Electronic Funds Transfer and Branch Banking - the Application of Old Law to New Technology
ELECTRONIC FUNDS TRANSFER AND BRANCH BANKING — THE APPLICATION OF OLD LAW TO NEW TECHNOLOGY

The transformation to automated banking services made possible by the application of computer technology to bank-customer operations is causing a concomitant need for change in banking law. The pressures for technological change are clear: the present payments mechanism in the United States is generating a steadily increasing volume of paper; savings may be realized by financial institutions that replace at least some manual and mechanical operations with electronic payments services; innovative banking executives wish to offer new services to their customers unhindered by statutes they view as antiquated and overly restrictive.2

In response to these emerging changes in the payments mechanism are new federal regulations permitting the use of place-of-business (p-o-b) payments systems by various financial intermediaries.3 For example, a

1. More than thirty billion transactions are now made annually in the United States by check. Lindsey, Consumers Test Electronic Banking, N.Y. Times, Apr. 6, 1975, § 3, at 1, col. 7.


3. A p-o-b system consists of a terminal, installed in some location remote from the bank, that is connected by wire to the institution's central accounts computer. The terminal permits a bank customer to engage in a financial transaction with his bank, typically resulting in a crediting of funds to the customer's account, a cash withdrawal from his account, a transfer between his savings and checking accounts, or perhaps a payment transfer from his account to an account maintained by another bank customer.

Manned and unmanned terminals are currently in use. Unmanned terminals such as the now familiar automated teller machine, see note 42 infra, may be under the control of either the bank or a third party; however, involvement of a third party usually relates only to ownership and maintenance of the terminal, and the third party is neither directly nor financially involved in transactions between the bank and its customers. Those manned p-o-b terminals presently in use involve a third party in addition to the bank and its customer. In the typical operation of this type of system, the terminal is located in a retail establishment where it is manned by a store employee. Transactions involving the receipt of funds for deposit or cash withdrawals are first verified by the retail employee and are then debited or credited to an account maintained by the commercial establishment with the same bank, thereby making the store both a financial and functional intermediary between the bank and its customer. 39 Fed. Reg. 44421-22 (1974).

The system currently employed by First Federal Savings and Loan Association of Lincoln, Nebraska, and American Community Stores Corporation (ACS) is illustrative. ACS is engaged in the grocery business and operates a number of supermarkets in Nebraska under the name of "Hinky Dinky." In January, 1974, computer terminals belonging to First Federal were installed in two Hinky Dinky stores in Lincoln. (The system presently employs twenty-one supermarket units. Lindsey, supra note 1, at 5, col. 1). The First Federal-Hinky Dinky system has been au-
recent ruling by the Comptroller of the Currency allows national banks to establish p-o-b terminals remote from the bank without regard to state branch banking laws. By defining p-o-b terminal operations as a central bank function and not as constituting branch banking, the Comptroller seeks to avoid myriad problems arising from state limitations on branching that would effectively prohibit p-o-b operation by a considerable number of national banks. This Comment will focus on two questions raised by the Comptroller's ruling: (1) the effect of state branching laws on the use of p-o-b terminals by national banks assuming such terminals are branch banks, and (2) whether p-o-b terminals are branches under the relevant law.

EFFECT OF STATE LAW ON BRANCH BANKING

Under our "dual banking system" both federal and state governments charter and regulate commercial banks. The use of p-o-b terminals is critically dependent upon state law since two-thirds of the nation's banks are chartered under state authority and are therefore subject to state law.

The Federal Home Loan Bank Board (FHLBB) as a temporary, experimental project described by the FHLBB as a "place-of-business funds transfer system."

Operation of the Hinky Dinky system is currently the subject of litigation in both state and federal courts. In February, 1974, the Nebraska Attorney General initiated quo warranto proceedings alleging that Hinky Dinky was illegally engaged in the banking or building and loan business. In August, the Lancaster County District Court ruled that Hinky Dinky did not violate the state's banking or savings and loan laws by accepting deposits for First Federal. The case is currently on appeal to the Supreme Court of Nebraska. State ex rel. Meyer v. American Community Stores Corp., No. 39747 (Neb., filed Aug. 23, 1974).

The other action, filed in the United States District Court in Omaha on May 28, 1974, was brought by a group of financial institutions — national banks, state banks, and federal and state chartered savings and loan associations — and names as defendants the supermarket chain, the FHLBB and its members, and First Federal. This suit challenges not only the legality of the Hinky Dinky operation, but also that of the FHLBB's regulation permitting it. Initially the plaintiffs had requested only injunctive and regulatory relief, but under an amended complaint they now claim damages, alleging antitrust violations by First Federal and others under the Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1970). Bloomfield Fed. Savings & Loan Ass'n v. American Community Stores Corp., Civil No. 74-0-146 (D. Neb., June 11, 1975).


Prior to the Comptroller's ruling, in early 1974 the Federal Home Loan Bank Board permitted operation of a p-o-b system on an experimental and temporary basis, 12 C.F.R. § 545.4-2 (1975) (see note 3 supra), while the National Credit Union Administration has issued rules designed to achieve similar ends. 12 C.F.R. § 721.3 (1975).

regulation. More importantly, assuming p-o-b terminals are considered to be branch banks, their use by national banks would be affected because state law also governs the branch banking powers of national banks as a result of section 36(c) of the National Bank Act.7

The National Bank Act

The 1927 McFadden Act8 and its 1933 amendment9 form the basis of section 36(c) of the National Bank Act which provides:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.10

The meaning of section 36(c) cannot be understood without reference to the background which summoned it into being.11

Few branch banks were in existence when the National Currency Act of 186312 and its replacement, the National Bank Act of 1864,13 were enacted into law. It is not surprising, therefore, that neither Act contained

6. National banks are those commercial banks that arechartered by the United States Government and are required to belong to the Federal Reserve System. National banks also hold membership in the Federal Deposit Insurance Corporation which insures deposits of all Federal Reserve member banks and such other banks as voluntarily become insured by the Corporation. Board of Governors of the Federal Reserve System, The Federal Reserve System Purposes and Functions 262 (1963). Regulation of national banks is primarily accomplished under the authority of the National Bank Act, Act of June 20, 1874, ch. 343, 18 Stat. 123 (codified in sections of Titles 5, 12, 18, 19, 28, and 31 of the United States Code), which is administered by the Comptroller of the Currency, the Board of Governors of the Federal Reserve Board, and the Federal Deposit Insurance Corporation. National banks are further subject to those state laws that do not conflict with their functions and duties as federal agencies and instrumentalities; e.g., First Nat'l Bank v. Missouri, 263 U.S. 640 (1924); First Nat'l Bank v. California, 262 U.S. 366 (1923); Easton v. Iowa, 188 U.S. 220 (1903).

a provision dealing with branch banks. Thus, section eight of the National Bank Act of 1864 required that banking transactions take place "at an office or banking house located in the place specified in [the bank's] organization certificate."\(^\text{14}\)

By the early 1920's, state laws allowing branch banking by state banks permitted those institutions such a distinct competitive advantage that in some states the state banking system challenged the continued operation of national banks.\(^\text{15}\) Attempting to meet the threat of state competition, the Comptroller authorized the establishment of what were then known as "teller windows" by national banks.\(^\text{16}\) In authorizing this expansion, the Comptroller relied upon a 1923 opinion of the Attorney General that absence of specific statutory branching authority would not prevent national banks from establishing additional offices "for the transaction of business of a routine character" such as "the receipt of deposits and the cashing of checks for their customers."\(^\text{17}\)

Despite the authorization, ensuing expansion of national bank facilities was successfully challenged in *First National Bank v. Missouri*\(^\text{18}\) on the basis of illegal branch banking. The Supreme Court found that although a national bank is an instrumentality of the federal government and thus necessarily subject to the paramount authority of the United States, it is also subject to the laws of the state in which it operates unless those laws tend to interfere with the purposes of the bank's creation or tend to impair or destroy its efficiency as a federal agency.\(^\text{19}\) Finding that the prohibition of branch banking by state statute neither frustrated the purpose for which the national bank was created nor interfered with the discharge of its duties to the federal government, the Court concluded that inasmuch as federal law gave no authority to establish or maintain bank branches,\(^\text{20}\) state law was competent to control the branching powers of a national bank.\(^\text{21}\)

\(^{14}\) 13 Stat. at 102.


