.

64. *See id.*

65. *See* GARDNER & MILLS, *supra* note 33, at 12.

66. *See* Britt, *supra* note 62, at 17-30.

67. *See* Goldwasser, *supra* note 34, at 62-63.

68. *See Survey on Bank Fees Draws Criticism,* (visited Mar. 7, 1999) available at http://www.cuna.org/data/ consumer/ advice/ aba_survey.html.

69. *See* LUDTKE, *supra* note 16, at 305-08.

70. *See* Elliott J. Weiss, *The Board of Directors, Management, and Corporate Takeovers: Opportunities and Pitfalls, reprinted in* THE BATTLE FOR CORPORATE CONTROL: SHAREHOLDER RIGHTS, STAKEHOLDER INTERESTS AND MANAGERIAL RESPONSIBILITIES, at 36-38 (Arnold W. Sametz ed. 1991).

71. *See generally* Britt, *supra* note 62, at 17-30 (discussing, generally, the existence of limitations on who may become credit union members).

72. *See* Gilpin, *supra* note 6, at 1.

73. *See* Sinkley, *supra* note 59, at 6.

70 million members would agree, credit unions are likely to remain an integral part of our economy.[74]

III. THE DEBATE OVER CREDIT UNION MEMBERSHIP REQUIREMENTS

Anyone may go down to the local savings or commercial bank of their choice and open up an account.[75] The composition of savings and commercial banks' depositor base is not regulated or restricted by law.[76] On the other hand, credit unions, by definition, cannot operate in this manner.[77] They are restricted by law as to whom they can offer membership.[78]

Two traditional requirements exist that limit the credit unions' ability to expand membership.[79] Members must either share a common bond (serving, for example, "persons of a religious, municipal, fraternal, or community relation")[80] or share a geographical common bond (serving a narrowly defined town or municipality).[81]

These requirements have been interpreted and reinterpreted many times over the years.[82] The NCUA has taken a liberal stance in allowing credit unions to expand their membership.[83] For example, Communicators Federal Credit Union in Houston has broadened its membership to "all retirees and senior citizens living within a 25 mile radius of Houston."[84] Other credit unions have expanded the businesses they serve even though the new additions are unrelated to those the credit union was set

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74. *See America's Credit Unions, Next Stop Congress*, THE ECONOMIST, Feb. 28, 1998, at 78.

75. *See generally* GARDNER & MILLS, *supra* note 33, at 295-334 (discussing, comparing, and contrasting the products, assets, liabilities, income, and expenses of commercial banks, savings banks, and credit unions).

76. *See id.*

77. *See* Federal Credit Union Act § 109, 12 U.S.C. § 1759(a) (1998) (stating the limitations on who may become credit union members).

78. *See* Britt, *supra* note 62, at 17.

79. *See* 12 U.S.C. § 1759(b)(1998).

80. *Id.*

81. *See id.*

82. *See generally* Foust, *supra* note 9, at 56-58 (discussing the NCUA's 1982 policy change and its effect on the credit union industry).

83. *See id.*

84. *Id.*

up to serve.[85] Still another credit union has offered membership to "any firm or contractor that has any dealings with the government."[86] This phenomenal expansion of credit union membership continued throughout the eighties and nineties.[87]

Those who compete directly with credit unions, primarily the officers and directors of smaller commercial and savings banks, argue that the NCUA's stance on credit union membership has become too liberal and permissive.[88]

The banking industry is characterized by keen competition for customers' funds, both with other banks and non-bank financial intermediaries such as brokerage houses and insurance companies.[89] Customers provide funds for the institutions to engage in profitable lending and investing activities.[90] They also generate significant fee income for the institution in the form of service charges.[91]

The businesses of commercial and savings banks and credit unions are becoming so much alike,[92] that when coupled with the numerous advantages credit unions enjoy (tax exemption, personalized service, lower fees, and better rates) and the credit unions' desire to compete more aggressively, a conflict between the competitors was inevitable.[93]

IV. NATIONAL CREDIT UNION ADMINISTRATION V. FIRST NATIONAL BANK & TRUST

The U.S. Supreme Court's first opportunity to address the membership requirement debate in the credit union industry was in *National Credit Union Administration v. First National Bank & Trust.*[94] Initially,

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85. *See id.*

86. *Id.*

87. *See* Caroline Wilson, *Credit Union Battle Update*, AMERICA'S COMMUNITY BANKER, Feb. 1998, at 16-25.

88. *See House Votes to Let Credit Unions Expand Membership*, N.Y. TIMES, Apr. 2, 1998, at D5.

89. *See* COOPER & FRASER, *supra* note 1, at 29.

90. *See generally* GARDNER & MILLS, *supra* note 33, at 317-20 (discussing the asset and liability structure of credit unions).

