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A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches

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A CONSTITUTIONAL AND STATUTORY ANALYSIS OF STATE TAXATION OF EDGE ACT CORPORATE BRANCHES

INTRODUCTION

An Edge Act[1] corporation is a federally chartered entity engaging in international banking and finance.[2] Section 627 of the Edge Act[3] expressly empowers a state to tax the income of an Edge corporation if its home office is located within the state.[4] Pursuant to a general

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1. 12 U.S.C. §§ 611-632 (1976 & Supp. V 1981).

2. *Id.* § 611. Although theoretically Edge corporations can be organized by individuals and non-banking institutions, Wiley, *Edge Act Corporations—Catalysts For International Trade and Investment*, 16 Bus. Law. 1014, 1014-15 (1961), Edge corporations in practice are owned by other banking institutions. *Id.* at 1015; S. Rep. No. 1073, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1425. Examples include Citibank, N.A., which owns Citibank International, an Edge corporation with its home office in Florida and twelve domestic branches, and Manufacturers Hanover Trust Company, which owns Manufacturers Hanover International Banking Corp., an Edge corporation with its home office in Florida and three domestic branches. *See* Board of Governors of the Federal System, *Banking Edge and Agreement Corporations Operating as of September 30, 1982*, Computer Printout [hereinafter cited as *Banking Edge and Agreement Printout*] *and* Board of Governors of the Federal Reserve System, *Edge and Agreement Corporations and Branches*, Computer Printout (Sept. 10, 1982) [hereinafter cited as *Branch Printout*]. In order to arrive at the number of existing domestic Edge corporations and branches, data from the Sept. 30, 1982 printout, which distinguished between Agreement and Edge corporations, was compared with the data from the Sept. 10, 1982 printout, which collectively lists all existing Edge corporations and Agreement corporations and their branches. An Edge corporation is to be distinguished from an Agreement corporation, which is a state-chartered entity engaged in activity similar to that of an Edge corporation. Kelly, *Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks*, 20 Va. J. Int'l L. 37, 38 n.10 (1979) (interpreting 12 U.S.C. §§ 601-605 (1976)) (§ 605 repealed by Act of Aug. 23, 1935, ch. 614, § 329, 49 Stat. 717). Agreement corporations are infrequently used, Kelly, *supra*, at 38 n.10, and there is no express federal authority for a national bank to establish domestic branches of such corporations. *See* 12 U.S.C. § 601 (1976) (only foreign branches are expressly allowed). Only six Agreement corporations exist nationwide. *See Banking Edge and Agreement Printout and Branch Printout, supra.*

3. 12 U.S.C. § 627 (1976). The provision states:

> Any corporation organized under the provisions of this subchapter shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

Id.

4. *Id.*

directive in section 3 of the International Banking Act of 1978 (IBA),[5] Federal Reserve Regulation K[6] was amended in 1979 to permit Edge corporations to establish domestic branches[7] throughout the nation.[8] Section 627 does not indicate, however, whether the income of such a branch is subject to taxation[9] by the state in which it is located if the home office of the Edge corporation is not located within that state.[10]

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5. Pub. L. No. 95-369, § 3, 92 Stat. 607 (1978) (currently codified at 12 U.S.C. §§ 611a, 614, 615(a) & 618-619 (Supp. V 1981)).

6. 12 C.F.R. § 211 (1982) (amending 12 C.F.R. § 211 (1978)). The Board of Governors of the Federal Reserve System regulates the activities of an Edge corporation through this provision. *See id.* § 211.1-.7.

7. In general banking terms, a branch office is defined as an entity authorized to perform general banking business, including accepting deposits and lending money. Note, *The International Banking Act of 1978*, 19 Harv. Int'l L.J. 1011, 1012 n.9 (1978) [hereinafter cited as *International Banking*]; *see* 12 U.S.C. § 36(f) (1976); *id.* § 3101 (Supp. V 1981). By contrast, an agency is generally defined as a banking office that is prohibited from accepting deposits. *Id.* § 3101; *International Banking*, *supra*, at 1012 n.9. An agency, however, is authorized to maintain credit balances and lend money. 12 U.S.C. § 3101 (Supp. V 1981). Prior to the amendment to Regulation K, an Edge corporation was prohibited from establishing domestic branches, but was allowed to establish domestic agencies with prior Federal Reserve approval. 12 C.F.R. § 211.6(a) (1978), *amended by* 12 C.F.R. § 211.4(c) (1982). The legislative history suggests that these agencies were not to have the same authority as branches, *see* 58 Cong. Rec. 7857 (1919) (statements of Reps. Haugen & Platt), but rather were allowed to represent the corporation. *See id.* Thus, the federal regulations governing the establishment of Edge agencies stated that they could only be established for "specific purposes," 12 C.F.R. § 211.6(a) (1978), *amended by* 12 C.F.R. § 211.4(c) (1982), and could not generally perform the business of the Edge corporation. *Id.* The location of the home office is contained in the articles of association of the Edge corporation. 12 U.S.C. § 613 (1976).

There are two types of Edge corporations: those that are engaged in banking and those that are engaged solely in investment. The distinctions between the two forms of Edge corporations deal with deposits, lending and capital requirements. Roussakis, *Miami's Thrust in International Banking*, 13 Law. of the Am. 468, 473 n.4 (1981). An Edge corporation "engaged in banking" accepts deposits in the United States from "nonaffiliated" persons. 12 C.F.R. § 211.2(d) (1982). A credit ceiling of 10% of its capital and surplus limits the ability of the banking Edge corporation to grant credit to any one individual. *Id.* § 211.6(b)(i). Capital requirements for the corporation are set at 7% of risk assets. Roussakis, *supra*, at 473 n.4. An Edge corporation engaged in investment does not accept deposits and has no capitalization requirements. *Id.* (interpreting 12 C.F.R. § 211.2(d), .6(b)(i) (1982)).

8. 12 C.F.R. § 211.4(c) (1982) (amending 12 C.F.R. § 211.6(a) (1978)).

9. This Note solely addresses the issue whether a state may impose a tax upon the income of an Edge corporate branch. An income tax is distinguishable from a bank shares tax, which is a tax upon the shareholders of a corporation. Society For Sav. v. Bowers, 349 U.S. 143, 147-48 (1955). On a practical level, however, a shares tax is paid by the corporation. Zamora, *Regulating Foreign Bank Operations in Texas*, 19 Hous. L. Rev. 427, 463 (1982). The authority of a state to impose a nondiscriminatory bank shares tax upon the shareholders of an Edge corporation is expressly granted in § 627 without any limitation to the home state. 12 U.S.C. § 627

Although one commentator has posited that the language in section 627 and the amendment to Regulation K have created a loophole which permits branches located outside the home-office state to escape taxation,[11] the current policy of those states in which a substantial number of Edge corporate branches are located is otherwise. Florida, New York, Illinois and California deem Edge corporate branches taxable under state corporate taxation statutes regardless of the location of their home offices.[12] Adding to the uncertainty, the

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(1976). In the congressional debates leading to the passage of the Edge Act, the issue arose whether the state in which the corporation is located or whether the state in which the shareholder resides should have the authority to tax the shares. *See* 58 Cong. Rec. 8107-09 (1919) (general discussion). Two conflicting arguments were presented. *See id.* at 8107-08 (statements of Reps. Connally & Wingo). One argument was that because a share of stock is personal property, the situs of such property should follow the owner and be taxed in the state in which the owner resides. *Id.* at 8107 (statement of Rep. Connally). A second agrument was that the shares of stock should be taxed in the same manner as the shares of a national bank were taxed. *Id.* at 8108 (statement of Rep. Wingo). This would have limited the shares tax to the state in which the corporation was located. *See* Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-12, *amended by* Act of Feb. 4, 1868, ch. 6, 15 Stat. 34 (national bank statute). This second argument was initially accepted in the House, 58 Cong. Rec. 8109 (1919), and express language was included in the provision to limit shares taxation to the state in which the home office was located. *Id.* at 8107. The limitation, however, was later expressly eliminated in conference with the Senate. H.R. Rep. No. 473, 66th Cong., 1st Sess. 3 (1919). See *infra* notes 69-72 and accompanying text.

10. *See* 12 U.S.C. § 627 (1976). Commentators have interpreted this absence of statutory language addressing the taxation of these branches as prohibiting such taxation. *See* O'Brien, *State and Local Taxation of Branches of Edge Act Corporations—Opportunities and Limitations*, 96 Banking L.J. 893, 894-95 (1979) (assuming states cannot tax branches if home office not located in the state); Note, *New Rules For Edge Act Corporations Under the International Banking Act of 1978*, 3 Fordham Int'l L.F. 193, 219 (1980) (a "strict reading" suggests states cannot tax branches) [hereinafter cited as *New Rules*].

11. O'Brien, *supra* note 10, at 895 ("The history of bank taxation in the United States suggests that Congress intended this result."). In the sole judicial decision addressing the state taxation of an Edge corporation, Commonwealth v. First Pennsylvania Overseas Fin. Corp., 425 Pa. 143, 229 A.2d 896 (1967), the Supreme Court of Pennsylvania, in dictum, interpreted § 627 as prohibiting state taxation of an Edge corporation if the home office of the corporation is located outside the state. *Id.* at 146, 229 A.2d at 898. The issue was whether a federally chartered Edge corporation with its home office in Pennsylvania was subject to a state capital stock tax. Although branching was not permitted at the time of the decision, the court's statement could be relied upon subsequent to the amendment to Regulation K to preclude states' taxation of branches that are not located in the home state.

12. Cal. Rev. & Tax. Code §§ 23,151, 23,181 (West 1979 & Supp. 1982) (the applicability of these tax provisions to Edge corporations and branches was verified in a letter, dated Feb. 11, 1983, from Mr. Benjamin F. Miller, Supervising Counsel, Multistate Research and Regulations Section, California Franchise Tax Board (on file with the *Fordham Law Review*)); Fla. Stat. Ann. §§ 220.62–.63, .69 (West Supp. 1983) (the applicability of these tax provisions to Edge corporations and branches was verified in a phone inquiry, on Apr. 21, 1983, to Mr. Frank J. Siska, Technical

American Bar Association Committee on Banking and Savings Institutions (ABA Committee) has recommended repeal of section 627[13] as part of a broader plan to create a uniform system of state taxation of federal depositories.[14]

This Note contends that no constitutional basis exists for holding Edge corporate branches immune from state taxation. Part I reviews the historical development of the Edge corporation and describes the legislative amendments that have led to the ambiguity concerning branch taxation. Part II examines the congressional intent behind section 627 and concludes that the legislative history does not support an interpretation that would exclude an Edge corporate branch from taxation by the state in which it is doing business. Part III examines the criteria for state tax immunity of a federal instrumentality, and determines that this immunity should not be available to Edge corporations. In addition, policy considerations support subjecting Edge corporate branches to taxation by the states from which they obtain significant benefits. This Note acknowledges that future congressional action is appropriate. The absence of such action, however, should not preclude the judicial determination that an Edge corporate branch may be taxed by the state in which it has an office to do business.