\(^{17}\) 34 Op. ATT’Y GEN. 1 (1923).

\(^{18}\) 263 U.S. 640 (1924), aff’d State ex rel. Barrett v. First Nat'l Bank, 297 Mo. 397, 249 S.W. 619 (1923). Proceedings in quo warranto had been brought by the State of Missouri to determine the authority of a national bank to establish and conduct a "branch bank" contrary to the provisions of a state statute providing "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house." 263 U.S. at 655.

\(^{19}\) 263 U.S. at 656. See also *Davis v. Elmira Savings Bank*, 161 U.S. 275, 278–79 (1896).

\(^{20}\) "This apparently was the interpretation of Congress itself, since in two instances at least special legislation was deemed necessary to allow the establishment of branch banks." 263 U.S. at 658.

\(^{21}\) The Supreme Court also found that the operation of a branch bank was not an incidental power conferred by an act of Congress granting to national banks "all such incidental powers as shall be necessary to carry on the business of banking."
Lacking express statutory authority or judicial interpretation that would permit branching, national banks were unable to reach financial resources available to state banks, and their very existence was threatened by the resulting imbalance. One month following the Supreme Court's decision in the Missouri case, Representative McFadden introduced a bill that would authorize branching on the part of national banks. Passage of the bill was urged in order to permit a workable "competitive equality" among state and national banks. Once Representative McFadden's bill was enacted as the McFadden Act of 1927, national banks were permitted, with the approval of the Comptroller of the Currency, to establish new branches within the city, town, or village in which the bank was located provided such establishment were permitted state banks by state law.

In 1932 the Senate began consideration of an amendment to the McFadden Act which sought to permit a national bank to branch anywhere within its own state without regard to state law, and, within fifty miles of the parent bank, in other states as well. This proposal aroused deter-

Id. at 659. Mr. Justice Sutherland observed that "the mere multiplication of places where the powers of a bank may be exercised is not . . . a necessary incident of a banking business, within the meaning of [the statute]." Id.


26. 44 Stat. at 1228. Additionally, the McFadden Act also imposed for the first time a limit on the branching powers of some state chartered banks. 39 Fed. Reg. 44417 (1974). Those state banks that were members of the Federal Reserve System were allowed to retain existing branches, but were forbidden the establishment of new branches "beyond the limits of the city, town, or village in which the parent bank is situated." 44 Stat. at 1229.

Although the Act was eventually passed, it is interesting to note that there existed an opposing alliance of those who "[d]id not want any limitation placed on the power of the states to grant branches anywhere and everywhere" with a "small but very respectable element who [were] so adverse to branch banking or branch offices or branch anything that they would protest against the national bank teller carrying change across the street to a one-legged widow selling peanuts to a paralyzed cripple on the corner." 67 CONG. REC. 2817 (1926) (remarks of Representative Stevenson).

27. S. REP. No. 584, 72d Cong., 1st Sess. 16 (1932); 75 CONG. REC. 9891 (1932) (remarks of Senator Glass).
mined filibusters both in 1932 and 1933, the single outstanding objection to the amendment being founded upon the view that it would constitute an invasion of state sovereignty for the federal government to establish within a state's borders a species of banking not sanctioned by local policy. The opponents saw the amendment as an attempt to make the McFadden Act's "national branch banking policy" into a national branch banking system. As a compromise Senator Bratton offered as his amendment substantially the present section 36(c)(2), thereby limiting statewide national bank branching to those states that affirmatively grant similar branching power to state banks.

**Competitive Equality**

The idea that national and state banks should "compete on equal terms" reflects the underlying purpose of the McFadden Act and its 1933 amendment. The importance of the concept of "competitive equality" cannot be overstated, for this concept is the focal point of judicial construction of section 36(c) and its authorization of branch banking. Any ambiguity as to the extent of federal deference to state law was resolved.

28. 75 CONG. REC. 9890, 13,002 (1932); see, e.g., 76 CONG. REC. 1449, 1997, 2079, 2080, 2205, 2206 (1933).
29. 68 CONG. REC. 5816 (1927).
30. See 64 Mich. L. Rev. 155, 159 (1965). As Senator Norbeck put it, "We have the unit bank, the American kind of bank, the bank owned and managed by the home folks of a community. . . ." 75 CONG. REC. 9975 (1932). Senator Wheeler did "not want to permit national banks to go in there and establish branches against the will of the people." 76 CONG. REC. 1997 (1933). And Senator Bratton maintained, "[I]t is easily conceivable that if we [adopt the amendment] in the course of ten years or less three or four powerful banking institutions may control the banking system of the country." 76 CONG. REC. 1450 (1933).
31. 76 CONG. REC. 2080 (1933).
32. 77 CONG. REC. 5896 (1933).
33. At the time of its enactment, Representative McFadden stated that "national banks are able to meet the needs of modern industry and commerce and competitive equality has been established." 68 CONG. REC. 5815 (1927) (emphasis added).
34. See, e.g., 77 CONG. REC. 5896 (1933) (remarks of Representative Luce, the member of the Conference Committee who reported the bill to the House).
36. These courts dealt not only with the language of the statute, but also looked to the purpose of Congress and the broad national policy that was evidenced by enactment of the McFadden Act.
37. The significance of this deference to state law is perhaps best illustrated by the remarkable diversity among states in their approach to branch banking. The
in 1966 by the Supreme Court's decision in *First National Bank v. Walker Bank & Trust Co.*[^37], where the Court stated:

> It appears clear from this résumé of the legislative history of § 36 (c)(1) and (2) that Congress intended to place national and state

following tabulation of state statutes pertaining to branch banking does not reflect the detailed provisions of the law in certain states such as limitations that branches be established only by merger or consolidation, geographic restrictions, restrictions based upon the population of the location of the parent bank or of the proposed branch, or requirements governing existing banking facilities where the branch is sought to be established; however, these limitations or restrictions must be consulted for "a 'branch' may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch." *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 130 (1969).

### Summary of State Branch Banking Statutes

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[^a]: Permits branches within the city and county of main office.
[^b]: Permits branches within 100 mile radius of main office.
[^c]: Permits branches within city, county, or county contiguous to county of main office.
[^d]: Permits offices and facilities within county of main office.
[^e]: Permits banks to establish branches within the county or county contiguous to the county in which the parent bank is located, or within a certain distance of the parent bank.
[^f]: Permits banks to establish branches within the limits of the banking district in which the parent bank is situated.
[^g]: Permits banks to establish branches outside the state and outside the United States.
[^h]: Permits one detached facility per bank.
[^i]: Permits one automobile drive-in facility per bank connected to central bank building.
[^j]: Permits only "facilities," "offices," "agencies," or "stations" for limited purposes, as distinguished from branches.
[^k]: One off-premises facility permitted effective May 15, 1972.
[^l]: Statewide branching for commercial banks, savings banks, and savings and loan associations will be permitted after January 1, 1976.


banks on a basis of "competitive equality" insofar as branch banking was concerned.\textsuperscript{38}

In \textit{Walker Bank} the Comptroller of the Currency argued that if state law permitted any type of branching, section 36(c) prohibitions were inapplicable and, therefore, national banks might establish branches in violation of specific state regulations. But Justice Clark's analysis demonstrated the Court's acceptance of the philosophy of "competitive equality"\textsuperscript{39} and the basic flaws of the Comptroller's argument:

The Comptroller argues that Utah's statute "expressly authorizes" state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those states the laws of which permit it, and even there "only to the extent that the State laws permit bank branching." Utah clearly permits it "only to the extent" that the proposed branch takes over an existing bank.\textsuperscript{40}

The Court concluded that even if the Utah provision were determined to be a "method" of establishing a branch bank, it was, contrary to the Comptroller's argument, part and parcel of Utah's policy and therefore incorporated into sections 36(c)(1) and (2). Thus, \textit{Walker Bank} makes

\textsuperscript{38} Id. at 261 (emphasis added).