91. *See id.*

92. *See* COOPER & FRASER, *supra* note 1, at 29.

93. *See* Foust, *supra* note 9, at 56-58.

94. 118 S.Ct. 927, 927-40 (1998).

the Court had to decide if the plaintiffs, commercial bankers, had standing to challenge the actions of the FCUA under Section 10(a) of the Administrative Procedures Act.[95] Secondly, the Court had to decide if the NCUA's interpretation of the Federal Credit Union Act, which prompted the expansion of credit union membership, was legal and proper.[96]

In addressing the prudential standing issue, the Court analyzed four different cases[97] involving suits brought by competitors of financial institutions.[98] The Court specifically rejected an inquiry into whether or not Congressional intent was to benefit the plaintiffs.[99] The standard the Court adopted to determine standing to sue is that the plaintiff need only be "arguably within the zone of interests protected."[100] Ultimately, the Court found that the commercial bankers had standing to sue[101] in *National Credit Union Administration,* as did the challengers in the cases the Court used as precedent.

The second, and perhaps more influential issue in *National Credit Union Administration,* dealt with the propriety of the NCUA's interpretation of the Federal Credit Union Act.[102] The membership issue circulated around the NCUA's allegedly relaxed interpretation of the common bond requirement as required by the Federal Credit Union Act at that time.[103] In effect, the NCUA was permitting credit unions to serve multiple employer groups that were completely unrelated provided that the members served within each individual group were related.[104] For example, in this case, the AT&T Federal Credit Union was permitted to extend membership to employees of the American Tobacco Company, and

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95. *See id.* at 932-38.

96. *See id.* at 938-40.

97. *See id.* at 932-38 (relying on Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); Arnold Tours v. Camp, 400 U.S. 45 (1970); Clarke v. Securities Indus. Ass'n., 479 U.S. 388 (1987); and Investment Co. Inst. v. Camp, 401 U.S. 617 (1971)).

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.* at 938.

102. *See id.*

103. *See* Sinkley, *supra* note 59, at 6.

104. *See* Wilson, *supra* note 87, at 16-25.

commercial bankers brought suit claiming they were competitively harmed by the credit union's expansive membership policy.[105]

The Court, citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*,[106] set forth a framework for evaluating this issue.[107] The Court stated that the first inquiry must be: whether Congress has directly spoken to the precise issue at question. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Further, if we determine that Congress has not directly spoken to the precise question at issue, we then inquire whether the agency's interpretation is reasonable.[108]

The Court reasoned that the "common bond" must exist between all members of the credit union through occupation and that the "common bond" requirement interpreted any other way would negate its meaning.[109] The Court then noted that the Federal Credit Union Act requires and intends membership to be limited, and that without the restrictive interpretation of the common bond requirement, this limitation would not be achieved.[110]

The first segment of the required analysis on this issue remains uncontested. The matter cannot be easily disposed of because the applicable section of the Federal Credit Union Act, as it existed in 1993, is not unambiguous.[111] However, the Court has failed to give sufficient deference to the NCUA's arguably reasonable policy interpretation. Nor did the Court, in any way, mention or take note of the various impacts its decision might have on the credit union industry itself internally and externally between the credit unions and their competitors.[112] The Court

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105. *See* National Credit Union Admin. v. First Nat'l. Bank & Trust Co., 118 S.Ct. 927, 931-32 (1998).

106. 467 U.S. 837 (1984).

107. *See First Nat'l. Bank*, 118 S.Ct. at 938.

108. *See id.* (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

109. *See id.* at 938-40.

110. *See id.*

111. *See* Federal Credit Union Act § 109, 12 U.S.C. § 1759 (revised Mar. 1993).

112. *See generally First Nat'l. Bank*, 118 S.Ct. at 927-40 (failing to mention the possible impact on the credit union industry or consumers).

merely construed, in a very literal manner, the language of the Federal Credit Union Act.[113]

A. *Potential Effects of the Court's Ruling*

The results of the Court's interpretation could have had potentially damaging effects on the public and the credit union industry.[114] One House Representative, Jim Leach, Chairman of the House Banking Committee commented, "It is inconceivable to me that Congress will allow millions of Americans to be kicked out of the financial institution of their choice."[115] Other commentators speculated that the effect of the ruling would be less severe, and would only prevent the credit unions from bringing in new members from unrelated employer groups.[116] Yet others believed that the Court would allow a grandfathering of current members.[117] The fact remains that the Court did not address the mechanics for credit unions to fall into compliance with the ruling.[118]

What would have been the impact of the Court's decision in *National Credit Union Administration* had Congress not statutorily overruled the decision? Numerous paths could have been taken by credit unions to fall into compliance with the decision.[119] Although ranging in severity, the possible ramifications of any paths chosen by affected credit unions would potentially cause a tremendous loss in competition among financial intermediaries, a regulatory and administrative nightmare, and ultimately a detriment to the American public.[120]

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113. *See id.*

114. *See* Foust, *supra* note 9, at 56-58.