I. The Edge Act Corporation

A. *Historical Development*

Congress authorized banks to create Edge corporations in 1919 under section 25(a) of the Federal Reserve Act[15] in response to a need to provide Europe with international credit and to secure the nation's

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Assistant, Bureau of Technical Assistance, Florida State Department of Revenue); Ill. Ann. Stat. ch. 120, §§ 2-201, 3-304 (Smith-Hurd Supp. 1982-1983) (the applicability of these tax provisions to Edge corporations and branches was verified in a phone inquiry, on Feb. 14, 1983, to Mr. Hal Crandell, Supervisor of Rules and Regulations, Income Tax Legal Division, Illinois Department of Revenue); N.Y. Tax Law § 1451 (McKinney 1975) (the applicability of this tax provision to Edge corporations and branches was verified in a letter, dated Feb. 25, 1983, from Mr. Andrew F. Marchese, Chief of Tax Regulations, Technical Services Bureau, New York State Department of Taxation and Finance (on file with the *Fordham Law Review*)). The majority of Edge corporate branches and home offices are located in California, Florida, Illinois, New York and Texas. *See Banking Edge and Agreement Printout, supra* note 2, *and Branch Printout, supra* note 2, *and* Board of Governors of the Federal Reserve System, *Nonbanking Edge and Agreement Corporations Operating as of year-end 1981,* Computer Printout [hereinafter cited as *Nonbanking Edge and Agreement Printout*].

13. Committee on Banking and Sav. Insts., Tax Section Recommendation No. 1981-3, 34 Tax Law. 861, 862 (1981).

14. *See id.*

15. 12 U.S.C. §§ 611-632 (1976 & Supp. V 1981).

foreign trade market after World War I.[16] The Edge corporation originally was empowered to provide general banking services for international transactions,[17] to establish overseas branches,[18] to receive deposits in the United States relating to international business transactions,[19] and to invest in the stock of other corporations.[20] Fed-

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16. *See* Cong. Rec. 8082 (1919) (statement of Rep. Phelan); J. Baker & M. Bradford, American Banks Abroad: Edge Act Companies and Multinational Banking 49 (1974); McGuire, *The Edge Act: Its Place in the Evolution of International Banking in the United States,* 3 Law. of the Am. 427, 430-31 (1971). Prior to the passage of the Federal Reserve Act in 1913, national banks had no authority to engage in international finance. McGuire, *supra,* at 429; Wiley, *supra* note 2, at 1016-19. The vast majority of American foreign trade was financed in sterling by London banks. Tamagna & Willis, *United States Banking Organization Abroad,* 42 Fed. Res. Bull. 1284, 1286 (1956). In order to furnish American banks with the power to finance the nation's growing foreign trade, Congress passed the Federal Reserve Act of 1913. It provided that "any national banking association having a capital and surplus of $1,000,000 or more might establish branches in foreign countries . . . with the approval of the Federal Reserve Board." H.R. Rep. No. 408, 66th Cong., 1st Sess. 1 (1919); *see* Federal Reserve Act of 1913, § 25, 38 Stat. 251, 273 (codified as amended at 12 U.S.C. § 601 (1976)). Only a few large, well-established American banks took advantage of this new authority. J. Baker & M. Bradford, *supra,* at 25. Discrimination against the dollar and competition from European banks limited bank expansion under the Act. McGuire, *supra,* at 429. To rectify the situation, in 1916 Congress empowered a national bank with capital and surplus of $1,000,000 or more to invest up to 10% of its capital and surplus in federal or state-chartered financial institutions engaging in international banking. Act of Sept. 7, 1916, 39 Stat. 752, 755-56 (codified as amended at 12 U.S.C. § 601 (1976)). Because no federal charter for an international banking institution existed in 1916, only a state charter could be used. These entities are now known as "Agreement Corporations." McGuire, *supra,* at 430; Wiley, *supra* note 2, at 1016. See *supra* note 2. Only eight American financial institutions took advantage of these statutory provisions. H.R. Rep. No. 408, 66th Cong., 1st Sess. 2 (1919). In order to enhance the prestige of these banks in international markets, Congress established a federal charter for international banking corporations. 12 U.S.C. §§ 612-614 (1976 & Supp. V 1981); *see* 58 Cong. Rec. 8083 (1919) (statement of Rep. Phelan); J. Baker & M. Bradford, *supra,* at 51. Congress believed that a federal charter would provide the corporation with greater respect in international markets, and better establish a uniform system of American involvement in international banking. 58 Cong. Rec. 8082 (1919) (statement of Rep. Phelan); J. Baker & M. Bradford, *supra,* at 51.

17. 12 U.S.C. § 615(a) (1976), *amended by* Pub. L. No. 95-369, § 3(d)-(e), 92 Stat. 607, 609 (1978) (currently codified as amended at 12 U.S.C. § 615(a) (Supp. V 1981)).

18. *Id.* § 615(b).

19. *Id.* § 615(a), *amended by* Pub. L. No. 95-369, § 3(d)-(e), 92 Stat. 607, 609 (1978) (currently codified as amended at 12 U.S.C. § 615(a) (Supp. V 1981)).

20. *Id.* § 615(c). The powers of an Edge corporation originally were limited in four ways: 1) a minimum capital investment of $2,000,000 was required to obtain a federal charter, *id.* § 618, *amended by* Pub. L. No. 95-369, § 3(d), 92 Stat. 607, 609 (1978) (currently codified as amended at 12 U.S.C. § 618 (Supp. V 1981)); 2) United States citizenship was a prerequisite for directorship, *id.* § 614; 3) the parent company could invest only 10% of its capital and surplus in an Edge corporation, *id.* §

eral Reserve Regulation K, issued in 1920,[21] did not allow an Edge corporation to establish any domestic branches.[22] In order for a bank to establish Edge corporate offices in several states, each office was required to be separately incorporated within the state in which the bank wished to operate, with a minimum capital investment of two million dollars.[23] Because of this incorporation requirement and the authorization of home state taxation in section 627, a state effectively had the authority to tax an Edge corporation located and incorporated within its borders.

Section 3 of the IBA[24] was the first major revision of the Edge Act.[25] Prior to 1978, the "antiquated statutory and regulatory framework"[26] under which an Edge corporation operated hampered its ability to compete effectively with foreign-based institutions.[27] Consequently, Edge corporate development lagged prior to the passage of the IBA.[28]

618, *amended by* Pub. L. No. 95-369, § 3(d), 92 Stat. 607, 609 (1978) (currently codified as amended at 12 U.S.C. § 618 (Supp. V 1981)); and 4) all transactions had to be incidental to international business as determined by the Board of Governors of the Federal Reserve System. *Id.* § 615(a), *amended by* Pub. L. No. 95-369, § 3(d)-(e), 92 Stat. 607, 609 (1978) (currently codified as amended at 12 U.S.C. § 615(a) (Supp. V 1981)).

21. J. Baker & M. Bradford, *supra* note 16, at 33.

22. 12 C.F.R. § 211.6(a) (1978), *amended by* 12 C.F.R. § 211.4(c) (1982). Regulation K did allow the Edge corporation to establish "agencies" in other states with prior Board approval. *Id.* However, the "agency" was generally not allowed to "carry on [the Edge Corporation's] business." *Id.* By contrast, a domestic branch of an Edge corporation is now authorized to carry on banking business. *See id.* § 211.4(c) (1982) (amending 12 C.F.R. § 211.6(a) (1978)). See *supra* note 7.

23. Board of Governors of the Federal Reserve System, *The International Banking Act of 1978: A Report by the Board of Governors of the Federal Reserve System* (Sept. 17, 1980) [hereinafter cited as *Federal Reserve Report*], *reprinted in Foreign Bank Operations and Acquisitions in the United States: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 1400, 1404 (1981); Cobb, *A Shot in the Arm For Edge Act Corporations*, 97 Banking L.J. 236, 237 (1980). An Edge corporation could, however, establish both domestic agencies and overseas branches. 12 U.S.C. § 615(b) (1976) (overseas branches and agencies); 12 C.F.R. § 211.6(a) (1978) (domestic agencies), *amended by* 12 C.F.R. § 211.4(c) (1982).

24. Pub. L. No. 95-369, § 3, 92 Stat. 607 (1978) (codified in 12 U.S.C. §§ 611(a), 614, 615(a) & 618-619 (Supp. V 1981)).

25. 44 Fed. Reg. 36,005, 36,006 (1979). For a detailed analysis of the IBA and its effect on the Edge corporation, see Cobb, *supra* note 23; Foorman, *Revised Regulation K: Selected Issues Affecting Banking Edge Corporations*, 1980 U. Ill. L. F. 41; Kelly, *supra* note 2; *New Rules, supra* note 10, at 193.

26. S. Rep. No. 1073, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1424.

27. *Id.*

28. By 1929, 15 Edge corporations had been chartered. McGuire, *supra* note 16, at 436. However, all 15 were liquidated or absorbed within the next decade. *Id.* Only

The IBA relaxed certain restrictions and allowed Edge corporations greater flexibility in expanding their operations.[29] Pursuant to a general directive of the IBA, the Board of Governors of the Federal Reserve System amended Regulation K in 1979 to allow Edge corporations to establish interstate branches with prior approval of the Board of Governors.[30] The amendments appear to have been successful in expanding Edge corporate development; today, seventy-one Edge corporations with ninety domestic branches engaged in international banking exist nationwide.[31]

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six Edge corporations were in existence as of 1956. Tamagna & Willis, *supra* note 16, at 1292. After a surge of Edge corporate development in the late 1960's and early 1970's, *see The edge is off the Edge Act banks*, Bus. Wk., Apr. 7, 1975, at 42, col. 1, only four new Edge corporations were established in 1977 and 1978. *Federal Reserve Report*, *supra* note 23, at 1405.

29. Subsection 3(a) of the IBA stated that the objective of the Act was to modify the provisions of the Edge Act that discriminated against foreign banking institutions and hindered the competitiveness of the Edge corporation. The Board of Governors of the Federal Reserve System was directed to revise its regulations governing the Edge corporation in light of this congressional objective. Pub. L. No. 95-369, § 3(a), 92 Stat. 607, 608 (1978). Subsection 3(b) established a policy statement for the Edge Act. *Id.* § 3(b), 92 Stat. at 607, 608-09 (codified in 12 U.S.C. § 611a (Supp. V 1981)). Subsection 3(c) eliminated the United States citizenship requirement for ownership of an Edge corporation. *Id.* § 3(c), 92 Stat. at 609 (codified in 12 U.S.C. § 614 (Supp. V 1981)). Subsection 3(d) eliminated the restriction on outstanding liabilities. *Id.* § 3(d), 92 Stat. at 609 (codified in 12 U.S.C. §§ 615(a), 618 (Supp. V 1981)). Originally, the Edge corporation was prohibited from having outstanding liabilities at any one time on its bonds, promissory notes, or debentures in excess of ten times its paid-in capital and surplus. 12 U.S.C. § 615(a) (1976). Subsection 3(e) eliminated the mandatory ten percent reserve requirement on deposits and subjected the Edge corporation to the same requirements as member banks of the Federal Reserve System. Pub. L. No. 95-369, § 3(e), 92 Stat. 607, 609 (1978) (codified in 12 U.S.C. § 615(a) (Supp. V 1981)). Subsection 3(f) allowed foreign-owned banks to acquire a majority interest in an Edge corporation if prior approval of the Board of Governors was obtained. *Id.* § 3(f), 92 Stat. at 609-10 (codified in 12 U.S.C. § 619 (Supp. V 1981)).

