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Electronic Banking and Its Effect on Interstate Branching Restrictions - An Analytic Approach

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ELECTRONIC BANKING AND ITS EFFECTS ON INTERSTATE BRANCHING RESTRICTIONS—AN ANALYTIC APPROACH

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INTRODUCTION

An irresistible banking force is meeting a movable banking object. The object is, of course, retreating. Irresistibly, the burst in electronic capabilities that has accompanied the fourth quarter of the twentieth century is changing the way banks conduct business.[1] Money, once movable only from hand to hand, then through the use of paper-based instructions, now moves with the speed of light from coast to coast, internationally, or even through the stratosphere. These electronic capabilities are pushing hard against a general principle of American banking: a bank may not branch beyond the state in which it is created.[2] The prin-

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1. *See* D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems ¶ 1.01[1], at S1-2 (Supp. 1985) ("substantial shift to [electronic fund transfer] . . . and escalating use of [automatic teller machines]"); Alces, *A Jurisprudential Perspective for the True Codification of Payments Law*, 53 Fordham L. Rev. 83, 83 (1984) (recent increase in technological sophistication in banking methods); Fraser, *Structural and Competitive Implications of Interstate Banking*, 9 J. Corp. L. 643, 643 (1984) (recent rapid technological change in banking methods).

2. *See* Department of Treasury, Geographic Restrictions on Commercial Banking in the United States 2-6 (1981); Frieder, *Legislating for Interstate Bank Expansion: Financial Deregulation and Public Policy*, 9 J. Corp. L. 673, 725 (1984); Ginsburg, *The Future of Interstate Banking*, 9 J. Corp. L. 655, 656 (1984). See *infra* note 36 and accompanying text.

Commercial banks have many alternate ways of relating to states, and customers in states beyond the bank's home states. One is through the use of bank holding company affiliates. That structure is controlled by the Bank Holding Company Act (BHCA), 12 U.S.C. §§ 1841-1850 (1982), and will be addressed in this Article only to the extent relevent to commercial bank branching. Other methods of geographic expansion will be touched on at various places in this Article.

The branches of savings and loan associations (S&L's) present a related, but different, set of issues and will not be part of our core subject. This Article's point of view, however, and its conclusion are as applicable to S&L's as to commercial banks. The powers of federal S&L's are contained in the Home Owners' Loan Act of 1933 (HOLA), 12 U.S.C. §§ 1461-1470 (1982). HOLA has been construed to permit federal S&L's to branch, *see* North Arlington Nat'l Bank v. Kearny Fed. Sav. & Loan Ass'n, 187 F.2d 564, 566 (3d Cir. 1951), *cert. denied*, 342 U.S. 816 (1951), both intrastate and interstate, *see* Independent Bankers Ass'n of Am. v. Federal Home Loan Bank Bd., 557 F. Supp. 23, 25-27 (D.D.C. 1982). The Federal Home Loan Bank Board has, though, administered HOLA to prohibit interstate branching for federal S&L's in the same manner as federal law prohibited national banks. *See* 51 Fed. Reg. 33, 34 (1986) ("The Board generally limited Federal associations to branching within the states of their home offices . . . ."). Nevertheless, in 1981, it did remove geographic restrictions on the use of electronic terminals. *See* Fed. Reg. 41,763 (1981) (codified at 12 C.F.R. § 545.141(c) (1985)). Bank ciple, while fundamental, is not absolute; it is movable. It is already subject to a number of qualifications, refinements, exceptions ("loopholes" if you will)[3] that make its potency of a lower order than the irresistible march of electronic progress. The growing number of state statutes that permit bank holding companies to acquire banks in more than one state[4] and the consideration that Congress is giving to federal legislation on this subject,[5] matters to which we shall return, may be seen as part of the retreat from the principle. But even those developments are structured to require separate banks in separate states.[6]

Board authority to permit interstate branching for financially distressed federal S&L's was granted in the 1982 Garn-St. Germain Depository Institutions Act. *See* 12 U.S.C. § 1730a(m) (1982). Encouraged by the statutory blessing, in May 1983, the Board proposed to amend its regulations to permit interstate branching for federal S&L's whenever state law specifically permits entry by out-of-state institutions. *See* 48 Fed. Reg. 20,930 (1983) (codified at 12 C.F.R. § 563.22-1(c) (1985)). For state S&L's, the approach to interstate branching is the same as the approach to state commercial banks discussed in Part II.B. of this Article.