\textsuperscript{39} Three years later in First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969), the Court reaffirmed this proposition while dealing with the related problem of the definition of a "branch" as contained in section 36(f) of Title 12 U.S.C.:

The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.

\textit{Id.} at 133.

However, it should be noted that prior to \textit{Walker Bank} and Dickinson, courts had sometimes subordinated the philosophy of competitive equality to the desire to adhere only to federal law; see First Nat'l Bank v. Saxon, 352 F.2d 267, 271 (4th Cir. 1965), which the Supreme Court in \textit{Walker Bank} expressly found to be in conflict with the decisions that it was affirming.

A strong argument against complete competitive equality with regard to branch banking is presented in Comment, \textit{Federalism in Interpretation of Branch Banking Legislation}, 32 U. CHI. L. REV. 148 (1964); written before the \textit{Walker Bank} decision, the author urges that federal courts adopt federal definitions of the term "branch" based primarily upon the economic realities of banking. Even though well documented and well reasoned, this Comment fails in its attempt to justify its position with reference to the National Bank Act, specifically section 36(c). \textit{Compare} 64 MICH. L. REV. 155 (1965), which espouses the philosophy of "competitive equality." See also Comment, \textit{Branch Banking: The Current Controversy}, 16 STAN. L. REV. 983 (1964).

\textsuperscript{40} 385 U.S. at 261 (emphasis added).
it clear that through application of the concept of competitive equality, all of a state's restrictions with regard to branch banking shall apply to national banks.

In Independent Bankers v. Camp, the Comptroller granted the application of a national bank to open automated teller stations (ATMs) in a shopping center over the protest of the state superintendent of banking that Oregon's branching statute did not permit the use of off-premises automated tellers. The Comptroller argued that this interpretation of state law by the state superintendent of banking was not binding upon him, that the state law did not forbid automated tellers to state banks, and that even if it did, national banks were not subject to the prohibition. The district court held that absent a specific Oregon statute permitting automated branches to state banks, ATMs were not available to national banks operating within the state. The district court noted that "the proposed new branches were not to be traditional bank offices," and also observed that the Oregon legislature did not contemplate automated tellers when it enacted the branching statutes.

After examining the state's branching statute, the court indicated that the Comptroller had to strain to fit automated tellers easily within a traditional branching definition that made no specific mention of these devices, while the superintendent of banking had to strain to find a statutory prohibition against their use. Statutory specificity in the authorization of ATM use was deemed essential by this court, and absent that specificity, the court found that ATM operation was prohibited both state and national banks, determining by implication that in this setting

42. An automated teller is a mechanism that can accept deposits, dispense cash, or make transfers between accounts on an unattended basis. It is normally activated by a plastic card that has customer identification and account number data magnetically encoded on a strip on the back of the card. NEBRASKA BANKERS' ASS'N, NETS PROJECT STUDY, EXECUTIVE SUMMARY AND RECOMMENDATIONS (1974).
43. The phrase "statute law" as used in section 36(c)(2) includes legislative enactments only and not administrative interpretations of those enactments. Union Savings Bank v. Saxon, 335 F.2d 718 (D.C. Cir. 1964); First Nat'l Bank v. Camp, 326 F. Supp. 541 (D.D.C. 1971), cert. denied, 409 U.S. 1124 (1973). Yet the district court in Independent Bankers did determine that a state banking superintendent's interpretation of state law with respect to branch banking is at least entitled to respect and consideration; however, whether the superintendent's opinion is to be followed depends upon its conformance with the statute law of the state in question. First Nat'l Bank v. Camp, 465 F.2d 586 (D.C. Cir. 1972), cert. denied, 409 U.S. 1124 (1973).
44. 357 F. Supp. at 1353.
45. Id. at 1356.
46. ORE. REV. STAT. § 714.020 (1971).
47. 357 F. Supp. at 1356.
48. "[T]he demands of 12 U.S.C. § 36(c)(2) are not satisfied by statutory neutrality or inattention. Like the establishment of a branch, the operation of one is permitted only if such operation is authorized 'affirmatively and not merely by implication or recognition' by the statute law of Oregon. . . ." Id.
ATMs were branches. The district court concluded that it was for the state legislature to determine whether or not such a technological innovation should be encouraged.\textsuperscript{49} In arriving at this conclusion, the court noted the importance of the principle of competitive equality in those situations where, because of statutory vagueness, the Comptroller of the Currency and the state superintendent of banking would arrive at opposite interpretations of the law,\textsuperscript{50} "resulting in potentially severe competitive inequality between state and national banks."\textsuperscript{51} \textit{Independent Bankers} thus illustrates that even in a state that permits statewide branching, a p-o-b system might not be valid without specific state statutory authorization.

\textbf{The Comptroller's Ruling and Branching Defined}

It is against this background of federal branch banking law as it pertains to national banks that the interpretive ruling of the Comptroller of the Currency\textsuperscript{52} must be considered. The Comptroller's ruling seeks to permit national banks to establish, without state branching restrictions, electronic terminals through which an existing bank customer can initiate transactions resulting in a crediting of funds to his account, a cash withdrawal from his account, a transfer between his checking and savings accounts, and payment transfers from his account to those maintained by other bank customers. The Comptroller's ruling provides in pertinent part:

\begin{quote}
7.7491 Customer-Bank Communication Terminals.

A national bank may make available for use by its customers one or more electronic devices or machines through which the customer may communicate to the bank a request to withdraw money either from his account or from a previously authorized line of credit, or an instruction to receive or transfer funds for the customer's benefit. The device may receive or dispense cash in accordance with such a request or instruction, subject to verification by the bank. Such devices may be unmanned or manned by a bona fide third party under contract to the bank. . . . Any transactions initiated by such a device shall be
\end{quote}

\textsuperscript{49} \textit{Id.} at 1356-57. Since the district court's decision, Oregon has adopted a bill, effective January 1, 1974, permitting banks to place up to four ATMs in off-premises locations. \textit{Ore. Rev. Stat.} \textsection 714 (1973). Specific legislation concerning ATMs as applied to commercial banks has been introduced in several other states. Massachusetts, for instance, has authorized bank use of ATMs within the county in which its main office lies, a provision parallel to that state's branching laws, \textit{Mass. Gen. Laws Ann.} ch. 167 \textsection 65 (Cum. Supp. 1974); however, Washington, in approving operation of the units, has attached no territorial restrictions on their use. \textit{Wash. Rev. Code Ann.} \textsection 30.43.020 (Supp. 1974).

\textsuperscript{50} In passing on the request of a national bank to operate a branch, the Comptroller must apply the same \textit{standards} as those governing the applicable state body in passing on the same type of question with regard to a state bank. First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086, 1091 (4th Cir. 1969); Clermont Nat'l Bank v. Citizensbank Nat'l Ass'n, 329 F. Supp. 1331, 1335 (S.D. Ohio 1971).