30. 12 C.F.R. § 211.4(c) (1982) (amending 12 C.F.R. § 211.6(a) (1978)). The Board of Governors of the Federal Reserve System must approve the establishment of a domestic branch and will consider the same factors as it does in reviewing a request for an Edge corporate charter. *Id.* § 211.4(a). Those factors are: 1) "the financial condition of the applicant"; 2) "the general character of its management"; 3) the need for the services; and 4) the effects on competition. *Id.* Because the authority to allow Edge corporations to establish domestic branches was not explicit in the IBA's general directive, it has been suggested that revised Regulation K may be susceptible to constitutional challenge. *See* Zamora, *supra* note 9, at 457 n.171. Another commentator has suggested that the revision to Regulation K is consistent with the congressional mandate. Kelly, *supra* note 2, at 45.

31. *See Banking Edge and Agreement Printout*, *supra* note 2, *and Branch Printout*, *supra* note 2. There are also fifty-one separate Edge corporations in existence engaged in international investment. *See Nonbanking Edge and Agreement Printout*,

B. *State Taxation of Edge Corporate Branches*

Despite this branching authorization,[32] section 627, empowering states in which the home office is located to tax the Edge corporation, was not amended to address the taxation of these branches.[33] This legislative inaction, in combination with the current taxation practice of several states, has led to uncertainty in the taxation of Edge corporate branches.[34] Nevertheless, most of those states in which the majority of Edge branches are located generally have determined that the Edge corporate branch should not escape taxation in the state in which it is doing business.[35] For example, Illinois has deemed an Edge

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supra note 12. The IBA was immediately successful in escalating Edge corporate development. In the first 15 months after the passage of the IBA, 39 new Edge corporate offices were approved. Of these 39, 27 were branches of previously existing Edge corporations. *Federal Reserve Report*, *supra* note 23, at 1405.

The authority to branch across state lines allows the Edge corporation to expand more efficiently and at lower cost because the minimum capital requirement, 12 U.S.C. § 618 (1976), does not apply to branch expansion. Thus, it is probable that Edge corporate expansion will usually occur through the establishment of branches, rather than through the chartering of new corporations. Roussakis, *supra* note 7, at 474-80. This trend is made apparent by the frequency of banks consolidating their Edge corporations and establishing a home office with several branches. *Id.* at 476-78.

32. 12 C.F.R. § 211.4(c) (1982) (amending 12 C.F.R. § 211.6(a) (1978)).

33. *See* 12 U.S.C. § 627 (1976). Congress and the Board of Governors of the Federal Reserve System did not discuss the statutory provision when deciding on the appropriate amendments and revisions. *See* 44 Fed. Reg. 36,005, 36,006 (1979); S. Rep. No. 1073, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1422.

34. See *supra* notes 11-14 and accompanying text.

35. Cal. Rev. & Tax. Code §§ 23,151, 23,181 (West 1979 & Supp. 1982) (the applicability of these provisions to Edge corporations and branches was verified in a letter, dated Feb. 11, 1983, from Mr. Benjamin F. Miller, Supervising Counsel, Multistate Research and Regulations Section, California Franchise Tax Board (on file with the *Fordham Law Review*)); Fla. Stat. Ann. §§ 220.62-.63, .69 (West Supp. 1983) (the applicability of these provisions to Edge corporations and branches was verified in a phone inquiry, on Apr. 21, 1983, to Mr. Frank J. Siska, Technical Assistant, Bureau of Technical Assistance, Florida State Department of Revenue); Ill. Ann. Stat. ch. 120, §§ 2-201, 3-304 (Smith-Hurd Supp. 1982-1983) (the applicability of these tax provisions to Edge corporations and branches was verified in a phone inquiry, on Feb. 14, 1983, to Mr. Hal Crandell, Supervisor of Rules and Regulations, Income Tax Legal Division, Illinois Department of Revenue); N.Y. Tax Law § 1451 (McKinney 1975) (the applicability of this tax provision to Edge corporations and branches was verified in a letter, dated Feb. 25, 1983, from Mr. Andrew F. Marchese, Chief of Tax Regulations, Technical Services Bureau, New York State Department of Taxation and Finance (on file with the *Fordham Law Review*)). There is a trend among the states, however, to exempt international banking facilities from taxation in order to attract and maintain international banking business. Roussakis, *supra* note 7, at 482; *see, e.g.*, 1981 Cal. Legis. Serv. 825 (West); 1978 N.Y. Laws 288. An international banking facility is defined as "a set of asset and liability

branch taxable under its corporate tax statutes regardless of the location of its home office.[36] Similarly, the New York State Department of Taxation and Finance has determined that Edge corporate branches located in New York with home offices outside the state are taxable because section 627 does not address, and accordingly does not prohibit, the state from taxing Edge corporate branches.[37] In Florida, the income of a branch is taxable provided that it is not attributed to the activity of the home office.[38] This practice would seem to protect the corporation from double taxation.[39] Edge corporate branches in Cali-

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accounts segregated on the books and records of a depository institution, United States branch or agency of a foreign bank, or an Edge or Agreement Corporation that includes only international banking facility time deposits and international banking facility extensions of credit." 12 C.F.R. § 204.8(a)(1) (1982).

36. Ill. Ann. Stat. ch. 120, §§ 2-201, 3-304 (Smith-Hurd Supp. 1982-1983) (the applicability of these tax provisions to Edge corporations and branches was verified in a phone inquiry, on Feb. 14, 1983, to Mr. Hal Crandell, Supervisor of Rules and Regulations, Income Tax Legal Division, Illinois Department of Revenue). Approximately ten Edge corporate branches are located in Illinois. *See Banking Edge and Agreement Printout, supra* note 2, *and Branch Printout, supra* note 2. Approximately seven home offices are located in Illinois. *See Banking Edge and Agreement Edge Printout, supra* note 2, and *Nonbanking Edge and Agreement Printout, supra* note 12.

37. N.Y. Tax Law § 1451 (McKinney 1975) (the applicability of this tax provison to Edge corporations and branches was verified in a letter, dated Feb. 25, 1983, from Mr. Andrew F. Marchese, Chief of Tax Regulations, Technical Services Bureau, New York State Department of Taxation and Finance (on file with the *Fordham Law Review*)). Approximately 12 Edge corporate branches are located in New York. *See Banking Edge and Agreement Printout, supra* note 2, *and Branch Printout, supra* note 2. Approximately 31 Edge corporations have their home offices in New York. *See Banking Edge and Agreement Printout, supra* note 2; *NonBanking Edge and Agreement Printout, supra* note 12.

38. Fla. Stat. Ann. §§ 220.62–.63, .69 (West Supp. 1982-1983) (the applicability of these tax provisions to Edge corporations and branches was verified in a phone inquiry, on Apr. 21, 1983, to Mr. Frank J. Siska, Technical Assistant, Bureau of Technical Assistance, Florida State Department of Revenue). Approximately 8 Edge corporate branches are located in Florida. *See Banking Edge and Agreement Printout, supra* note 2, *and Branch Printout, supra* note 2. Approximately 28 home offices are located in Florida. *See Banking Edge and Agreement Printout, supra* note 2, *and Nonbanking Edge and Agreement Printout, supra* note 12. Because of recent amendments to the Florida Tax Code, Edge corporations, as well as all other banks engaged in international transactions, are subject only to a franchise tax in Florida. Roussakis, *The Edges Come to Miami*, The Bankers Mag. May/June 1981, at 85-86 (interpreting Fla. Stat. Ann. § 220.63 (West Supp. 1983)). This improvement in the Florida tax environment is expected to attract more international banking business to the state. Roussakis, *supra*, at 86.

39. Generally, a state may not tax income earned outside its borders. Asarco Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3109 (1982). If the income of a branch was attributable to both the home office state and the branch state, both states would be taxing the corporation on the same income. *Cf.* General Motors Corp. v. District of Columbia, 380 U.S. 553, 556-57, 560-61 (1965) (apportionment formulas should not cause multistate taxation of net income).

fornia are taxable under a unitary apportionment method.[40] The legislative history of section 627 does not appear to preclude these policies.

II. The Legislative History of Section 627

Section 627, by its terms, authorizes taxation of Edge corporate income only by the state in which the home office is located. Under the plain meaning rule,[41] therefore, a state would be prohibited from taxing an Edge corporate branch if the home office was not located within the state.[42] Assuming this result, a conflicting state taxation statute that imposes a tax upon a branch when its home office is not located within the state would be considered unconstitutional as a violation of the supremacy clause.[43] The failure of Congress to revise section 627 in light of the amendment to Regulation K, however, has rendered section 627 ambiguous.[44] Accordingly, an examination of the legislative history and purpose of section 627 is necessary to determine

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40. *See* Cal. Rev. & Tax. Code §§ 23,151, 23,181 (West 1979 & Supp. 1982) (the applicability of these tax provisions to Edge corporations and branches was verified in a letter, dated Feb. 11, 1983, from Mr. Benjamin F. Miller, Supervising Counsel, Multistate Research and Regulations Section, California Franchise Board (on file with the *Fordham Law Review*)). A unitary method of apportioning income includes the income of the corporation within the state in addition to the income of related corporations if the activities of the related corporation outside the state are dependent upon, or contribute to, the corporation's business within the state. *State Taxation of Interstate Commerce and Worldwide Corporate Income: Hearing Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance*, 96th Cong., 2d Sess. 689 (1980) [hereinafter cited as *Corporate Income Hearings*]. Approximately 17 Edge corporate branches and 13 home offices are located in California. *See Banking Edge and Agreement Printout*, *supra* note 2, *and Branch Printout*, *supra* note 2, *and Nonbanking Edge and Agreement Printout*, *supra* note 12.

A substantial number of Edge corporate branches exist in Texas as well. *See Banking Edge and Agreement Printout*, *supra* note 2, *and Branch Printout*, *supra* note 2. Because Texas specifically exempts all banks from the state franchise tax, Texas Tax Code Ann. § 171.078 (Vernon 1981); Zamora, *supra* note 9, at 462-63, one commentator has suggested that Edge corporations, like other banks, would therefore only be subject to the bank shares tax and real property tax. *Id.* at 463 (interpreting Texas Tax Code Ann. § 171.078 (Vernon 1982)).

41. If the statutory language is clear, there is no need to examine legislative history to determine congressional purpose. United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940); District of Columbia Nat'l Bank v. District of Columbia, 348 F.2d 808, 810 (D.C. Cir. 1965); *see* Federal Land Bank v. Priddy, 295 U.S. 229, 231-32 (1935).