115. Linda Greenhouse, *Credit Unions Lose To Banks In High Court,* N.Y. TIMES, Feb. 26, 1998, at D1.

116. *See* Joan Goldwasser, *Is Your Credit Union Safe?*, KIPLINGER'S PERSONAL FINANCE MAGAZINE, Oct. 1996, at 21.

117. *See id.*

118. *See generally First Nat'l. Bank,* 118 S.Ct. at 927-40 (affirming the lower court's decision, which was also silent as to how credit unions should comply).

119. *See, e.g.*, Wilson, *supra* note 87, at 16-25 (suggesting charter conversions to federal or state mutual thrifts); *See, e.g., American Banking Unco-operative, supra* note 7, at 99-102 (suggesting the dismantling of credit unions as a solution to the membership debate); *see also* Goldwasser, *supra* note 116, at 21 (suggesting the dismantling of offending credit unions as a possible effect of the Court's ruling).

120. *See, e.g.*, Dean Foust, *Cornered Credit Unions Come Out Fighting*, BUSINESS WEEK, Mar. 16, 1998, at 43-45.

The credit unions could have complied with the ruling by undergoing a charter conversion to a state or federally chartered mutual savings bank.[121] However, charter conversions are difficult, time-consuming, and costly to effectuate.[122] Additionally, the NCUA, in recent years, has made it more difficult for credit unions to convert to mutual thrifts.[123]

Assuming the absence of a grandfathering provision in the Court's holding, another mechanism to comply would have been for the credit unions to divest themselves of non-related membership groups.[124] To effectuate this change, the credit unions would probably have to fragment into smaller, less-diverse institutions serving narrower markets.[125] However, this fragmentation can cause problems for the institution.[126] Additionally, this approach would be contrary to the general trend in the financial services industry to combine or consolidate and avoid disintermediation.[127]

Hypothetically, this fragmentation would cause the number of credit unions in America to increase dramatically.[128] As previously mentioned, the larger the institution, the greater the variety of services it is generally able to offer to the public.[129] The resulting smaller credit unions might not be able to offer services or rates that would allow it to remain a viable competitor of the unaffected commercial and savings banks.[130] The

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121. *See* Kenneth N. Gilpin, *What Now? Piercing the Credit Union Haze*, N.Y. TIMES, Mar. 8, 1998, at 10.

122. *See* Henry N. Butler & Jonathan R. Macey, The Myth Of Competition In The Dual Banking System, 73 Cornell L. Rev. 677, 684-87 (1988) (mentioning the difficulties both in obtaining a new bank charter and converting a bank charter).

123. *See* Wilson, *supra* note 87, at 16.

124. *See* Greenhouse, *supra* note 115, at 1.

125. A logical inference to be drawn is that if credit unions both had to technically divest themselves of unrelated customer groups yet practically continue to serve them, a large credit union splitting into numerous distinct institutions to serve each smaller group would effectively address the fragmentation problem.

126. *See* Gilpin, *supra* note 121, at 10.

127. *See, e.g.*, COOPER & FRASER, *supra* note 1, at 3-4.

128. Hypothetically, if the number of credit unions potentially affected by the Court's ruling were to choose to comply in this manner, the total number of credit unions in the United States would increase.

129. *See* GARDNER & MILLS, *supra* note 33, at 315-17.

130. *See id.* (indicating that smaller credit unions generally offer fewer, less-diverse, and less-sophisticated products).

result most likely would be an outflow of consumers from the credit unions to these other institutions.[131]

Second, serious managerial and administrative problems pertaining to the structure and/or inter-relatedness of the offspring credit unions would likely arise among the affected institutions.[132] The new institutions would have to address questions, on a macro level, relating to corporate governance and financial and regulatory compliance.[133] On a micro level, they would have to address questions about all aspects of operating procedure.[134] These complex and time-consuming questions, coupled with the costs involved (for example, legal fees, advertising expense, real estate acquisitions for the establishment of new office space, the implementation of amended charters, by-laws, and operational policies and procedures; and the acquisition of completely new information handling systems to name a few) would effectively divert management's attention from their core businesses causing an amplified effect on the credit unions tenuous competitive stance.[135]

Third, the prospective increase in the number of credit unions in existence, as well as the potential increase in charter conversions, would impose a hardship upon regulatory authorities who supervise and approve such activities.[136] Although an individual credit union's board of directors is vested with the power by section 1761(b)(1) of the Federal Credit Union Act to "act upon applications for membership,"[137] any ad-

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131. *See* GART, *supra* note 3, at 16-19 (suggesting that customers benefit from "a more complete line of products and services"). The absence of a benefit to consumers would naturally cause them take their banking business elsewhere.