\textsuperscript{51} 357 F. Supp. at 1357. \textit{See also} Lincoln Bank & Trust Co. v. Exchange Nat'l Bank & Trust Co., 383 F.2d 694, 699-700 (10th Cir. 1967).

subject to verification by the bank either by direct wire transmission or otherwise.

Use of such devices at locations other than the main office of the bank does not constitute branch banking. A bank may provide insurance protection under its bonding program for transactions involving such devices.\textsuperscript{53}

By determining that the use of p-o-b systems does not constitute branch banking, the Comptroller’s ruling seeks to avoid the many and varied problems of state restrictions on branch banking that would come into play via section 36(c).

\textit{Branch Banking Defined}

It is clear that Congress, by section 36(c), intended to have state law determine whether branch banking should be permitted; however, Representative McFadden’s proposal was originally ambiguous in that it failed to provide whether state law should be used to determine what constituted “branch banking,” or whether the federal courts should instead determine whether a given activity was branch banking by application of a federal standard or definition. The various congressional debates with regard to section 36(c) never extended beyond consideration of the issue of the desirability of branch banking to a direct discussion relating to the standard by which the statutory term should be construed. Explaining the bill to the House, Representative McFadden did make clear that it sought to establish a national branch banking policy,\textsuperscript{54} and consistent with this view, the bill was amended to provide a definition of the term “branch.” Representative McFadden described the definitional section of the Act as providing that a branch is any place away from the main banking office where the bank carries on its business of “receiving deposits, paying checks, lending money, or transacting any business carried on at the main office. . . .”\textsuperscript{55} Section 36(f) of the National Bank Act now provides that

\begin{quote}
[\textit{t}he term “branch” as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.\textsuperscript{56}
\end{quote}

The Supreme Court was faced with the construction of section 36(f) in \textit{First National Bank v. Dickinson,}\textsuperscript{57} a case involving a national bank that had established an armored car messenger service and had begun construction of a stationary off-premises receptacle in a shopping center

\begin{itemize}
\item \textsuperscript{53} 12 C.F.R. § 7.7491 (1975) (emphasis added).
\item \textsuperscript{54} 68 CONG. REC. 5815 (1927).
\item \textsuperscript{55} 68 CONG. REC. 5816 (1927).
\item \textsuperscript{57} 396 U.S. 122 (1969).
\end{itemize}
for deposits of cash and checks, activities the bank considered beyond the
purview of branch banking restrictions. The bank had contractually ar-
ranged with its customers that funds would not be deemed deposited until
they arrived at its main office, and that checks would be deemed paid only
when the money was handed to the armored car teller at the bank rather
than at the time the customer actually received cash from the teller. The
Supreme Court held that even if a national bank contractually arranged
with its customers that funds accompanied by a deposit slip and delivered
to the bank's armored car or to a stationary off-premises receptacle should
not be deemed deposited until such funds arrived at the bank, the bank
had, for all purposes contemplated by the language of section 36(f), re-
ceived a deposit at the time a customer delivered the funds to the armored
car or to the receptacle.

In discussing the contractual arrangements between bank and customer,
the Court stated:

We have no difficulty accepting the bank's argument that the debtor-
creditor relationship is a creature of contract and that the parties can
agree that until monies are physically delivered to the bank no deposit
will be credited to the customer's account. We are satisfied, however,
that the contracts have no significant purpose other than to remove
the possibility that the monies received will become "deposits" in the
technical and legal sense until actually delivered to the chartered
premises of the bank. . . . [W]hile the contracting parties are free
to arrange their private rights and liabilities as they see fit, it does not
follow that private contractual arrangements, binding on the parties
under state law, determine the meaning of the language or the reach
of § 36 (f).68

The Court suggested that in considering the second part of section 36(f),
it is necessary to penetrate the form of the contracts to the underlying
substance of the transaction,59 and on that basis found that the bank re-
ceived a deposit upon the customer's delivery of the money, "even though
the parties . . . agreed that its technical status as a 'deposit' which may be
drawn on [was] to remain inchoate. . . ."60 Thus the Court concluded that

[s]ince the putative deposits are in fact "received" by a bank facility
apart from its chartered place of business, we are compelled, in con-
struing § 36 (f), to view the place of delivery of the customer's cash
and checks accompanied by a deposit slip as an "additional office, or
. . . branch place of business . . . at which deposits are received."61

In the Dickinson case the Supreme Court found that because the
purpose of the McFadden Act was to maintain competitive equality, it was
relevant to construe section 36(f) as reaching beyond a narrow considera-
tion of contractual rights and liabilities created by the transaction, to a

58. Id. at 135.
59. Id. at 137.
60. Id. (emphasis added).
61. Id. (emphasis added).
consideration of "all those aspects of the transaction that might give the bank an advantage in its competition for customers." In construing the "competitive equality" concept, the Court stated:

Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later.

The Court determined that it was unnecessary to "characterize the contracts as a sham or subterfuge" so as to conclude that the "conduct of the parties and the nature of their relations" brought the bank's challenged activities within the federal statutory definition of branch banking.

In Dickinson, the Court determined that "federal law alone applies to resolve the threshold question whether [a] challenged activity falls within the definition of 'branch.'" It is unclear whether the Court meant that the definition of the term "branch" does not consider state branching law and that section 36(f) is merely a "threshold" question that must be determined before any concepts of competitive equality and the application of section 36(c) to the problem may be considered, or whether it meant that in considering a branching problem, the definition in section 36(f) is to be compared with the activity as a "threshold" determination, and if the activity meets the requirements of this preliminary definition, state law restrictions on branching are then incorporated by the federal definition.

Under the concept of a federal definition which does not consider state branching law, if the facility meets the broad functional requirements of the

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62. Id. at 136-37.
63. Id. at 137. A similar case, Jackson v. First Nat'l Bank, 430 F.2d 1200 (5th Cir. 1970), cert. denied, 401 U.S. 947 (1971), was decided following the Supreme Court's decision in Dickinson. Here the operation of an armored car owned by a subsidiary of a bank holding company was found to be an illegal branch bank. The court indicated that although the transfer of ownership of the armored car from the bank to the subsidiary corporation might terminate the violation in strict form, it changes not a whit of the substance. . . . [T]he whole scheme of maintaining competitive equality between national and State banking systems looks to substance not form. . . .
64. 396 U.S. at 137.
65. Id.
66. 396 U.S. at 133 n.7 (emphasis added). "[T]o allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of 'branch.'" Id. at 133-34; accord, North Davis Bank v. First Nat'l Bank, 457 F.2d 820, 823 (10th Cir. 1972): "What constitutes a branch of a national bank is to be determined by the definition in § 36(f), not local law."
definition provided by Congress in section 36(f) of the National Bank Act, if the branch bank, branch office, or additional office receives deposits, pays checks, or lends money, branching will be found and the Court will refer to state law, under section 36(c), to determine whether the particular branching activity is to be permitted. Since Congress saw fit to provide a federal definition of what constitutes branch banking, it is arguable that an activity that constitutes branching for purposes of section 36(f) in one state should also be considered branching in another state regardless of the various differences in each state's branching statutes.