42. 12 U.S.C. § 627 (1976).

43. *Cf.* Perez v. Campbell, 402 U.S. 637, 644 (1971) (state statute in conflict with Federal Bankruptcy Act violates the supremacy clause); Franklin Nat'l Bank v. New York, 347 U.S. 373, 378-79 (1954) (state statute in conflict with the Federal Reserve Act violates the supremacy clause).

44. *See* 12 U.S.C. § 627 (1976).

whether states impliedly are forbidden from imposing a tax on Edge branches if the home office is not located in the state.[45] The legislative history, however, is not entirely clear. It can be interpreted either to support or prohibit this taxation.

Upon introduction in the Senate,[46] the taxation provision of the Edge Act provided that an Edge corporation would pay taxes "in like manner as is paid by other banking corporations transacting business in the United States."[47] The debates preceding Senate approval of this language give some indication that Edge corporations would not be exempt from state taxation.[48] Senator Edge, the sponsor of the legislation, stated: "[A] corporation organized under [the Edge Act] would be taxed in every way that any other similar corporation is taxed if there is nothing said to the contrary. In other words, we define it when we exempt, and when we do not define it they are not exempted."[49] Senator Norris also stated that Edge corporations should be taxed by any state in which they were located and doing business in the same manner as other similar financial corporations:

> [There] is no reason why [an Edge corporation] should be relieved from taxes that other corporations doing business in those cities have to pay to the States. They ought to be taxed like any other banks. There ought to be no exemption about it. If they are located in New York they get the protection of the laws of New York, and

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45. If the language of a statute is ambiguous, the legislative history of the statute should be examined to determine congressional intent. United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953); Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 106-07 (D.C. Cir. 1976); District of Columbia Nat'l Bank v. District of Columbia, 348 F.2d 808, 810 (D.C. Cir. 1965); Comptroller of the Treasury v. Maryland Nat'l Bank, 44 Md. App. 366, 373, 408 A.2d 753, 757 (1979); *see* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) (should examine the underlying legislative purpose); Federal Land Bank v. Priddy, 295 U.S. 229, 231-32 (1935) (same); Sorrells v. United States, 287 U.S. 435, 446 (1932) (same).

46. 58 Cong. Rec. 2579 (1919) (S. 2472). The bill was initially referred to the Senate Committee on Banking and Currency. *Id.*

47. *Id.* at 4969.

48. *See id.* at 4968-69 (general discussion). As was the case with national banks, the underlying intent of Congress was to guarantee that a state would not discriminatorily tax a federally chartered corporation in order to favor state-chartered organizations. *Id.* at 8083 (statement of Rep. Phelan); First Fed. Sav. & Loan Ass'n v. Tax Comm'n, 437 U.S. 255, 258 & n.2 (1978). One Senator, however, contended that Edge corporations should not be subject to any state or local taxation because the corporation would only be conducting international business. 58 Cong. Rec. 4969 (1919) (statement of Sen. Owen).

49. 58 Cong. Rec. 4969 (1919) (statement of Sen. Edge). The Senator further stated that "we want to make it doubly sure, and inasmuch as no one wants [Edge corporations] to escape any taxation, State or Federal, I am entirely satisfied to have language inserted to make it clear." *Id.*

> they ought to be required to pay a tax to the State of New York the same as any other corporation doing business in that State.[50]

Senate and House analogies to national banks, however, support a more restrictive interpretation. Senator Norris endorsed a proposal that would have taxed Edge corporations in the same manner "as member banks of the Federal Reserve System."[51] Because member banks include national banks, this phrase could be interpreted to restrict state taxation of Edge corporations to the limited taxes imposed on national banks.[52] Although the Senate ultimately passed over the "member banks" language,[53] Senator Norris and members of the House drew more specific analogies to national bank taxation. Senator Norris stated that it would be "satisfactory" if Edge corporations were taxed like national banks.[54] Representative Wingo further stated that the House version of the tax provision was to be interpreted as requiring Edge corporations and their shares to be taxed in the same manner as national banks and their shares.[55] At that time, a state could not tax the income of national banks, but rather was limited to real property taxation and shares taxation by the state in which the bank was "located."[56]

These analogies drawn to national bank taxation, however, are somewhat ambiguous. The statements of Senator Norris and Repre-

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50. *Id.* (statement of Sen. Norris).

51. *Id.*

52. Board of Governors of the Federal Reserve System, The Federal Reserve System 64 (1961).

53. 58 Cong. Rec. 4969 (1919) (statement of the Presiding Officer).

54. *Id.* (statement of Sen. Norris).

55. *Id.* at 8108 (statement of Rep. Wingo). Representative Dunbar also made a comparison to national banks. *Id.* at 8083 (statement of Rep. Dunbar). Representative Dunbar's statement, unlike Representative Wingo's, was made solely in the context of shares taxation. *Id.*

56. Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111-12, *amended by* Act of Feb. 10, 1868, ch. 6, 15 Stat. 34, 34 (currently codified at 12 U.S.C. § 548 (1976)); *see* Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 669 (1899). In 1926, Congress amended R.S. 5219 to allow states to tax the net income of national banks. Act of Mar. 25, 1926, ch. 88, 44 Stat. 223 (currently codified as amended at 12 U.S.C. § 548 (1976)). Until 1969, a state could only subject a national bank to taxation in the four ways that Congress had expressly authorized in the statute. *Id.* (state could tax the shares of a national bank, include dividends in the taxable income of a shareholder, tax the national bank on its net income, or measure such tax by net income). One commentator has suggested that a comparison of Edge corporate taxation to national bank taxation indicates a congressional intent to limit state taxation to the home state. O'Brien, *supra* note 10, at 894-95. Because Congress only specified state taxation authority over Edge corporations by the state in which the home office is located, 12 U.S.C. § 627 (1976), Congress may have intended that the manner of state taxation of Edge corporations be limited to the express provision. O'Brien, *supra* note 10, at 895 ("Unless Congress assumed that the same principle would apply to Edge Act corporations, the enactment of this [home state] provision is enigmatic.").

sentative Wingo indicate that they were not entirely familiar with the nature of the restrictions on national bank taxation at the time. Senator Norris believed that national banks were taxed by any state in which they were doing business.[57] Representative Wingo suggested that Edge corporate taxation would not only be similar to national bank taxation, but would also be similar to the taxation of other corporations, such as state banks and oil corporations.[58] Furthermore, the analogies made in the House should not be deemed adequate to restrict state income taxation to the home office state because they were made principally in the context of the House discussion of shares taxation.[59]

A second argument against branch taxation can be premised on these analogies to national banks. Because the national bank statute restricted the taxation of national bank shares to the state in which the bank was located,[60] Congress may have intended to restrict Edge corporate taxation to the state in which the home office was located. This language, however, should not be interpreted to prohibit state taxation of a branch merely because the home office is not located in that state. At the time of the Edge Act's enactment, "located" was necessarily restricted to the state of incorporation.[61] Today, however, an Edge branch may be located and doing business in states other than the state in which the home office is located.[62] In 1919, Congress did not envision that an Edge corporation would be able to establish domestic branches.[63] This may have reflected the concern that branch banking would lead to a dangerous concentration of power in the banking field.[64] Accordingly, one year after the Edge Act was passed in 1919, the Federal Reserve enacted Regulation K[65] which prohibited

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57. 58 Cong. Rec. 4969 (1919) (statement of Sen. Norris).

58. *Id.* at 8108 (statement of Rep. Wingo).

59. *Id.* at 8107-09 (general discussion). There were only a few inconclusive references to the taxation of corporate assets. *See id.* at 8109 (statement of Rep. Black); *id.* at 8108 (statement of Rep. Wingo).

60. See *supra* note 56 and accompanying text.

61. This was a result of the restriction on domestic branching, *see* 12 C.F.R. § 211.6(a) (1978), *amended by* 12 C.F.R. § 211.4(c) (1982), and the need to incorporate separately each corporate office, *Federal Reserve Report, supra* note 23, at 1404; *see* 12 U.S.C. §§ 611-614, 618 (1976), *amended by* 12 U.S.C. § 618 (Supp. V 1981).

62. *See* 12 C.F.R. § 211.4(c) (1982).

63. 58 Cong. Rec. 8100-01 (1919) (statements of Reps. Platt, Young, Cannon & McFadden); *see* Tamagna & Willis, *supra* note 16, at 1288.

64. Tamagna & Willis, *supra* note 16, at 1288; *see* 58 Cong. Rec. 8100 (1919) (statement of Rep. Cannon). This sentiment is consistent with the prevailing view that a few large financial institutions may monopolize the banking industry if branch banking is permitted. *See* Note, *Interstate Branch Banking: That Someday is Today*, 21 Washburn L.J. 266, 278 (1982).

65. Tamagna & Willis, *supra* note 16, at 1288.

the Edge corporation from establishing domestic branches.[66] Therefore, dictum in *Commonwealth v. First Pennsylvania Overseas Finance Corp.*,[67] which suggests that a state may not tax an Edge corporation when its home office is not within state boundaries,[68] can best be understood in light of this prohibition against Edge corporate branching. Because the taxation statute exhibited no apparent ambiguity, this strict reading was appropriate.

A third argument against the taxation of branches could be based on language deleted from the final version of section 627. The House version of the tax provision[69] originally stated that shares of the corporation "owned by nonresidents of any State shall be taxed only in the city or town in which the corporation's home office is located, and not elsewhere."[70] In response to the argument that the state in which a stockholder resides should be allowed to tax the shares,[71] this location

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66. 12 C.F.R. § 211.6(a) (1978), *amended by* 12 C.F.R. § 211.4(c) (1982). Today, restrictions on the ability of national banks to establish domestic branches still exist. The McFadden Act allows a national bank to establish intrastate branches only if the state in which it is located permits such branching. 12 U.S.C. § 36(c) (1976). The statute does not authorize interstate branching. *See id.* The Douglas Amendment to the Bank Holding Act prohibits a bank holding company from crossing state lines unless the state in which the company wishes to locate has express legislation allowing for such activity. *See* 12 U.S.C. § 1842(d) (Supp. V 1981). These branching restrictions do not apply to Edge corporations. *See id.* § 36(c) (1976) (McFadden Act expressly applies only to national banks); *id.* § 1841(c) (Bank Holding Act expressly exempts all banks organized under § 25 and § 25(a) of the Federal Reserve Act, which include Edge corporations). Congress excluded § 25(a) financial institutions from the provisions of the Bank Holding Act because it believed that it was unnecessary to restrict the expansion of organizations doing little domestic business in order to prevent the domestic monopolization of the banking industry. S. Rep. No. 1095, 84th Cong., 2d Sess. 7-8, *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482, 2488-89. National banks have taken advantage of these exemptions to form Edge corporations as a means of expanding interstate. *Branching Brouhaha*, Wall St. J., Jan. 13, 1981, at 32, col. 1. While an Edge corporation cannot perform domestic banking business that is not related to international transactions, 12 U.S.C. § 615(a) (Supp. V 1981), it does provide a convenient forum for a national bank to establish a presence in a number of states. *See Branching Brouhaha*, *supra*, at 32, col. 1.