132. *See* Gilpin, *supra* note 121, at 10.

133. *See id.*

134. *See* Stanley M. Huggins, *Implementing Merger Efficiencies, in* CONSOLIDATION, LIQUIDATION, AND RECAPITALIZATION BANKS FACE THE 90'S 349, 376 (Practising Law Institute 1992) (discussing, in the context of a bank integration, the need to address problems related to operating systems).

135. *See id; See generally* Paul L. Lee, *Merger Conversions of Mutual Savings Institutions*, in CONSOLIDATION, LIQUIDATION, AND RECAPITALIZATION BANKS FACE THE 90'S 409, 409-45 (Practising Law Institute 1992) (discussing the required actions and concerns of management when effectuating a bank merger or consolidation).

136. *See generally At the Agencies: OTS,* THE REGULATORY COMPLIANCE WATCH, Apr. 21, 1997, at 1-5 (discussing the "burdensome" conversions process faced by mutual thrifts and the regulator's need to make the process more efficient).

137. Federal Credit Union Act § 113, 12 U.S.C. § 1761b(1) (1998).

ditions must be approved by the appropriate regulatory agency.[138] Currently, the NCUA oversees and grants permission for new credit unions to form.[139] Similarly, the Comptroller of the Currency, is responsible for activities relating to commercial banking,[140] and the Federal Home Loan Bank and appropriate state authorities are responsible for conversions to savings banks and savings and loans.[141] Approximately 3,600 credit unions would potentially have been affected by the Court's ruling.[142] Applications to regulatory authorities, in addition to those naturally occurring in the industry, would likely flood regulators' desks and inevitably cause a delay in the approval process.[143]

Finally, the inconvenience to credit union members and the negative impact on consumer perception would have a potentially adverse affect on the industry as a whole.[144] When a financial institution merges with another, despite management's best efforts, its customers might not be pleased.[145] Customers must not only adjust to new faces in their local branch, but also to new policies and procedures.[146] This change generally brings about a feeling of unrest among the customers and the safety, soundness, and stability of the institution is called into question.[147] A certain uncomfortable period of adjustment is sure to follow.[148]

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138. *See, e.g.,* 12 U.S.C. § 1754 (1998) (The NCUA Board shall investigate and approve organization certificates).

139. *See id.* at § 1752.

140. *See Lawrence J. White*, THE S&L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 26 (Oxford University Press 1991).

141. *See id.*

142. *See* Gilpin, *supra* note 121, at 10.

143. *See id.*

144. *See generally* testimony of John P. LaWare, Member, Board of Governors of The Federal Reserve System, before the Committee on Banking, Finance, and Urban Affairs, U.S. House of Representatives, Sept. 24, 1991, available *in* CONSOLIDATION, LIQUIDATION, AND RECAPITALIZATION BANKS FACE THE 90'S 713, at 731-39 (Practicing Law Institute 1992).

145. *See* Huggins, *supra* note 134, at 400.

146. *See id.*

147. *See id.*

148. *See id.*

B. *The Court Should Have Deferred To The NCUA's Policy*

All of these impacts, taken as a whole, beg the question of why the Supreme Court held as it did in *National Credit Union Administration.* Did the Court simply ignore the practical implications of its ruling? The following discusses how the Court arrived at its decision regarding credit union membership in *National Credit Union Administration* and poses the question of the propriety of its decision.

Using a case the Supreme Court relied upon to find standing, a substantive argument can be made that the NCUA's policy regarding credit union membership should have been upheld. In *Arnold Tours, Inc. v. Camp,*[149] a travel agency brought suit against a commercial bank hoping to enjoin the bank from offering travel services to the public.[150] The Comptroller of the Currency had ruled that:

> Incidental to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles, as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.[151]

The issue in this case centered upon whether the offering of travel services was truly an incidental power of the bank.[152] The Federal Court of Appeals, on remand, viewed incidental powers as "those which are directly related to one or another of a national bank's express powers."[153] The Court would have deferred to the Comptroller's decision had travel services been found to be incidental.[154]

The facts of *National Credit Union Administration* can be distinguished on numerous grounds from those present in *Arnold Tours.* First, the policy determination by the NCUA of allowing credit unions to accept unrelated employment groups for membership was even more re-