On the other hand, an argument can be made that Dickinson actually adopts a test more subtle than the broad functional definition provided by section 36(f). The Supreme Court indicated that the various facets of a transaction that give a national bank advantages in its competition for customers are relevant in construing the term "branch." Since what might give a national bank competitive advantages or disadvantages vis-à-vis a state bank will ultimately depend upon those activities that are to be permitted the state bank under the laws of the state in which it operates, it appears that state law will, in effect, refine the federal definition of what constitutes a branch. Thus in Dickinson, it was relevant that, under state law, a state bank would not be permitted to use armored cars to pick up monies from its customers in determining that the national bank had "received" a deposit away from its main office and was therefore engaged in branch banking, even though the bank had carefully structured the transaction in order to avoid this characterization. One apparent problem with accepting such a test is that it could result in the characterization of similar activities as branching in one state and not in another. Conceivably, this could be considered unsound when it is remembered that Congress did adopt a definition of branching without any indication that the classification of activities under this definition was to vary among the states according to the nuances of each state's branching law. Because the definition of branching in section 36(f) is so broad, it will make little difference which test is employed in cases where national banks are attempting to skirt the limitations imposed on state banks by characterizing a particular activity as beyond the purview of the section 36(f) definition of branching.

Section 36(f) and the Comptroller's Ruling

The Supreme Court has recognized that a regulatory agency faced with new developments may overturn past administrative rulings and practice, 67. As noted by the Court, although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term.

396 U.S. at 135. The Dickinson Court concluded that the term "branch bank" included, at the very least, "any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more." Id.
thus permitting flexibility and adaptability to changing needs; however, the Court has cautioned that such adaptation must fall “within the limits of the law.”

When confronted with a problem of statutory construction, the Supreme Court has held that “great deference” must be granted by the courts to “the interpretations given the statute by the officers or agency charged with its administration.”

Congress has committed to the Comptroller of the Currency the initial responsibility for determining whether the conditions under which a national bank may establish a branch are met. Although the Comptroller may have supervisory power over national banks, he cannot override a statutory limitation on the branch banking activity of a national bank. Once the challenged activity meets the broad federal definition of branching provided by section 36(f), the Walker Bank decision establishes that the principle of competitive equality calls for the incorporation of state branching restrictions into section 36(c). Thus, a branch may be established only when, where, and how state law would permit a state bank to establish and op-

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71. 275 F.2d at 272; accord, Investment Co. Inst. v. Camp, 401 U.S. 617, 628 (1971); “Quite obviously the Comptroller should not grant new authority to national banks until he is satisfied that the exercise of this authority will not violate the intent of the banking laws.”


erate such a facility. Although the Comptroller interprets section 36(f) as not to include “customer-bank communication terminals,” an examination of judicial interpretation of the statute renders the Comptroller’s interpretation suspect at best.

The principal statutory question is whether, within the meaning of the National Bank Act, a p-o-b terminal is a

branch bank, branch office, branch agency, additional office, or . . . branch place of business . . . at which deposits are received, or checks paid, or money lent.

The first part of section 36(f) seems to contemplate the existence of some sort of detached facility “at which deposits are received, or checks paid, or money lent.” Although a p-o-b terminal facility may not fit within an understanding of what might be meant by “branch bank,” “branch office,” or “additional office” — terms that reasonably connote a traditional brick-and-mortar branch banking operation — the same cannot be said so easily with regard to an understanding of what is meant by “branch agency” or “place of business.”

Even though the present discussion is concerned with the federal definition of “branch,” it is interesting to examine state construction of the term. Under interpretations of state laws by several state attorneys general, the sale or issuance of bank money orders through the agency of commercial

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76. For example, the application of section 36(f) to drive-in or walk-up facilities has been considered by the courts. In Jackson v. First Nat'l Bank, 246 F. Supp. 134 (D. Ga. 1965), the court was faced with a state statute providing that a bank could establish either a “bank office” or a “bank facility” in addition to the parent bank. The defendant had in fact established a parent bank as well as a bank office in close proximity, but thereafter established a third facility some three hundred feet from the main banking institution for the purpose of cashing checks and receiving deposits. The establishment of this drive-in facility was enjoined, the court holding that it was a “branch bank” within the meaning of section 36(f). In so holding, the court dismissed defendant's contention that the facility was but an expansion of an existing facility, noting a considerable distance between the parent bank and the drive-in facility, the number of intervening structures, and the lack of physical connection between the main banking house and the drive-in facility. Further, since the branch facility had an adverse effect on the balance of competition in the area, the drive-in facility could not be considered an expansion of an existing banking institution that would be excluded from the federal and state requirements for establishing a branch bank. Likewise, in State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (D. Wash. 1966), the Comptroller’s approval of a similar facility was found to be arbitrary and not in accordance with law.
establishments has been found to constitute illegal branch banking. A bank's use of services performed by an insurance agent to facilitate transaction of the bank's business has also been held to constitute branch banking. Similarly, a bank that had arrangements with an automobile dealer regarding bank-financed automobile loans was found to have operated a loan production office at the dealer's place of business: "The mere fact that such activity does not contravene the Federal... regulations does not mean that the activity does not violate state law." It should be noted that with regard to a p-o-b operation, the Comptroller determined that "[t]he [commercial] establishment is not an agent of the bank because it is acting as it does for its own business purposes, and accordingly is a bona fide third party"; however, this characterization fails to take into account the fact that in this operation the commercial establishment, by serving its own business purposes or interests, is at the same time serving those of the bank. In all of the above instances, the sales clerk, the insurance agent, and the automobile salesman each served the mutual interests of his respective employer and those of a bank, just as operation of a p-o-b system by a retail employee would likewise serve both interests.

Whether considered as an "agency" or as some sort of detached facility contemplated by section 36(f), a manned p-o-b terminal would surely fall within the locational aspect of the definition of a "branch" for it may be considered a "place of business" if nothing more. Further, while this question was not specifically addressed in Independent Bankers, the decision there being bottomed on section 36(c), it is implicit that the district court determined that unmanned ATM terminals were to be viewed as falling within the section 36(f) definition. In light of the foregoing, then, it is doubtful that either a manned p-o-b terminal or an unmanned automated teller machine, as putatively authorized by the Comptroller, may escape the first portion — the locational aspect — of the branch bank definition.

The second part of the section 36(f) definition, a location "at which deposits are received, or checks paid, or money lent," is the key to a determination of whether the operation of a p-o-b system would constitute branch banking under federal law. For a location to constitute a "branch bank,"

81. In the Dickinson case, an off-premises deposit box or receptacle was found a sufficient "place of business" so as to trigger application of federal/state branching limitations. 396 U.S. at 124 et seq.
82. The Comptroller asserts that "even if a CBCT [Customer-Bank Communication Terminal] is considered to be a branch office, branch agency, or branch place of business — it is not receiving deposits, paying checks, or making loans within the meaning of 12 U.S.C. § 36(f)." 39 Fed. Reg. 44419 (1974).
it is not necessary that a complete banking operation be conducted, it being sufficient if only limited banking functions are performed. The patent meaning of the second part of the statute is that the challenged activity will be considered a “branch” for purposes of section 36 if any one of the three specified conditions is met — if deposits are received, or if checks are paid, or if money is lent.

The Comptroller characterizes the system as a communications medium that initiates certain transactions with the bank. Stating that

> consummation of these transactions by the bank for the customer is contingent upon certain conditions being satisfied before contractual rights and obligations attach and “deposits are received, or checks paid, or money lent,”

the Comptroller applies this conceptualization to the operation of both unmanned automated terminals and manned p-o-b terminals as if the determination that all transactions are actually consummated upon the adjustment of accounts within the bank’s central computer is decisive in construing the definition of branching.