67. 425 Pa. 143, 229 A.2d 896 (1967).

68. *Id.* at 146, 229 A.2d at 898. There is only one Edge corporate branch in Pennsylvania. *See Banking Edge and Agreement Printout*, *supra* note 2, *and Branch Printout*, *supra* note 2. The author was unable to obtain a response whether the state department of revenue exempts branches from taxation.

69. 58 Cong. Rec. 8107 (1919). The only difference between the House version and the final version of § 627 is that the shares restriction was deleted in the final provision. *See* H.R. Rep. No. 473, 66th Cong., 1st Sess. 3 (1919) (Conference Report).

70. 58 Cong. Rec. 8107 (1919).

71. *See, e.g.*, *id.* at 8107-09 (statements of Reps. Connally & Wingo). See *supra* note 9.

restriction on the taxation of shares was later deleted in conference.[72] Because Congress expressly deleted the language in the Edge Act restricting shares taxation to the state in which the home office was located "and not elsewhere,"[73] but did not delete the language restricting corporate income taxation to the home office state, it may be argued that an intent to restrict corporate taxation to the home office state should be inferred.[74] However, the wording of the deleted shares taxation language was more restrictive than the language that now appears in the income taxation provision.[75] The terms "only in the city or town in which" and "not elsewhere" in the deleted shares provision of the House version suggested an absolute ban on state shares taxation if the home office was not located within the state. No equivalent language was in the corporate income tax provision of the House version.[76] Thus, it may be argued that Congress did not change the language of the corporate income tax provision because it did not view the language as an absolute ban. In addition, reliance upon a comparison of the home state specification in the corporate income tax provision with the deleted bank shares tax restriction should not be dispositive because the taxes are conceptually different.[77]

A fourth argument against Edge branch taxation can be based on the recent amendments to the national bank statutes. Because Congress repealed the ban of multi-state taxation of national banks in the 1969 amendments to the National Bank Act of 1864 (NBA)[78] and did

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72. H.R. Rep. No. 473, 66th Cong., 1st Sess. 3 (1919) (Conference Report).

73. *See id.*

74. This is an application of the maxim of statutory construction known as *expressio unius est exclusio alterius.* 2A C. Sands, Sutherland's Statutes and Statutory Construction §§ 47.23–.25 (4th ed. 1973). The maxim means the expression of one thing implies the exclusion of another. *See id.* § 47.23, at 123. The maxim should not, however, be applied when an expansive interpretation would be consistent with public policy. 2A C. Sands, *supra,* § 47.25.

75. *Compare* 58 Cong. Rec. 8107 (1919) (House version of § 627) *with* 12 U.S.C. § 627 (1976) (final version of § 627).

76. *See* 58 Cong. Rec. 8107 (1919).

77. The corporate tax issue does not involve the question of where the situs of personal property should be. For the general distinctions between these taxes, see *supra* note 9.

78. *Compare* Pub. L. No. 91-156, §§ 1(a), 2(a), 83 Stat. 434 (1969) (authorizing interstate taxation of national banks) (currently codified at 12 U.S.C. § 548 (1976)) *with* Act of Mar. 25, 1926, ch. 88, 44 Stat. (pt. II) 223 (limiting state taxation of national banks to the state in which the bank is located and to four methods of taxation) (currently codified as amended at 12 U.S.C. § 548 (1976)). In the debates leading to the passage of the 1969 amendments, concern was voiced over the advisability of granting tax authority to state governments other than the home state. S. Rep. No. 530, 91st Cong., 1st Sess. 3, *reprinted in* 1969 U.S. Code Cong. & Ad. News 1594, 1596-97. A Treasury Department representative stated "that the question of

not authorize state taxation of Edge corporate branches in the IBA, the congressional silence in section 627 could be interpreted as a deliberate omission.[79] The date of, and authorization for, Regulation K, however, clearly indicates that the omission was not intentional. Although section 3 of the IBA directed the Federal Reserve to amend its regulations so as to provide Edge corporations greater flexibility, it did not specifically direct the Federal Reserve to authorize domestic branching.[80] The Board, however, relied on the general directive to provide for this branching authorization.[81] The drafters of the IBA therefore had no reason to address the taxation of branches because the issue did not arise until after the amendment to Regulation K.

Finally, despite the possible arguments in favor of a restrictive reading of section 627, it is phrased as an affirmative grant of state taxation authority.[82] The ambiguity in both the final version of section 627 and its legislative history therefore should not be interpreted to reflect congressional intent to preclude state taxation of an Edge corporation in states in which the home office is not located. Accord-

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taxation of national banks by States other than the home State, [should] be considered and treated separately." *Id.* at 3, *reprinted in* 1969 U.S. Code Cong. & Ad. News at 1596. Because of this stated concern, Congress separately dealt with interstate taxation in the amendments. Pub. L. No. 91-156, §§ 1-2, 83 Stat. 434 (1969). A temporary amendment was passed restricting the taxing authority of states in which the home office was not located. *Id.* § 1, 83 Stat. at 434. A permanent amendment was to be implemented in 1972 providing for nondiscriminatory taxation by all states. *Id.* § 2, 83 Stat. at 434. However, the implementation was postponed on three occasions. Pub. L. No. 92-213, § 4(a), 85 Stat. 775, 775 (1971); Pub. L. No. 93-100, § 7(c), 87 Stat. 342, 347 (1973); Pub. L. No. 94-222, § 1, 90 Stat. 197, 197 (1976). The moratorium expired on September 12, 1976, Levinson, *Interstate Taxation and Apportionment of Bank Income*, 34 Nat'l Tax J. 447, 449 (1981); O'Brien, *supra* note 10, at 893 n.4, and today there is no restriction upon state taxation of national banks. 12 U.S.C. § 548 (1976). *See generally* Levinson, *supra*, at 447-49 (discussing the amendments to the NBA). While federal and state law restrict the ability of national banks to branch across state lines, see *supra* note 66, national banks do maintain "loan and deposit generating offices and representatives in other states . . . regularly contact out-of-state customers to maintain and expand business." Levinson, *supra*, at 449.

79. This is an application of the maxim of statutory construction known as *expressio unius est exclusio alterius*. See *supra* note 74.

80. *See* Pub. L. No. 95-369, § 3(a), 92 Stat. 607, 608 (1978). See *supra* notes 29-30 and accompanying text.

81. *See* 44 Fed. Reg. 36,005, 36,005-06 (1979).

82. *Compare* 12 U.S.C. § 627 (1976) (Edge corporation) ("Any corporation organized under . . . this subchapter shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations . . . .") *with* Act of Mar. 25, 1926, ch. 88, 44 Stat. (pt II) 223 (national bank) ("The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing . . . .") *and* 12 U.S.C. § 2055 (1976) (Federal Land Bank) ("Every Federal land bank . . . shall be exempt from Federal, State, municipal, and local taxation.").

ingly, states should have the power to tax Edge corporate branches unless the Constitution, under the federal instrumentality doctrine, mandates otherwise.

III. Edge Corporations and Federal Instrumentality Analysis

A. *Federal Instrumentality Defined*

A federal instrumentality is an entity so closely connected to the federal government that it becomes "one of its constituent parts."[83] As such, it is not subject to the plenary taxation powers of the states.[84] A state therefore may not, without the express consent of Congress, levy a tax upon it.[85] Thus, if the Edge corporation is considered to be a federal instrumentality, a state may tax it only as Congress expressly authorizes. Section 627 expressly provides for taxation only by the state in which the home office is located.[86] Therefore, assuming that the Edge corporation is a federal instrumentality, the absence of statutory language authorizing state taxation of branch offices prohibits a state from imposing a tax on an Edge corporate branch if the home office is not located within that state.[87]

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83. United States v. Township of Muskegon, 355 U.S. 484, 486 (1958); *see* United States v. New Mexico, 455 U.S. 720, 735 (1982) (a federal instrumentality is an entity "so closely connected to the Government that the two cannot realistically be viewed as separate entities"); Department of Employment v. United States, 385 U.S. 355, 359-60 (1966) (a federal instrumentality is "virtually . . . an arm of the Government"); Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942) (a federal instrumentality is an "[arm] of the Government deemed by it essential for the performance of governmental functions").

84. Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961); *see, e.g.*, United States v. New Mexico, 455 U.S. 720, 733 (1982); First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 350 (1968) (Marshall, J., dissenting); United States v. Boyd, 378 U.S. 39, 43-44 (1964); McCulloch v. Maryland, 17 U.S. 159, 213, 4 Wheat. 316, 436 (1819); United States v. State Bd. of Equalization, 639 F.2d 458, 459 (9th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981); B. Schwartz, Constitutional Law § 2.6, at 56 (1979); L. Tribe, American Constitutional Law § 6-29, at 395 (1978). If an organization is deemed a federal instrumentality and is therefore not subject to the plenary powers of the state to tax, the organization may still be subject to other forms of state regulation. *See, e.g.*, American Nat'l Red Cross v. Labor Relations Comm'n, 363 Mass. 525, 529-30, 296 N.E. 2d 214, 217-18 (1973) (even though the Red Cross is a federal instrumentality, it is subject to the jurisdiction of the state labor relations commission).

85. *See, e.g.*, First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968); Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961); United States v. City of Detroit, 355 U.S. 466, 469 (1958); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954); Mayo v. United States, 319 U.S. 441, 446 (1943); First Nat'l Bank v. Anderson, 269 U.S. 341, 347 (1926); United States v. State Bd. of Equalization, 639 F.2d 458, 459 (9th Cir. 1980), *cert. denied*, 451 U.S. 1028 (1981); L. Tribe, *supra* note 84, § 6-28, at 391-92; *id.* § 6-29, at 394-95.

86. 12 U.S.C. § 627 (1976).

87. *See* First Nat'l Bank v. Anderson, 269 U.S. 341, 347 (1926); Osborn v. Bank of the United States, 22 U.S. 326, 381, 9 Wheat. 738, 865-66 (1824); L. Tribe, *supra*

The basis for this exemption from state taxation is found in the supremacy clause of the Constitution,[88] as initially interpreted in *McCulloch v. Maryland*.[89] Since then, the distinction between a taxable entity and an immune instrumentality "has been drawn by an unsteady hand"[90] in a field of law that has been "much litigated and often confused."[91] Today, no simple test is available for determining the existence of a federal instrumentality.[92] Courts generally have looked to organizational and operational characteristics that suggest that the entity is virtually "an arm of the Government."[93] This analy-

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note 84, § 6-28, at 391-92. By contrast, some courts have suggested that when statutory language providing for state taxation exists, but is at variance with the intent of the legislature, a court should go beyond the plain words of the statute and look to the underlying legislative intent as revealed by the statute's legislative history. *See, e.g.*, First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 343 (1968) (legislative history examined in determining whether the federal national bank taxation statute prescribed the only method of state taxation of a national bank); District of Columbia Nat'l Bank v. District of Columbia, 348 F.2d 808, 810 (D.C. Cir. 1965) (legislative history examined in determining that a national bank was subject to a District of Columbia gross earnings tax even though the federal taxation statutes did not expressly provide for gross earnings taxation); Comptroller of the Treasury v. Maryland Nat'l Bank, 44 Md. App. 366, 373-74, 408 A.2d 753, 757 (1979) (legislative history examined in determining whether a national bank is exempt from a local retail sales tax). For a discussion of the legislative history of the Edge Act, see *supra* pt. II.