149. 400 U.S. 45 (1970).
150. *See id.*
151. *Id.*
152. *See id.*
153. Arnold Tours v. Camp, 472 F.2d 427, 431 (1972).
154. *See id.*

strictive than the one promoted by the Comptroller in *Arnold Tours*.[155] Credit unions were not branching or attempting to branch into unrelated fields of business.[156] The issue solely involved the actions of credit unions within their own industry.[157] Secondly, the process of developing and growing membership is primarily vital, not incidental, to the credit union's survival.[158] Membership expansion lies at the very core of the credit unions' ability to thrive and compete.[159] The decision in *Arnold Tours* at least suggests that with regards to express powers, the Court should be extremely deferential to the agency's determination.[160]

Recently, a case[161] decided by the U.S. Supreme Court further emphasizes the deferential stance taken in *Arnold Tours*. In *Nationsbank of North Carolina v. Variable Life and Annuity Co.*,[162] an insurance company brought suit to enjoin a national bank from acting as an agent for the sale of life and annuity products pursuant to permission granted by the Comptroller of the Currency.[163] The Court deferred to the Comptroller's determination that selling insurance was an incidental power of the bank.[164]

When compared to the actions by banks in both *Arnold Tours* and *Nationsbank*, however, it seems clear that the NCUA's membership policy is far-less reaching than either banks being permitted to sell insurance or being prohibited from operating travel agencies.[165] This limitation would at least serve as one factor to indicate that the Court should have deferred to the NCUA's interpretation of the Federal Credit Union Act.

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155. *Compare* Nation Credit Union Administration v. First National Bank & Trust Co., 118 S.Ct. 927, 927-40, *with Arnold Tours*, 472 F.2d at 431.

156. *See First National Bank*, 118 S.Ct. at 927-40.

157. *See id.*

158. *See* Sinkley, *supra* note 59, at 6-8.

159. *See id.*

160. *See generally Arnold Tours*, 400 U.S. at 45-48.

161. *See* Nationsbank of North Carolina v. Variable Life and Annuity Co., 513 U.S. 251, 251-64 (1995).

162. 513 U.S. 251.

163. *See id.* at 255.

164. *See id* at 257.

165. *See generally First National Bank*, 118 S.Ct. at 927-40 (allowing credit unions to serve a wider variety of customers, not expanding their product lines or allowing them to encroach upon the business of competing non-bank companies).

The U.S. Supreme Court, in *National Credit Union Administration*, also relied upon *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[166] and found the NCUA's interpretation to be unreasonable. Using the framework promulgated in *Chevron*, the Court states that it must determine the reasonableness of the administrative agency's interpretation.[167] In *Chevron*, the Court had to determine the propriety of regulations passed by the Environmental Protection Agency that pertained to groupings of pollution-emitting devices.[168] The Court upheld the EPA's policy stating that, "[a]n agency's interpretation of a statute represents a reasonable accommodation of manifestly competing interests and is entitled to deference where the regulatory scheme is technical and complex, where the agency considered the matter in a detailed and reasoned fashion, and where the decision involves reconciling conflicting policies."[169]

The NCUA's interpretation of the membership provision should meet this three-part reasonableness standard. First, in *National Credit Union Administration*, the issue in question was certainly technical and complex.[170] Although the superficial question centered solely on the literal meaning of "membership" and "common bond," the implications of the Court's decision ran much deeper.[171] To reasonably foresee and manage the effects of the Court's decision, the technical skill and expertise of the NCUA would surely be required.

Additionally, there is no evidence that the NCUA adopted its membership policy in any manner other than a "detailed and reasoned fashion." The NCUA began expansively interpreting the Federal Credit Union Act in 1982 *and continued to do so for the next 16 years.*[172] It would be illogical to believe that, even if the initial decision to allow expansion in 1982 was ill-reasoned or unwise, the NCUA would continue on this path for as long as it did. A bad, ineffective, or harmful decision would

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166. 467 U.S. 837 (1984).

167. *See First National Bank*, 118 S.Ct. at 938-40.

168. *See* Chevron U.S.A., Inc, 467 U.S. at 839 (1984).

169. *Id.* at 865

170. *See Arnold Tours*, 472 F.2d at 433 (The Court of Appeals in this case deemed the operation of a travel agency to be "a highly complex activity." Arguably, the operation and regulation of the entire credit union industry in modern times is at least equally complex).

171. *See First National Bank*, 118 S.Ct. at 938-40; *see also* Gilpin, *supra* note 121, at 10.

172. *See First National Bank*, 118 S.Ct. at 934 (emphasis added).

likely have been reversed long ago. In *Smiley v. Citibank*, the Court held, "[t]he mere fact that an agency's interpretation of a statute contradicts a prior agency position is not fatal to a finding that the agency's interpretation is entitled to deference by the United States Supreme Court."[173]

Finally, the NCUA's decision regarding membership required the agency to reconcile conflicting policies.[174] The conflict at issue was whether or not permission to expand should, as a general policy, be granted.[175] For the NCUA to address this issue, hypothetically they would have to balance the competing benefits and detriments of allowing or disapproving membership expansion. Based upon the above analysis, the NCUA's decision easily and affirmatively slips into the reasonableness framework set forth in *Chevron*, and therefore should have been upheld.