In the Dickinson case the Comptroller likewise argued that deposits were received by the bank upon consummation of the transaction, the time when contractual rights and obligations attached and a debtor-creditor relationship between bank and customer was effectuated; however, the Supreme Court chose to disregard these internal matters, choosing instead to examine the external aspects of the transactions in order to determine whether the armored car or the deposit receptacle were to come within the branch bank definition. Because of the doctrine of competitive equality, the Court considered “those aspects of the transaction that might give the bank an advantage in its competition for customers” the decisive factor

86. The Attorney General of Kansas came to a similar conclusion: “The business of banking is not transacted at such terminal locations, but on the premises of the bank wherein the transactions are electronically effected and perfected” by a bank computer. 1974 KAN. ATT’Y GEN. Op. No. 74-196, June 12, 1974. Both the Comptroller’s interpretation and that of the Attorney General of Kansas indicate that the business of banking takes place within the central computer rather than at the terminal location.
87. 396 U.S. at 136.
88. “[W]hile the contracting parties are free to arrange their private rights and liabilities as they see fit, it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36(f).” Id.
89. Id. at 136-37.
in its determination of where, in fact, the deposits were received, in finding that the deposits were actually received at a place apart from the bank's chartered place of business, the Court was "compelled," in construing section 36(f), to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an "additional office, or . . . branch place of business . . . at which deposits are received." Unless the Supreme Court is willing to disregard its reasoning in Dickinson and overrule that decision, an examination of the Comptroller's determination that a "CBCT" system does not constitute branch banking should show that operation of such a system does indeed permit a bank a distinct competitive advantage and that section 36(f) definitional requirements are fulfilled when deposits are physically received at the place of delivery, a "branch place of business" apart from the bank's chartered premises.

90. "Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later." Id. at 137.

91. Id. The same type of analysis was used prior to the Dickinson decision in State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966), where the district court considered the check cashing process and found that a check is cashed within the meaning of section 36(f) "when the instrument is accepted from and the money paid to the holder," 291 F. Supp. at 195, and dismissed the remaining internal bank operations with respect to payment of the check as unrelated to a section 36(f) inquiry: "True, the remaining operations are part of the check-cashing process, but the act of check-cashing is complete after receipt of the check and payment of the money; and it is the act of check-cashing that is contemplated by section 36(f). Accord, Dickinson v. First Nat'l Bank, 400 F.2d 548 (1968), aff'd 396 U.S. 122 (1969).

92. The confusion engendered by sections 36(c) and (f) as well as the complex problems raised by the federal-state dichotomy in the branching area can perhaps be best realized through examination of a hypothetical suggested by the "Hinky Dinky" situation (see note 3 supra). Since Nebraska is a unitary banking state, Neb. Rev. Stat. § 8-157 (1970), and a p-o-b terminal would arguably be considered a branch, the use of p-o-b terminals by national banks in Nebraska would be illegal under section 36(c). However, in the "Hinky Dinky" case, State ex rel. Meyer v. American Community Stores Corp., No. 285, Aug. 5, 1974 (see note 3 supra), a lower Nebraska court indicated that banking operations were transacted inside the central computer rather than at the grocery store location. See note 86 supra and accompanying text. (It should be noted that the question being addressed in this case was whether the supermarket (Hinky Dinky) was engaged in the banking or the savings and loan business. The terminals in the supermarket were connected to a computer located in a federal savings and loan association. Federal savings and loan associations are not bound by statute to follow state limitations on branching, although the Federal Home Loan Bank Board has adopted a policy of prohibiting branching by a federal association if the state in which it operates prohibits all forms of branching. 12 C.F.R. § 556.5(b)(1) (1974). However, the theoretical basis of the Nebraska court's determination is still fully applicable to a consideration of the question of whether a similar operation by a national bank would constitute branching).

Assuming that p-o-b terminals meet the section 36(f) branch definition as Dickinson and Independent Bankers would suggest, the policy of competitive equality
Should a commercial bank presently begin a p-o-b operation it would plainly be an expansion of operating facilities, the very endeavor that state branching statutes seek to regulate and control and that Congress sought to confine via the principle of competitive equality. So long as branching is thus restricted, all commercial banks, be they state or federally chartered, are subject to the statutory limitations of the state in which they do business. In view of congressional deference to state regulation in this regard, it is neither for the Comptroller nor for the courts to license an evasion of this regulatory scheme by dancing a semantic foxtrot around the basic operational and functional nature of an electronic funds transfer system of this type.

In light of congressional and judicial reasoning, it would seem that a national bank, relying on the Comptroller's interpretation of the branch banking statute, would be inviting litigation by engaging in a p-o-b operation where not specifically permitted by state law, and in this respect, the analogous context of the Dickinson case should serve as a warning. In that situation, the Comptroller had issued a regulation permitting messenger services, stating that services such as those later employed by the First National Bank in Plant City, Florida, were not branch bank operations and were to be permitted upon the Comptroller's approval alone. On the basis of the Comptroller's determination, the Florida bank instituted its armored raises some interesting section 36(c) problems. Arguably, as the preceding paragraph suggests, Nebraska state banks would be permitted p-o-b systems even though Nebraska is a unitary banking state because the theoretical basis of the state court decision would appear to say that p-o-b terminals are not branches; however, if p-o-b terminals are to be considered national bank branches under section 36(f), section 36(c) (2) comes into play, providing that these terminals are to be permitted only if "authorized to state banks by the statute law of the state... by language specifically granting such authority affirmatively and not merely by implication or recognition..." 12 U.S.C. § 36(c) (2) (1970) (emphasis added). Thus, it appears that under section 36(c) (2) a national bank could not utilize a statewide p-o-b system in Nebraska, whereas a state bank may be permitted to do so in view of the state court interpretation. In such a situation, the section that sought to permit a workable competitive equality among state and national banks actually establishes an anomalous competitive inequality. (It should be noted, however, that under the terms of section 36(c) (1), p-o-b terminals would be permitted within the city in which the bank's main office is located on the basis of the lower Nebraska court's decision because this section speaks generally of the "law of the state" rather than specifically confining authorization to "statute law" as does section 36(c) (2)).

93. Indeed, there is substantial and respectable opinion that there should be greater liberality in permitting the expansion of national bank facilities; "however, the accomplishment of this good policy should be left to the legislative branches of the national and state governments and should not be brought about by executive fiat." American Bank & Trust Co. v. Saxon, 373 F.2d 283, 291 (6th Cir. 1967); accord, State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180, 198 (W.D. Wash. 1966). See also Bank of Dearborn v. Saxon, 244 F. Supp. 394, 398 (E.D. Mich. 1965), where the court charged that it was not for the defendants (the Comptroller of the Currency and a national bank) "to amend our 'antiquated' laws by clever devices of evasion..."
car messenger service and soon found itself at the courthouse door. Following the Dickinson decision the Comptroller was forced to amend his regulation, in order to comply with section 36, to provide that such systems were to be operated only where permitted by state law.94

PROPOSED BRANCING CHANGES

Branch banking regulation is currently undergoing reexamination.95 The best estimates are that in another ten years no state will remain without some form of statewide, multiple office banking,96 and this movement toward less restricted branch banking will undoubtedly be hastened by the sophisticated electronic computer hardware that present technology has made available.

In 1971 the United States Department of Justice submitted to the Council of State Governments a proposal that the states reexamine their laws limiting geographic expansion by banks,97 a proposal based on the broad theme that American consumers deserve greater competition within the financial industry and that bank management and bank regulators both deserve greater flexibility to make competitive decisions.98 Since the Justice Department's proposal, the Hunt Commission has made known its recommendation that states permit both commercial banks as well as thrift institutions to expand on a statewide basis.99 That report states that its

94. 12 C.F.R. § 7.7490 (1974), “Messenger Service,” now indicates that in some states the power to provide such a service may be limited by the branching provision of 12 U.S.C. 36 and the bank would then be required to consider those aspects of the transaction which might give the bank advantages over State chartered banks in its competition for customers.