88. U.S. Const. art. VI, cl. 2; *see* United States v. New Mexico, 455 U.S. 720, 733 (1982); B. Schwartz, *supra* note 84, § 2.6, at 55-56; L. Tribe, *supra* note 84, § 6-29, at 395. In addition, at least one court has held that federal restrictions on interstate taxation of banks can be upheld under Congress' power under the commerce clause. *See* Pacific First Fed. Sav. & Loan Ass'n v. Department of Revenue, 645 P.2d 27, 28-29 (Or.), *cert. denied*, 103 S. Ct. 216 (1982) (upholding the 1973 moratorium on interstate taxation of federal depositories on the basis of Congress' commerce clause power).

89. 17 U.S. 59, 4 Wheat. 316 (1819). Stating that the "power to tax involves the power to destroy," *id.* at 210, 4 Wheat. at 431, Chief Justice Marshall struck down a Maryland stamp tax on bank notes issued by the Baltimore branch of the Bank of the United States and held the bank to be a tax-immune federal instrumentality. *Id.* at 213, 4 Wheat. at 436. He reasoned that a state infringes upon the supremacy clause of the Constitution when it attempts to tax the operations of organizations with federal charters and supervision. *Id.* at 212-13, 4 Wheat. at 435-36.

90. United States v. County of Allegheny, 322 U.S. 174, 176 (1944).

91. United States v. City of Detroit, 355 U.S. 466, 473 (1958).

92. Department of Employment v. United States, 385 U.S. 355, 358-59 (1966); United States v. District of Columbia, No. 82-0923, slip op. at 7 (D.D.C. Sept. 3, 1982). The analysis requires "more than the invocation of traditional agency notions." United States v. New Mexico, 455 U.S. 720, 736 (1982).

93. Department of Employment v. United States, 385 U.S. 355, 359-60 (1966); Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942); *see, e.g.*, Federal Reserve Bank v. Metrocentre Improvement Dist. #1, 657 F.2d 183, 185-86 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982); United States v. City of Adair, 539 F.2d 1185, 1191 (8th

sis focuses on whether the imposition of the tax would significantly interfere with the exercise of a federal function.[94] The key factors weighing in favor of tax immunity can be summarized as follows: 1) whether the chartering body of the entity is federal;[95] 2) whether the federal government exerts substantial supervision and financial involvement;[96] and 3) whether the entity performs an essential governmental function.[97] In addition, whether the entity is operated for profit has been deemed important in certain circumstances.[98] Nevertheless, many financial institutions that operate for private profit have been deemed federal instrumentalities because they significantly affect the national economy and therefore perform an important governmental function.[99]

B. *Application of Federal Instrumentality Analysis to Edge Act Corporations*

Various organizational aspects of an Edge corporation may be characterized as federal. The chartering body of the Edge corporation is

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Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); Fahey v. O'Melveny & Myers, 200 F.2d 420, 466 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953); United States v. District of Columbia, No. 82-0923, slip op. at 7-8 (D.D.C. Sept. 3, 1982); Federal Nat'l Mortgage Ass'n v. Lefkowitz, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975); Gibson v. First Fed. Sav. & Loan Ass'n, 347 F. Supp. 560, 563 (E.D. Mich. 1972).

94. *See* United States v. New Mexico, 455 U.S. 720, 735 & n.11 (1982); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523-25 (1926).

95. *See* Department of Employment v. United States, 385 U.S. 355, 358-59 (1966); Federal Reserve Bank v. Metrocentre Improvement Dist. #1, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982); United States v. District of Columbia, No. 82-0923, slip op. at 8 (D.D.C. Sept. 3, 1982).

96. *See* Department of Employment v. United States, 385 U.S. 355, 358-60 (1966); Standard Oil Co. v. Johnson, 316 U.S. 481, 483-85 (1942); United States v. District of Columbia, No. 82-0923, slip op. at 8 (D.D.C. Sept. 3, 1982); Federal Nat'l Mortgage Ass'n v. Lefkowitz, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975). Direct federal supervision of the daily operations of an entity is not required to meet the criteria for tax immunity under the federal instrumentality doctrine. *See* Department of Employment v. United States, 385 U.S. 355, 359-60 (1966).

97. *See* Department of Employment v. United States, 385 U.S. 355, 359-60 (1966); Lewis v. United States, 680 F.2d 1239, 1242 (9th Cir. 1982); Rust v. Johnson, 597 F.2d 174, 178 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979); Fahey v. O'Melveny & Myers, 200 F.2d 420, 446 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953); United States v. District of Columbia, No. 82-0923, slip op. at 11 (D.D.C. Sept. 3, 1982); United States v. Maine, 524 F. Supp. 1056, 1059 (D. Me. 1981).

98. United States v. District of Columbia, No. 82-0923, slip op. at 9-10 (D.D.C. Sept. 3, 1982); *see* Standard Oil Co. v. Johnson, 316 U.S. 481, 484-85 (1942); United States v. Livingston, 179 F. Supp. 9, 18, 23 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960).

99. *See, e.g.*, Lewis v. United States, 680 F.2d 1239, 1241-42 (9th Cir. 1982) (dictum) (federal reserve bank); Federal Reserve Bank v. Metrocentre Improvement Dist. #1, 657 F.2d 183, 186 (8th Cir. 1981) (same), *aff'd*, 455 U.S. 995 (1982); Rust v. Johnson, 597 F.2d 174, 178 (9th Cir. 1979) (Federal National Mortgage Association).

the federal government.[100] Among the numerous federal statutory provisions and regulations governing the activities of the Edge corporation,[101] the Edge Act prescribes capital requirements.[102] In addition, approval of the Board of Governors of the Federal Reserve System is required for both the initial incorporation and any branch expansion of an Edge corporation.[103] Like Federal Reserve Banks that have been determined to further national monetary policy,[104] Edge corporations may be considered to further the nation's foreign trade policy.[105] Congress created the Edge corporation to provide credit to organizations in foreign countries in order to secure an effective international market for American products.[106] The legislative history of the Edge Act also reveals that the House wanted to require the use of the word "Federal" in the name of each Edge corporation and prevent state corporations not associated with the federal government from using this term.[107]

Nevertheless, these federal characteristics should not be sufficient to grant tax immunity to the Edge corporation under the federal instrumentality doctrine.[108] The Supreme Court has held that only those

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100. 12 U.S.C. § 614 (Supp. V 1981); 12 C.F.R. § 211.4(a) (1982).

101. *E.g.*, 12 U.S.C. §§ 611-632 (1976 & Supp. V 1981); 12 C.F.R. §§ 211.4-.7 (1982). The deposits of an Edge corporation are subject to federally prescribed reserve requirements. *Id.* § 211.4(d). The domestic activity of the Edge corporation must be incidental to international business transactions. *Id.* § 211.4(e). The corporation is required to keep records concerning financial performance and management decisions. *Id.* § 211.7(a). Examiners appointed by the Board of Governors must review the corporation's records annually. *Id.* § 211.7(b). The corporation must file two reports annually with the Board dealing with the condition of the corporation. *Id.* § 211.7(c).

102. 12 U.S.C. § 618 (Supp. V 1981). Strict lending limits also have been prescribed. 12 C.F.R. § 211.6 (1982).

103. 12 U.S.C. § 614 (Supp. V 1981) (approval for initial incorporation); 12 C.F.R. § 211.4(a), .4(c) (1982) (approval for branch expansion).

104. Although the following courts refer to the furtherance of fiscal policy, it is clear from the context that they were actually referring to the furtherance of monetary policy. Lewis v. United States, 680 F.2d 1239, 1242 (9th Cir. 1982); Federal Reserve Bank v. Metrocentre Improvement Dist. #1, 657 F.2d 183, 185-86 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982).

105. *See* S. Rep. No. 1073, 95th Cong., 2d Sess. 2-6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1422-26; 58 Cong. Rec. 8082 (1919) (statement of Rep. Phelan); Wiley, *supra* note 2, at 1014.

106. 58 Cong. Rec. 8082 (1919) (statement of Rep. Phelan); J. Baker & M. Bradford, *supra* note 16, at 49; McGuire, *supra* note 16, at 430-31; Wiley, *supra* note 2, at 1017-18. The Edge corporation also was intended to compete effectively with similar foreign institutions and strengthen the nation's control of international banking. S. Rep. No. 1073, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1424; J. Baker & M Bradford, *supra* note 16, at 51.

107. H.R. Rep. No. 408, 66th Cong., 1st Sess. 3 (1919).

108. A federal charter alone is not adequate to hold an organization immune from state taxation. Broad River Power Co. v. Query, 288 U.S. 178, 181 (1933); Western

organizations that are essential for the performance of governmental functions can be classified as tax immune under this doctrine.[109] Although an Edge corporation performs a service that is beneficial to the nation's economy,[110] it is a privately-owned corporation operated for

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Union Tel. Co. v. Massachusetts, 125 U.S. 530, 548 (1888); Railroad v. Peniston, 85 U.S. (18 Wall.) 5, 31-33 (1873); Midwest Fed. Sav. & Loan Ass'n v. Commissioner, 259 N.W.2d 596, 598 (Minn. 1977); Winchester v. Porterfield, 27 Ohio St. 2d 122, 129, 271 N.E.2d 786, 791 (1971); B. Schwartz, *supra* note 84, § 2.6, at 56; L. Tribe, *supra* note 84, § 6-28, at 392 n.7; *see, e.g.*, Indian Territory Illuminating Oil Co. v. Board of Equalization, 288 U.S. 325, 328 (1933); Alward v. Johnson, 282 U.S. 509, 514 (1931); William v. City of Talladega, 226 U.S. 404, 416 (1912). The rationale was best explained in Railroad v. Peniston, 85 U.S. (18 Wall.) 5 (1873). A railroad that had been chartered by Congress to create national roads was deemed not to be immune from taxation under the federal instrumentality doctrine. *Id.* at 31-32, 34-35. The Supreme Court reasoned that the federal government would have "no more ownership of the road authorized by Congress than they had in [a] road authorized by Kansas." *Id.* at 34. One court, in dictum, has suggested that constitutional due process limitations may prevent a state from taxing an Edge corporation because of its federal charter. Commonwealth v. First Pa. Overseas Fin. Corp., 425 Pa. 143, 146-47, 229 A.2d 896, 898 (1967). The due process clause restricts the ability of a state to tax an interstate corporation in two ways: 1) a tax may not be imposed unless there is some relation between the corporate activity and the taxing state, Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-73 (1978); and 2) the income attributed to the taxing state must be rationally related to "values connected with the taxing State." *Id.* at 273 (quoting Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968)). It does not appear, however, that the mere existence of a federal charter is sufficient to limit state taxation on due process grounds.