Another holding from *Chevron* supports the proposition that deference should have been given to the NCUA's policy determination and, therefore, that the NCUA's decision should have been upheld.[176] In *Chevron*, the Court states, "When a challenge to an agency construction of a statutory problem really centers on the wisdom of the agency's policy . . . the challenge must fail; federal judges have a duty to respect legitimate policy choices made by the political branches."[177]

In *National Credit Union Administration*, the plaintiff's main argument (contending that it was unfair of the NCUA to allow credit union to expand membership), could be seen as attacking the wisdom of the NCUA's policy.[178] If the membership issue is framed as being purely substantive and not a matter of statutory interpretation, the issue can certainly be viewed as questioning the wisdom of the NCUA's policy decision. In other words, if the litigated issue could be viewed as merely deciding whether the NCUA's policy decision was good or bad, not permissible or impermissible under the Federal Credit Union Act, the Court arguably would be bound to defer to the NCUA on this matter.

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173. Smiley v. Citibank, 517 U.S. 735, 742 (1996).

174. *See First National Bank*, 118 S.Ct. at 938-40.

175. *See id.*

176. *See* 467 U.S. 837, 839.

177. *Id.*

178. *See First National Bank*, 118 S.Ct. at 927-40; *See also* Foust, *supra* note 9, at 56-58.

Other recent Supreme Court cases, *Marsh v. Oregon National Resources Council* and *Smiley v. Citibank*, provide further support for the argument that deference should be accorded to an agency's policy determination.[179] In *Marsh*, the Court noted that,

> [a] federal court's review . . . is controlled by the arbitrary and capricious standard . . . a factual dispute, the resolution of which implicates substantial agency expertise; and thus does not involve review of a legal question; because analysis of the relevant documents requires a high level of technical expertise, deference must be given to the informed decision of the Corps as the responsible federal agency.[180]

Once again, assuming that the membership issue in *National Credit Union Administration* was one of policy, not law, and that there was a need for particular agency expertise, this language supports the contention that more deference should have been afforded to the NCUA.

Performing the analysis from another standpoint, the precedential weight of *Chevron*, overall, is questionable because the case is distinguishable from NCUA.[181] The affected industries in these two cases are substantially and materially different.[182] The underlying agency decision in *Chevron* was the Environmental Protection Agency's policy regarding a specific geographic region,[183] whereas the NCUA's policy affected the more pervasive credit union industry.[184] Credit unions, as mentioned earlier, exist in all fifty states and currently serve approximately 70 million

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179. *See generally* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (finding that the Army Corps of Engineers' policy determination that a secondary environmental impact statement was unnecessary was upheld by the Court because it was not deemed to be arbitrary or capricious.); *See also* Smiley v. Citibank, 517 U.S. 735, 745-47 (1996) (upholding the Comptroller of the Currency's interpretation of the word "interest" as found in the National Bank Act.).

180. *Oregon Natural Res. Def. Council*, 490 U.S. at 361.

181. *Compare* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 837-66 (1984), *with First National Bank*, 118 S.Ct. at 927-40.

182. *See id.*

183. *See Natural Resources Defense Council, Inc.*, 467 U.S. at 837-66.

184. *See* Gilpin, *supra* note 121, at 10.

members.[185] The effect of the NCUA's decision had an arguably more tangible, real effect on the public at large.[186]

The arguments proposed above, when taken together with a presumption that Congress intended the administrative agency, not the Court's, to determine the meaning of ambiguous statutory language;[187] the fact that the Court resorted to a literal, not practical, interpretation of the FCUA;[188] the Court's deliberate indifference to the NCUA's expertise;[189] the speed with which both the House of Representatives and the Senate acted to overturn the Court's decision;[190] and the overwhelming majority by which they did so,[191] clearly and persuasively indicate that the Court's holding was wrongly decided.

V. H.R. 1151 & THE AMENDED FEDERAL CREDIT UNION ACT

In response to the Court's decision in *National Credit Union Administration v. First National Bank & Trust*, both Houses of Congress enacted H.R. 1151 in April of 1998.[192] H.R. 1151 clarified, amended, and expanded in particular, the Federal Credit Union Act's requirements regarding credit union membership.[193] As one House Representative stated, "[i]t stops the bleeding that would have killed the credit union industry."[194]

Before the recent amendment, section 1759 of the Federal Credit Union Act reads as follows:

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185. *See* Foust, *supra* note 9, at 56-58.

186. *See id.*

187. *See* Smiley v. Citibank, 517 U.S. 735, 740-41(1996).