95. More than half the state legislatures have recently considered changes in their branching laws, changes that would cover a wide area of activity ranging from the mere expansion of limited facilities to the significant broadening of bank branching powers. Kirby, The Name's the Thing: Financial Communications Device, Not Automated Teller Machine, 91 Banking L.J. 135, 139 (1974). See also Darnell, Wider Branching Looms for Banks, 16 MANAGEMENT DIGEST FOR SAVINGS & LOAN EXECUTIVES 1, 2 (1973).

96. Darnell, supra note 95, at 2.


99. THE REPORT OF THE PRESIDENT’S COMM’N ON FINANCIAL STRUCTURE & REGULATION, pt. II-C at 59–63 (1971) [hereinafter cited as HUNT COMM’N REP.]. Viewed from the vantage point of more than thirty-five years of practical experience with the National Bank Act as amended in 1933, the Hunt Commission has submitted that “the existing regulatory system is, on balance, too restrictive,” id., pt. II-B at 43, and recommends that state legislation grant commercial banks the right to branch statewide. Id., pt. II-C at 61–62.
recommendations are intended to introduce greater banking competition and to improve the ability of financial institutions to adapt to technological change. While current banking laws were enacted during a period of national financial crisis and as a consequence suffer from a lack of any well-conceived master plan, the recent proposals for private industry reform have been offered as "studied, non-crisis alternatives to existing regulation."

Recognizing the future of banking operations and technology, recently enacted Federal Deposit Insurance Act amendments call for the establishment of a twenty-six member National Commission on Electronic Fund Transfers which is charged with conducting a thorough study and investigation in order to recommend appropriate and necessary administrative and legislative action in connection with "possible development of public or

100. The report emphasizes that "[c]onsumers will be helped if the states, following Commission recommendations, relax branching . . . laws to permit greater competition." Id., pt. III-A at 113. The Commission recognized that in a number of states bank branching restrictions so limit entry into local markets by financial intermediaries in the same class as well as in other classes that competition is stifled. For example, in many states, savings and loan associations and mutual savings banks have more restrictive branching privileges than commercial banks. In a few states, savings and loan associations have more liberal branching authority. Id., pt. II-C at 60. The Commission sees no justification in extending different branching rules to different institutions, especially when these institutions are otherwise competing. Id.

101. Id., pt. III-B at 117. The Commission urged the states to be progressive in remedying their existing branching laws, warning that the failure to act might "encourage the use of inferior organizational and technological means for extending markets. . . ." Id., pt. II-C at 62.

102. The present system of financial regulation was "designed to limit the depressed economic conditions of the 1930's, but poorly suited to cope with the expansionary conditions of the past decade." Presidential Message to Congress, Aug. 2, 1973. See also Hearings on the Credit Crunch and Reform of Financial Institutions Before the House Comm. on Banking and Currency, 93d Cong., 1st Sess., at 473 (statement of Ralph Nader): "[T]he industry's performance is restrained by a residue of laws emanating from the Depression psychosis . . . ."

103. Verkuil, Perspectives on Reform of Financial Institutions, 83 YALE L.J. 1349, 1374 (1974). Restrictive banking law is largely a product of the Depression, and the most important banking reform of that period turned out to be the development of universal deposit insurance which succeeded in eliminating serious risks of widespread bank failure. HUNT COMM'N REP., supra note 99, pt. II-B at 44. The economic premise of so much of our current banking regulation has thus been rendered obsolete to a great extent. Moreover, the entire technology on which banking services were then based has been revolutionized by the computer. "[W]e have seen but just the beginning, and . . . with new computer-based operations, the banking system of the future will be entirely different from the past." Baker, supra note 98 at 122.

private electronic fund transfer systems. . . .” Though coming at a somewhat late stage in the development of electronic funds transfer systems, it is some consolation that Congress appears to recognize the inherent problems of full utilization of such systems within the confines of existing legislation.

CONCLUSION

It cannot be overstated that law, both federal and state, should not be the vehicle employed to restrict beneficial technology without good reason. Decisions relating to the expansion of bank operating facilities should be left, to a much greater extent than has previously been the case, to the wisdom of management and the preferences of consumers. Our statutory and case law, both state and federal, must be responsive to the changing realities of computer technology in the banking industry.

It has not been the intent of this analysis to suggest an indiscriminate use of new technology in areas as vital to our economic well-being as the commercial banking industries. Yet it is doubtful that operation of the new electronic funds transfer systems can easily fit within existing banking statutes and their supporting court decisions.

The time has come for the public to be permitted the full advantage of new technology in the overly regulated banking industry, and legislators must reexamine their own role vis-à-vis laws which were enacted or construed before the advent of today's technological innovations, when our manner of living was substantially less mobile and less convenience oriented. New statutes [and] new decisions . . . must be carried forward over the vested-interest attitudes of those who fear competition and therefore innovation. . . . [I]t is outrageous for large segments

105. Among the areas this Commission is requested to take into account are
(1) the need to preserve competition among the financial institutions and other business enterprises using such a system;
(2) the need to promote competition among financial institutions and to assure Government regulation and involvement or participation in a system competitive with the private sector be kept to a minimum;
(3) the need to prevent unfair and discriminatory practices by any financial institution or business enterprise using or desiring to use such a system;
(4) the need to afford maximum user and consumer convenience.

43 U.S.L.W. at 130. The Commission must make an interim report within one year and submit a final report of its findings and recommendations not later than October 28, 1976.

106. As former Comptroller of the Currency James Saxon has recognized, it is clear that restrictive branch banking laws show but little regard for the public interest in that they are seemingly designed to protect the interests “of the less energetic or competent segments of the industry which cannot abide the prospect of competition.” Comment, Branch Banking — Restrictive State Laws Considered in Light of the Public Interest — Extension of National Power over Banking, 38 Notre Dame Law. 315 (1964). It is indeed unfortunate that such laws do not presently meet the economic needs of the people and of the banking industry, but “serve instead the determined opposition of parochial interest.” Id.
of the public to wait for the slow erosion of protectionistic conservatism in order to obtain benefits which already exist.\textsuperscript{107}

Public policy and wise administration demand that the banking industry be subject to some minimum level of effective governmental control, but that industry will grow more properly, and that industry will better serve the needs of the consumer, as soon as competitive innovation rather than standardization receives its belated but just recognition.

The continuing conflicts among state and federal bank regulatory agencies and the politics involved in even beginning to formulate administrative or legislative proposals for implementation of new banking technology contribute to delay and, in effect, substantially permit the continuation of some of the archaic concepts and laws that are the basis of this current banking dilemma.\textsuperscript{108} The computer age is well upon us and change is necessary in order to accommodate the beneficial aspects of its new technology.

\textsuperscript{107} Kirby, \textit{supra} note 95, at 153–54.

\textsuperscript{108} \textit{Id.} at 154.

\section*{ADDENDUM}

[After this Comment went to press, the Comptroller issued an interpretative ruling, 40 Fed. Reg. 21700 (1975), amending 12 C.F.R. \S 7.7491 (1975). This amended ruling, effective June 1, 1975, alters the original provision allowing statewide operation of a p-o-b system by an approved national bank by restricting installation of p-o-b terminals to within fifty miles of

the bank's main office or closest branch, whichever is nearer, unless such device or machine is available to be shared ... by one or more local (i.e., within the trade area of the device or machine) financial institutions authorized to receive deposits, such as a commercial bank, a mutual savings bank, a savings and loan association, or a credit union.