Federal supervision of an entity also has been considered inadequate for granting state tax immunity. *See* Broad River Power Co. v. Query, 288 U.S. 178, 181 (1933) ("The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid."); Midwest Fed. Sav. & Loan Ass'n v. Commissioner, 259 N.W.2d 596, 598 (Minn. 1977) ("The mere fact that an entity received its charter from the Federal government and is regulated by the Federal government is accordingly not sufficient to bring it within the statutory exemption."). In fact, federal supervision of the Edge corporation is limited in order to provide the corporation with the flexibility needed to compete with foreign banks. *See Federal Reserve Report*, *supra* note 23, at 1404. In 1979, the Board of Governors of the Federal Reserve System stated that there would be some disadvantages in allowing Edge corporations to become members of the Federal Reserve System. *Id.* at 1407. The Edge corporation would be subject to some greater restrictions as a member bank. *Id.*

109. Department of Employment v. United States, 385 U.S. 355, 358-60 (1966); Standard Oil Co. v. Johnson, 316 U.S. 481, 483, 485 (1942); *see* James v. Dravo Contracting Co., 302 U.S. 134, 156-57 (1937) (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523-24 (1926)).

110. See *supra* notes 104-06 and accompanying text. While Congress has considered Edge corporations important in assisting the United States' import and export markets, see *supra* note 16 and accompanying text, mere performance of a service for the federal government is not sufficient to confer tax immunity. *See* United States v. Boyd, 378 U.S. 39, 44 (1964) (contractor that did work for the federal government

private profit.[111] A federally chartered private corporation that only incidentally benefits the national economy[112] generally is not considered to perform a substantial governmental function.[113]

In addition, Edge corporations can be distinguished from those few private entities that the Supreme Court has deemed immune from taxation as federal instrumentalities. For example, the Court has held that the Red Cross, a private organization, is tax immune as a federal instrumentality.[114] The Court emphasized that the Red Cross performs substantial governmental functions and is subject to substantial federal supervision:[115] It is subject to periodic federal audit;[116] its chairman and certain members of its executive board are federally appointed;[117] it is authorized to meet national obligations arising out

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held not to be tax immune); Railroad v. Peniston, 85 U.S. (18 Wall.) 5 (1873) (company that built railroad under a federal charter held not to be tax immune).

111. *See* 12 U.S.C. § 619 (Supp. V 1981) (statutory provision providing for ownership of shares by citizens). Edge corporations are owned and operated by other banks, Kelly, *supra* note 2, at 37; *see* S. Rep. No. 1073, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1425, such as national banks, *see* Bank of Am. v. United States, 680 F.2d 142, 143 (Ct. Cl. 1982). National banks are privately owned. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 357 (1968) (Marshall, J., dissenting); Liberty Nat'l Bank & Trust Co. v. Buscaglia, 21 N.Y.2d 357, 367, 235 N.E.2d 101, 106, 288 N.Y.S.2d 33, 40-41 (1967), *rev'd on other grounds upon rehearing*, 23 N.Y.2d 933, 246 N.E.2d 361, 298 N.Y.S.2d 513, *cert. denied*, 396 U.S. 941 (1969). Thus, the Edge corporation may be compared to the private contractor performing services for the government for private profit—an entity that the Supreme Court continually has held subject to state taxation. United States v. Boyd, 378 U.S. 39, 44 (1964) (The Constitution "does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax . . . is ultimately borne by the United States."); United States v. City of Detroit, 355 U.S. 466, 469 (1958) ("[I]t is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government."); *see* Alabama v. King & Boozer, 314 U.S. 1, 14 (1941); Curry v. United States, 314 U.S. 14, 17-18 (1941); James v. Dravo Contracting Co., 302 U.S. 134, 154-55 (1937). *But see* Kern-Limerick Inc. v. Scurlock, 347 U.S. 110, 122 (1954) (federal contractor held immune from state gross receipts tax).

112. *See* United States v. Boyd, 378 U.S. 39, 44 (1964); United States v. City of Detroit, 355 U.S. 466, 469 (1958); James v. Dravo Contracting Co., 302 U.S. 134, 154-55 (1937).

113. *See* B. Schwartz, *supra* note 84, § 2.6, at 56; L. Tribe, *supra* note 84, § 6-28, at 392 n.7; *see, e.g.*, Broad River Power Co. v. Query, 288 U.S. 178, 180-81 (1933); Railroad v. Peniston, 85 U.S. (18 Wall.) 5, 31-32 (1873); National R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321, 1328 (D. Kan.), *aff'd mem.*, 414 U.S. 948 (1973).

114. Department of Employment v. United States, 385 U.S. 355, 358-60 (1966).

115. *Id.* at 359.

116. *Id.*; *see* 36 U.S.C. § 6 (1976).

117. Department of Employment v. United States, 385 U.S. 355, 359 (1966); *see* 36 U.S.C. § 5 (1976).

of certain foreign treaties;[118] and it receives significant federal assistance.[119]

Congress has historically viewed the Red Cross as a quasi-governmental institution.[120] By contrast, the federal government's role in supervising the activities of Edge corporations is administrative and more limited in nature.[121] While the federal government regulates the banking activities of the Edge corporation, it is not authorized to control the appointment of directors or to involve itself in the corporation's policy-making.[122] Moreover, no comparable legislative tradition of holding the Edge corporation tax immune exists.[123]

Nevertheless, courts have held various private financial institutions to be federal instrumentalities even though they exhibit few federal characteristics.[124] For example, the Supreme Court has held that Fed-

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118. Department of Employment v. United States, 385 U.S. 355, 359 (1966); *see* Geneva Convention For the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074 (1932); Geneva Convention For the Amelioration of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940 (1882).

119. Department of Employment v. United States, 385 U.S. 355, 359 n.11 (1966); *see* 36 U.S.C. § 13 (1976) (federal government furnishes the Red Cross with a national headquarters in Washington, D.C.).

120. Department of Employment v. United States, 385 U.S. 355, 359-60 (1966); H.R. Rep. No. 1728, 82d Cong., 2d Sess. 2 (1952); *see also* Proclamation of President Taft, Aug. 22, 1911, 37 Stat. 1716 (executive branch proclaiming that only the Red Cross would be authorized to aid the United States armed forces in time of war).

121. *See* 12 U.S.C. §§ 611-632 (1976 & Supp. V 1981); 12 C.F.R. §§ 211.4, .6-.7 (1982). Besides the general banking restrictions governing Edge corporations, federal supervision rests primarily with the Board of Governors, which prescribes and reviews the annual financial reports of the corporation. *Id.* § 211.7 (1982). See *supra* note 101 and accompanying text.

122. *See* 12 U.S.C. §§ 611-632 (1976 & Supp. V 1981); 12 C.F.R. § 211.4-.7 (1982).

123. The legislative history, in fact, suggests that the Edge corporation was to be more independent than other federally chartered financial institutions. *See* 58 Cong. Rec. 8083 (1919) (statement of Rep. Phelan) (Edge corporations are more independent than national banks); *Federal Reserve Report, supra* note 23, at 1407 (recommending that the Edge corporation be denied Federal Reserve membership).

124. The list includes: 1) Federal Reserve Banks, Lewis v. United States, 680 F.2d 1239, 1242 (9th Cir. 1982); Federal Reserve Bank v. Metrocentre Improvement Dist. #1, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982), 2) Federal National Mortgage Associations, Rust v. Johnson, 597 F.2d 174, 178 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979); Federal Nat'l Mortgage Ass'n v. Lefkowitz, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975); *but see* Roberts v. Cameron-Brown Co., 556 F.2d 356, 359 (5th Cir. 1977); Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 31-32 (6th Cir. 1975), 3) Federal Credit Unions, United States v. Maine, 524 F. Supp. 1056, 1059 (D. Me. 1981), 4) Federal Home Loan Banks, Association of Data Processing Serv. Org. v. Federal Home Loan Bank Bd., 568 F.2d 478, 480 (6th Cir. 1977); Fahey v. O'Melveny & Myers, 200 F.2d 420, 446 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953), 5) Federal Savings & Loan Associations, United States v. State Tax Comm'n, 481 F.2d 963, 969 (1st Cir. 1973); Federal Sav. & Loan Ins. Corp. v.

eral Land Banks[125] and national banks[126] are federal instrumentalities immune from unauthorized state taxation. Certain factors, however, compelled those conclusions. In holding that the Federal Land Bank is immune from state taxation, the Court had a clear legislative directive upon which to base its decision.[127] Section 26 of the Federal Farm Loan Act of 1916[128] states that the Federal Land Bank is to be considered a federal instrumentality and expressly prohibits state taxation.[129] Section 627 of the Edge Act contains no comparable language. Rather, the language in section 627 affirmatively grants state taxation authority.[130]

Similarly, despite the private characteristics of national banks, the Supreme Court traditionally has held them to be federal instrumental-

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Kearney Trust Co., 151 F.2d 720, 725 (8th Cir. 1945); *but see* Gibson v. First Fed. Sav. & Loan Ass'n, 347 F. Supp. 560, 563 (E.D. Mich. 1972); Midwest Fed. Sav. & Loan Ass'n v. Commissioner, 259 N.W.2d 596, 598 (Minn. 1977); Winchester v. Porterfield, 27 Ohio St. 2d 122, 129, 271 N.E.2d 786, 791 (1971), 6) Federal Land Banks, Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961); Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102-03 (1941), and 7) national banks, First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244 (1931); Des Moines Nat'l Bank v. Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667-68 (1899); McCulloch v. Maryland, 17 U.S. 159, 213, 4 Wheat. 316, 436 (1819).

125. *E.g.*, Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149 (1961); Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102-03 (1941). A Federal Land Bank is a federally chartered entity established for the purpose of "assuring farmers opportunity to borrow money upon long-term mortgages, at minimum interest rates." 7B Michie on Banks and Banking § 267, at 137 (W. Willson, J. Vaughan, R. Thiele & J. Dandridge eds. 1973) [hereinafter cited as Michie].

126. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244 (1931); First Nat'l Bank v. City of Hartford, 273 U.S. 548, 550 (1927); Des Moines Nat'l Bank v. Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667-68 (1899); McCulloch v. Maryland, 17 U.S. 159, 213, 4 Wheat. 316, 436 (1819). A national bank is a federally chartered entity initially established "for the purpose of providing a currency for the whole country and a market for the loans of the general government." 7 Michie, *supra* note 125, § 1, at 4.

127. Federal Land Bank v. Board of County Comm'r, 368 U.S. 146, 155-56 (1961); Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102-04 (1941); *see* Federal Farm Loan Act of 1916, ch. 245, § 26, 39 Stat. 360, 380, *repealed by* Pub. L. No. 92-181, § 5.26(a), 85 Stat. 583, 624 (1971).

128. Federal Farm Loan Act of 1916, ch. 245, § 26, 39 Stat. 360, 380, *repealed by* Pub. L. No. 92-181, § 5.26(a), 85 Stat. 583, 624 (1971). The repeal of the statute has only moved the taxation provision to another section, 12 U.S.C. § 2055 (1976).