188. *See generally First National Bank*, 118 S.Ct. at 935-40 (discussing the various verbal constructs of terms contained within the Federal Credit Union Act).

189. *See generally id.* at 927-40 (ignoring the NCUA's many years of expertise in regulating the credit union industry.).

190. *See Timeline of AT&T Case Covers Nearly Eight Years*, (visited Mar. 7, 1999) http://www.cuna. org/data/ consumer/advice/timeline.html.

191. *See* Michael Schroeder, *Bill Favoring Credit Unions Clears House*, WALL STREET JOURNAL, Apr. 2, 1998, at 4 (The House of Representatives passed the amended Federal Credit Union Act in a vote of 411 to 8.).

192. *See id.*

193. *See* Federal Credit Union Act § 109, 12 U.S.C. § 1759 (1998).

194. *House Votes To Let Credit Unions Expand Their Memberships*, N.Y. TIMES, Apr. 2, 1998, at D5 (quoting Representative Paul E. Kanjorski).

> **Membership** – Federal credit union membership shall consist of the incorporators and such other persons and incorporated or unincorporated organizations, to the extent permitted by the rules and regulations prescribed by the Board, as may be elected to membership and as such each shall subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except the Federal credit union *membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.* Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.[195]

The most notable and relevant amendment to the Federal Credit Union Act is found in section 1759 of the 1998 revised Federal Credit Union Act.[196] This section expansively addresses single common bond,[197] multiple common bond,[198] and geographic common bond[199] requirements. These descriptions which are expanded and clarified, in comparison to previous editions of the Federal Credit Union Act, shed light on Congress' intent regarding membership expansion.[200]

Congress is taking the middle-road in its new regulation of the industry.[201] The Court's decision, as argued in Section III(A) of this Note, would have caused credit union membership to dwindle, while the NCUA's expansive interpretation of the Federal Credit Union Act would

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195. 12 U.S.C. § 1759 (emphasis added).

196. *See id.*

197. *See* 12 U.S.C. § 1759(b)(1).

198. *See* 12 U.S.C. § 1759(b)(2).

199. *See* 12 U.S.C. § 1759(b)(3).

200. *Compare generally* Federal Credit Union Act §§ 1751 - 1795 (1998) *with* Federal Credit Union Act §§ 1751 - 1795 (1993).

201. *See generally* 12 U.S.C. § 1759 (implementing more stringent regulations of credit unions' membership than the expansive interpretation previously taken by the NCUA. However, the revised membership section still allows for greater expansion of credit union membership than the Court's decision in *National Credit Union Administration* would arguably have allowed.).

potentially allow a great expansion in credit union membership.[202] The Court's restrictive ruling can be viewed as being at one end of the spectrum, while the NCUA's permissive interpretation is at the other.[203]

Multiple common bond membership, which allows a credit union to serve multiple unrelated groups of members provided they are intra-related, was at issue is *National Credit Union Administration.*[204] Congress imposed a numeric restriction in section 1759(d) of the revised Act.[205] This restriction allows credit unions to accept for membership any unrelated group of people provided their group is comprised of less than 3,000 members.[206]

This 3,000 member multiple common bond limitation is arguably ineffectual over time. For example, if fifty 3,000 member groups come together under one credit union, the net growth to the institution is 150,000 members. This combination would be entirely permissible under the revised provision.[207] Similarly, if only three 50,000 member groups band together, an action that would be forbidden by the revised provision,[208] the net growth to the institution is also 150,000 members. Given the fact that many more small groups (under 3,000 members) exist than large ones,[209] Congress' intent to limit expansion in the industry can be easily subverted.

The revised Act effectively addresses numerous issues raised by the Court's ruling in *National Credit Union Administration.*[210] For example, the divestiture consequence, which would require credit unions to divest unrelated member groups from their service, as mentioned in the poten-

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202. *See generally* Foust, *supra* note 9, at 56-58 (discussing the NCUA's 1982 policy change and the effect of it on the credit union industry).

203. *See generally Judge Throws Out Changes In Rules For Credit Unions*, N.Y. TIMES, Dec. 5, 1996, at D2 (mentioning the NCUA's 1982 change in credit union membership policy).

204. *See First National Bank*, 118 S.Ct. at 927-32.

205. *See* 12 U.S.C. § 1759(d)(1)(1998).

206. *See id.*

207. *See* 12 U.S.C. § 1759(d)(1) (Any number of unrelated groups with fewer than 3,000 members may combine and be included in the membership field of a multiple common-bond credit union.).

208. *See id.* (This combination of unrelated groups would violate the numeric limitation because the groups proposed to be included in the multiple common bond credit union's membership have more than 3,000 members.).

209. *See* GARDNER & MILLS, *supra* note 33, at 315-30.