\textit{Id.} at 21704. The Comptroller also notes that when the original ruling was issued, prominent concern was directed toward "'exclusive' or 'dedicated' terminals established and owned by a single bank and operated principally for the benefit of its own customers;" \textit{id.} at 21701, rather than toward "networks of CBCTs owned by a third party and shared by a number of banks or other financial institutions." \textit{Id.} Thus, in addition to the distance restriction now placed upon the use of p-o-b facilities, the Comptroller's ruling makes clear that national banks are allowed to par-
ticipate in a network of shared facilities, "whether or not the bank itself owns or operates the terminals." Id.

Also after this Comment went to press, three cases relevant to the foregoing discussion were decided. The Supreme Court of Nebraska on May 1, 1975, decided State ex rel. Meyer v. American Community Stores Corp., 193 Neb. 634, 228 N.W.2d 299 (1975), see notes 3 & 92 supra. The court affirmed the opinion of the Lancaster County District Court, concluding that the installation of computer terminals in retail stores as authorized by the Federal Home Loan Bank Board does not constitute engaging in either a banking or savings and loan business by the retail store.

The court noted the testimony of the assistant director of banking to the effect that the Nebraska statutes would not prohibit "anyone from acting as an agent for a savings and loan association," 228 N.W. 2d at 302, remarking that state chartered savings and loan associations maintain agents who "accept deposits and transmit them to the home office and make on-the-spot withdrawals or transmit withdrawal requests to the home office." Id. The assistant director of banking thus conceded that a retail store such as Hinky Dinky "could act as an agent for a state chartered savings and loan association in Nebraska under current state statutes." Id. Indeed, the court found that Hinky Dinky's activities amounted to "acting as an intermediary and assisting in the transfer of funds between First Federal and First Federal's depositors." Id. at 303.

The court made reference in dictum to the determinations of "[v]arious federal agencies having jurisdiction over financial institutions" that p-o-b terminals manned by retail employees "may be established under specified conditions by a financial institution under their jurisdiction," id., and cited the Comptroller's regulation as an example supporting the proposition that [s]uch operations do not constitute an illegal . . . carrying on of business at an unauthorised branch by the financial institution involved. Id. Although the court apparently accepted the Comptroller's regulation at face value, the clear import of the court's decision is that Hinky Dinky is serving as First Federal's agent in the operation of the p-o-b system. While this would not necessarily constitute a violation of federal or state statutes or regulations with regard to savings and loan associations, see note 92 supra, such an agency relationship would constitute a violation of 12 U.S.C. § 36 prohibitions in a unitary banking state.

On June 11, 1975, the United States District Court for the District of Nebraska entered final judgment in Bloomfield Federal Savings & Loan Ass'n v. American Community Stores Corp., Civil No. 74-0-146 (D. Neb., June 11, 1975); see note 3 supra. The district court entered summary judgment in favor of defendant Federal Home Loan Bank Board (FHLBB) and its members upon claims that the FHLBB had adopted and amended rules and regulations "without authority pursuant to § 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. § 1464)," slip op. at 2, that the FHLBB had failed to follow procedural requirements in authorizing the operation of the Hinky Dinky terminals, id.
at 6, and that defendant First Federal Savings and Loan Association had “made unsecured loans to Hinky Dinky . . . and/or [had] credited customers with funds not paid to it, . . . in violation of governing statutes and regulations.” Id. at 8.

In discussing plaintiffs' claim that the FHLBB had failed to follow procedural requirements in authorizing the Hinky Dinky terminals, the district court noted the crucial difference between branch authorization by the Comptroller of the Currency with respect to national banks and branch authorization by the FHLBB with respect to federal savings and loan associations: 12 U.S.C. § 36(c) is “inapplicable to the Board's approval of branches for federal associations,” id. at 7, see note 92 supra, and it is “[o]nly where a state has expressed an outright hostility to branching . . . will the Board not authorize 'branching.'” Slip op. at 7, see note 92 supra.

Further, while section 36(f) seeks to define the term “branch” applicable to national bank operations, “Congress has not defined 'branching' in the area of federal savings and loan associations, but has left it to the Board's discretion to determine by regulation what constitutes a 'branch.'” Slip op. at 7. By regulation (12 C.F.R. § 545.14 (1975)), the FHLBB has determined that a “branch” is a permanent and full-time office “at which any business of a federal association may be transacted.” Id. at 8 (emphasis in original). Noting that a p-o-b terminal permits an account holder to transmit a funds transfer communication and that “[12 C.F.R. § 545.4-2 (1975)] prohibits the use of the remote service unit for opening . . . accounts . . . , or for the origination, processing or approval of any loans,” id., the court then determined that a remote service unit is merely a means of communication that permits a funds transfer “to be effectuated on the premises of First Federal.” Id.; see text accompanying notes 85 & 86 and note 86 supra. Thus, the court concluded that p-o-b terminals are really sui generis and are not comprehended by the FHLBB regulations governing the establishment of branch offices by federal savings and loan associations. Slip op. at 8.

While the United States District Court for the District of Nebraska has concluded that operation of p-o-b terminals by a federal savings and loan association is not branching, the United States District Court for the District of Colorado has reached an opposite conclusion with respect to national banks. In State ex rel. State Banking Board v. First National Bank, 394 F. Supp. 979 (D. Colo. 1975) the district court held that, with respect to the function of receiving deposits, operation of an ATM by a national bank violated 12 U.S.C. § 36, and that “to the extent that the Comptroller's ruling permits the use of an ATM to receive deposits, it is erroneous.”

First National had installed three ATMs, one in a shopping center at some distance from the main bank building. Due to the restrictions on branching in Colorado, Colo. Rev. Stat. § 11-6-101(1) (1973), see note 36 supra, the same operation would have been prohibited a state bank. Thus the State of Colorado on the relation of its State Banking Board and
State Bank Commissioner challenged the operation as illegal branch banking, claiming that the Comptroller's authorization of the activity was invalid. Id. at 2.

Guided by Walker Bank and Dickinson, the court upheld plaintiff's contention that the ATM operation was prohibited by section 36(c) because deposit activity fell within the federal definition of branching provided by section 36(f). The court concluded that there was "no functional difference between the way in which a customer makes a deposit in this machine and the stationary receptacle for deposits which was the subject of the decision in . . . Dickinson," id. at 8, and that "to the extent that it performs the function of receiving deposits, this machine constitutes a branch bank under Title 12 U.S.C. § 36(f)." Id. In dictum, the district court also noted that the ATM was neither a place where checks were paid nor where money was lent, id. at 9. This determination is surprising in view of the court's treatment of the deposit transaction. The district court interpreted "check" in a technical sense and thus concluded that "[t]o instruct the bank by depressing the keys on [the ATM] machine is not the writing of an order for the BANK to pay upon demand." Id. The court reached this result even though it found an "obvious similarity" between the customer's drawing of a check and the use of an ATM to obtain funds and even though it admitted that the results of both transactions were functionally the same. This technical treatment of the words "checks paid," in referring to the transaction by which funds are withdrawn from an ATM account, seems inconsistent with the nontechnical interpretation of the deposit function. See text accompanying notes 82-92 supra. However, once the court reached the decision that the ATM was a place where deposits were received, it was no longer necessary to question these other activities as the definition of branching under section 36(f) was satisfied by the conclusion with respect to deposits. See text accompanying notes 82-84 supra.

In reaching its conclusions, the district court "followed the directions of the Supreme Court of the United States . . . to consider the McFadden Act by applying the literal meaning of its language to the functions of the machine." Id. at 10. Noting that the Comptroller of the Currency had no authority to do otherwise, id., the court accordingly determined that the Comptroller's interpretative ruling was erroneous to the extent that it allowed the use of the ATM to receive deposits, and that the permission given First National to operate the units was invalid. Id.]