129. Federal Farm Loan Act of 1916, ch. 245, § 26, 39 Stat. 360, 380, *repealed by* Pub. L. No. 92-181, § 5.26(a), 85 Stat. 583, 624 (1971).

130. 12 U.S.C. § 627 (1976).

ities[131] on the basis of the clear intent in the legislative history[132] of the NBA.[133] In the Court's most recent analysis of national banks,[134] it refused to reach the instrumentality issue in light of this clear congressional intent to limit state taxation of these banks.[135] In 1969, however, Congress amended the NBA to authorize nondiscriminatory state taxation of national banks.[136] Congress determined that there was "no longer any justification for . . . continuing to grant national banks immunities from State taxation which are not afforded State banks."[137] Therefore, the prior congressional intent to exempt a national bank from state taxation is no longer present.[138]

Both courts and the legislature have noted similarities between the statutes governing Edge corporations and those governing national banks.[139] For example, their respective taxation statutes were passed to prevent discriminatory state taxation favoring state-chartered institutions.[140] The substantial erosion of state tax immunity for national

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131. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 340 (1968); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244 (1931); First Nat'l Bank v. City of Hartford, 273 U.S. 548, 550 (1927); Des Moines Nat'l Bank v. Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667-68 (1899); McCulloch v. Maryland, 17 U.S. 159, 213, 4 Wheat. 316, 436 (1819).

132. Cong. Globe, 38th Cong., 1st Sess. 1893-95 (1864).

133. Act of June 3, 1864, ch. 106, § 41, 13 Stat. 99, 111 (currently codified as amended at 12 U.S.C. § 548 (1976)).

134. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968).

135. *Id.* at 341; *see* Cong. Globe, 38th Cong., 1st Sess. 1893-95 (1864).

136. Pub. L. No. 91-156, §§ 1(a), 2(a), 83 Stat. 434, 434 (1969) (currently codified as amended at 12 U.S.C. § 548 (1976)).

137. S. Rep. No. 530, 91st Cong., 1st Sess. 2, *reprinted in* 1969 U.S. Code Cong. & Ad. News 1594, 1595. As a result, despite the national bank's status as a federal instrumentality, a state now has express plenary authority to tax the national bank provided that it is done in a nondiscriminatory manner. *See* 12 U.S.C. § 548 (1976).

138. *See* S. Rep. No. 530, 91st Cong., 1st Sess. 2, *reprinted in* 1969 U.S. Code Cong. & Ad. News 1594, 1595 ("The committee is in full accord with the [principle] that every State government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure [with respect to national banks.]").

139. *See* First Fed. Sav. & Loan Ass'n v. Tax Comm'n, 437 U.S. 255, 258 (1978) (12 U.S.C. § 548 (1976) and 12 U.S.C. § 627 (1976) were passed to "protect federally chartered financial institutions from 'unequal and unfriendly competition' caused by state tax laws favoring state-chartered institutions." (footnote omitted)); Apfel v. Mellon, 33 F.2d 805, 807 (D.C. Cir. 1929) ("The statutes relating to the organization of national banks are analogous to [the statutes relating to the organization of Edge corporations.]"), *cert. denied*, 280 U.S. 585 (1929); 58 Cong. Rec. 8083 (1919) (statement of Rep. Phelan) ("These corporations are just as independent of the Government as the national banks are to-day.").

140. First Fed. Sav. & Loan Ass'n v. Tax Comm'n, 437 U.S. 255, 258 & n.2 (1978). In addressing the state taxation of a Federal Credit Bank, the Supreme Court recently stated that "there has been no departure from the principle that state taxes

banks suggests that the similarities of a national bank to an Edge corporation should not be relied upon to grant the Edge corporation state tax immunity.[141] In light of this erosion, it is unlikely that Congress would prohibit nondiscriminatory taxation of Edge corporate branches in states in which the home office is not located.[142]

IV. Policy Concerns

A. *The Need for Legislative Action*

The banking field traditionally is an area of congressional concern.[143] Accordingly, it has been suggested that the issue of Edge corporate branch taxation can only be resolved through congressional action.[144] The ABA Committee has recommended repeal of section 627 as part of a broader plan to establish a uniform method of state taxation of federal depositories.[145] Given the existing ambiguity between the taxation practice of certain states and the lack of a provision expressly authorizing this practice, congressional action is indeed warranted. Nevertheless, in the interim, congressional inaction should not preclude the judiciary from resolving the issue by upholding the application of state taxation statutes to Edge corporate branches in non-home office states.[146]

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are constitutionally invalid if they discriminate against the Government." Memphis Bank & Trust Co. v. Garner, 103 S. Ct. 692, 696 n.7 (1983).

141. See *supra* notes 139-40 and accompanying text.

142. *Cf.* Memphis Bank & Trust Co. v. Garner, 103 S. Ct. 692, 696 n.7 (1983) ("[T]he scope of the Federal Government's Constitutional tax immunity has been interpreted more narrowly in recent years.").

143. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 345 (1968).

144. *See* O'Brien, *supra* note 10, at 897; *New Rules, supra* note 10, at 219.

145. Committee on Banking and Sav. Insts., Tax Section Recommendation No. 1981-3, 34 Tax Law. 861, 862 (1981). Currently, there is no uniform jurisdictional standard for taxation of federal depositories, *id.*, nor is there a uniform standard for apportioning the tax base among the states in which the bank is located, *id.* The ABA recommendation presents a uniform standard for interstate taxation of federal depositories. *Id.* at 861. While this Note supports the ABA's recommendation to repeal § 627, the broader issue is beyond the scope of this Note. While the ABA proposal expressly includes Edge corporations, two bills have been introduced in Congress that conceivably would have had an impact on § 627. The Interstate Taxation of Depositories Act of 1979 would have provided for a uniform system of interstate taxation of financial institutions. 125 Cong. Rec. 5739-41 (1979) (interpreting S. 719, 96th Cong., 1st Sess. (1979)). The Interstate Taxation Act of 1979 would have established a uniform method of apportioning corporate income among the states. S. 983, 96th Cong., 1st Sess. 19 (1979), *reprinted in Corporate Income Hearings, supra* note 40, at 22; Staff of the Joint Comm. on Taxation, 96th Cong., 2d Sess., *Description of S. 983 and S. 1688 Relating to State Taxation of Interstate Business and Foreign Source Corporate Income* 4 (Joint Comm. Print 1980) [hereinafter cited as Staff Report].

146. See *supra* notes 35-40 and accompanying text.

B. *State Fiscal Concerns*

The Edge corporation should not be able to escape paying its fair share of taxes in a state in which it is doing business.[147] Generally, if a corporation does business within a state, the state may tax the income of the corporation attributable to business activities within the state.[148] When an Edge corporation does business within a state, it uses state services and is under the protection of state law.[149] It would be inappropriate to shield the Edge corporate branch from paying for such services and benefits merely because its home office is not located in the state.

Moreover, if a court were to interpret section 627 as preventing non-home office states from taxing branches, the anomalous result is that states in effect would lose taxation power over Edge corporations that they had prior to the amendment of Regulation K. Because each Edge corporation initially had to be separately incorporated in the state in which it conducted business,[150] the corporation was subject to taxation by any state in which it was located. Under this interpretation, the amendment allowing the establishment of domestic branches without requiring separate incorporation would deprive home states of the taxation authority they previously possessed over Edge corporations located and doing business within the state.[151]

Since *McCulloch*, the determination whether an entity is tax immune has implicitly rested on traditional theories of federalism.[152] The theory is that state taxation of an entity that has been deemed to be closely connected to the federal government may create an interference with substantive federal policy.[153] Authorizing state taxation of

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147. Zamora, *supra* note 9, at 464.

148. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959); Smith v. Lummis, 149 Fla. 660, 667, 6 So. 2d 625, 627-28 (1942); International Textbook Co. v. Connelly, 67 Misc. 49, 58, 124 N.Y.S. 603, 609, *aff'd per curiam*, 140 A.D. 939, 125 N.Y.S. 1125 (1910), *aff'd*, 206 N.Y. 188, 99 N.E. 722 (1912); *see Corporate Income Hearings*, *supra* note 40, at 689; Staff Report, *supra* note 145, at 3. See *supra* note 39 and accompanying text.

149. *See* 58 Cong. Rec. 4969 (1919) (statement of Sen. Norris).

150. *Federal Reserve Report*, *supra* note 23, at 1404.

151. Nothing in the legislative history to the IBA suggests that Congress wished to limit the authority of a state to tax an Edge corporation. *See* S. Rep. No. 1073, 95th Cong., 2d Sess. 2-6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1422-26.

152. *See* Mayo v. United States, 319 U.S. 441, 445 (1943); James v. Dravo Contracting Co., 302 U.S. 134, 154-55 (1937) (quoting Railroad v. Peniston, 85 U.S. (18 Wall.) 5, 36-37 (1873)); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926); McCulloch v. Maryland, 17 U.S. 159, 212-13, 4 Wheat. 316, 435-36 (1819); United States v. City of Leavenworth, 443 F. Supp. 274, 278 (D. Kan. 1977); L. Tribe, *supra* note 84, § 6-31, at 401.

153. James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926); United States v. City of Leavenworth, 443 F.

the Edge corporate branch in a state in which the home office is not located does not create such an interference with federal policy because the Edge corporation is not closely connected with the federal government.[154] To suggest that state taxation of these branches would interfere with federal policy in light of permissible home-state taxation would be inconsistent.[155] The expansion of tax immunity to encompass the Edge corporate branch would interfere instead with state sovereignty,[156] and would represent a "manipulation" of federal tax laws that has "no proper place in determining the allocation of power between co-existing sovereignties."[157]

CONCLUSION

The federal government should restrict state authority to tax a corporate organization doing business within state boundaries only under the clearest and narrowest of circumstances. The supremacy clause of the Constitution should not be construed so as to alter traditional notions of federalism. An Edge corporation should not be deemed a federal instrumentality, and thus its branches should be subject to state taxation. Because Congress has not explicitly intended to preclude state taxation of branches, and in light of existing policy considerations, a state should have the authority to tax the Edge corporate branch doing business in that state. The rapid escalation of Edge corporate development requires that the issue be resolved and that the current state policy of taxing Edge corporate branches in non-home office states be endorsed.

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Supp. 274, 278 (D. Kan. 1977); L. Tribe, *supra* note 84, § 6.28, at 392; *see* United States v. New Mexico, 455 U.S. 720, 735 (1982); Mayo v. United States, 319 U.S. 441, 445 (1943); McCulloch v. Maryland, 17 U.S. 159, 213, 4 Wheat. 316, 435-36 (1819).

154. See *supra* notes 108-42 and accompanying text.

155. *See* 12 U.S.C. § 627 (1976).

156. Such a policy would expand immunity to institutions primarily on the basis of a federal charter or federal regulation. State fiscal interests would be invaded, and tax immunity would be extended beyond all reasonable boundaries. See *supra* pt. III(A).

157. United States v. New Mexico, 455 U.S. 720, 737 (1982).