210. *See American Banking Unco-operative*, *supra* note 7, at 99-102.

tial effects section of this Note,[211] is effectively nullified. In section 1759(c)(1), existing members of credit unions are permitted to remain members.[212]

The revised Act also addresses the problems hypothetically faced by affected credit unions fragmenting into smaller institutions.[213] The key distinction between Congress' approach and the Court's approach is that the process under Congress' amendment *is suggested and subject to numerous qualifications*, whereas the Court's decision would have arguably *forced* the fragmentation upon the unwilling affected institutions.[214] Section 1759(f)(1)(A) of the revised Federal Credit Union Act calls for the Board to encourage the formation of smaller credit unions "whenever practicable and consistent with reasonable standards for the safe and sound operation of the credit union."[215] This provision has the effect of preserving the competitive ability of smaller institutions.[216] Fragmentation will occur under the amendment only if the resulting institution can remain viable.[217]

Another significant amendment to the Act requires the NCUA Board to evaluate, prior to permitting a credit union to extend its membership to unrelated groups, a number of criteria to ensure the safety and soundness of the industry.[218] The Board is restricted from approving expansion if: there is evidence of unsound practices in the subject credit union;[219] the credit union is inadequately capitalized;[220] or the credit union has inadequate administrative capabilities to handle the increased work load.[221] The Board must also subjectively review and consider the competitive

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211. *See, e.g.*, 12 U.S.C. § 1759(c)(1); *See, e.g.*, 12 U.S.C. § 1759(d).

212. *See* 12 U.S.C. § 1759(c)(1).

213. *See* 142 U.S.C. § 1759(f)(1)(A).

214. *See generally* National Credit Union Administration v. First National Bank & Trust Co., 118 S.Ct. 927, 927-40 (1998)(stating that credit unions were to comply with the ruling but not describing how)(emphasis added)

215. 12 U.S.C. § 1759(f)(1)(A).

216. The NCUA will determine that a credit union should fragment to serve a smaller population only if divesting the credit union of customers would still leave it in a position of financial and administrative safety and soundness.

217. *See* 12 U.S.C. § 1759(f)(1)(A).

218. *See* 12 U.S.C. § 1759(f)(2).

219. *See id.*

220. *See* 12U.S.C. § 1759(f)(2)(B).

221. *See* 12 U.S.C. § 1759(f)(2)(C).

harm caused to *other credit unions.*[222] Congress has granted the NCUA wide discretion to impose other restrictions as they see fit.[223]

These amendments are significant for a number of reasons. First, they are very protective of the industry itself as a whole, the individual credit unions, and the public they serve.[224] This protective quality extends to consider the financial, administrative, and competitive ramifications of proposed membership expansion.[225] Second, the NCUA's broad authority to regulate and oversee the industry on all levels is reinforced.[226] Even the more solidified provisions of the Act are subject to Board interpretation. Additionally, the open-ended grant of authority indicates Congress' intent for the NCUA to be the guardian and keeper of the industry.[227]

VI. Conclusion

Credit unions are important players in the American financial system.[228] Their unique characteristics and approach to providing financial services certainly distinguishes them from the thousands of other financial institutions available to the American public.[229] Although the last decade has brought the seemingly innocuous and beneficial credit unions under constant fire from competitors, the credit union industry as a whole is growing and probably will continue to do so well into the future.[230]

Despite the close-call and potential hardships almost imposed by the Supreme Court's decision in *National Credit Union Administration*, the credit union industry was rescued when Congress revised the Federal Credit Union Act, effectively overruling the Court's decision.[231] Even

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222. *See* 12 U.S.C. § 1759(f)(2)(D).

223. *See* 12 U.S.C. § 1759(f)(2)(E).

224. *See generally* 12 U.S.C. § 1759(f) (requiring the Board to consider the overall safety and stability of the credit union industry as well as the safety and stability of the individual credit unions it regulates).

225. *See, e.g.,* 12 U.S.C. § 1759(f)(1)(B); *See also* 14 U.S.C. § 1759(f)(1)(C); *See also* 12 U.S.C. § 1759(f)(1)(D).

226. *See* 12 U.S.C. § 1752a.

227. *See* 12 U.S.C. § 1759(f)(2)(E).

228. *See* Sinkley, *supra* note 59, at 6-12.

229. *See id.*

230. *See id.*

231. *See House Votes to Let Credit Unions Expand Membership*, N.Y. TIMES, Apr. 2, 1998, at D5.

though the revised Act places some restraint on the NCUA's power to regulate the credit union industry, overall, its net effect will likely be positive.

Credit unions are unlikely to be free and clear just yet. The battle may be won, but the war is far from over. As time passes, novel attacks by competitors to the advantages that credit unions, their members, and Congress hope to protect will certainly become issues to be litigated in our courts.

Donald Novajovsky