The National Credit Union Administration apparently approves of a national credit union existing in more than one state as long as the "common bond" requirement is met. *See* 12 C.F.R. Part 708 (1985). The requirement is met if federal credit union membership is limited to groups with a "common bond of occupation or association, or to groups within a well defined neighborhood, community or rural district." 12 U.S.C. § 1759 (1982). The branching powers of state credit unions are governed by the laws of the states. See *infra* note 27.

3. Three of the most common loopholes involve bank holding companies, see *infra* notes 4, 129-41 and accompanying text, loan production offices (LPO's), see *infra* Part III.A.3.b., and foreign banks, see *infra* notes 37-39 and accompanying text.

4. Under authorization contained in section 3(d) of the BHCA, 12 U.S.C. § 1842(d) (1982), 26 states have enacted legislation permitting the acquisition of banks by out-of-state bank holding companies. *See* Alaska Stat. § 06.05.235(e) (Supp. 1985); Conn. Gen. Stat. Ann. § 36-552 to -554 (West Supp. 1985); Del. Code Ann. tit. 5, ch. 8 (1985); D.C. Code Ann. § 803 (1985); Fla. Stat. Ann. § 658.295 (West 1984); Ga. Code Ann. § 7-1-620 to -625 (Supp. 1985); Idaho Code § 26-2605 (Supp. 1985); Ill. Ann. Stat. ch. 17, §§ 2507-2508 (Smith-Hurd 1981 & Supp. 1985); Ind. Code Ann. § 28-2-15-16 to -17 (Burns Supp. 1985); Iowa Code Ann. § 524.1805 (West Supp. 1986); Ky. Rev. Stat. Ann. § 287.900(b) (Bobbs-Merrill Supp. 1984); Me. Rev. Stat. Ann. tit. 9-B, § 1013 (1980 & Supp. 1985); Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1986); Mass. Gen. Ann. Laws ch. 167A, § 2 (Michie/Law. Co-op. Supp. 1985); Neb. Rev. Stat. § 8-905 (1983); Nev. Rev. Stat. § 666.128 (1985); N.Y. Banking Law § 142-b (McKinney Supp. 1986); N.C. Gen. Stat. § 53-211 (Supp. 1985); Ohio Rev. Code Ann. § 1101.05 (Page 1985); Or. Rev. Stat. § 715.065 (1985); R.I. Gen. Laws § 19-30-2 (Supp. 1985); S.C. Code Ann. § 34-24-30 (Law. Co-op. Supp. 1985); S.D. Codified Laws § 51-16-40 (Supp. 1985); Tenn. Code Ann. § 45-12-103 (Supp. 1985); Utah Code Ann. § 7-19-2 (Supp. 1985); Va. Code § 6.1-399 (Supp. 1985); Wash. Rev. Code Ann. § 30.04.230 (Supp. 1986).

In February 1986, New York and California agreed to allow bank acquisitions between the two states beginning in 1990. *See* Wall St. J., Mar. 3, 1986, at 2, col. 3.

5. *See* H.R. 2707, 99th Cong., 1st Sess. (1985) (Depository Institutions Acquisitions Act of 1985) (authorizing certain interstate acquisitions of depository institutions). The Reagan administration has recently urged Congress to remove interstate banking barriers. *See* R. Reagan, Economic Report of the President 211 (1986) ("it is time to move toward true interstate banking").

6. Both the state statutes and the proposed national legislation authorize ownership of banks in more than one state by a bank holding company, but do not authorize interaction among banks of different states.

This Article will deal principally with the interstate branching power of commercial banks, and will examine many of the legal complexities of interstate banking in the context of electronic banking. My conclusion is that present interstate branching law reflects an out-of-date approach to our financial needs. In addition, the availability of new electronic technologies invites evasion of the present branching restrictions. The resulting pattern honors neither the principle of one-state, one-bank nor that of true interstate banking. Our babel of law now metes out rewards and penalties among institutions without regard for social utility. Ironically, no particular attention is given today to reform of the branch banking laws. But only by addressing those laws directly can we expect to structure a rational approach to geographic banking issues.

I. Basic Prohibitions Against Interstate Branching

A. *Federal Law—The McFadden Act*

The McFadden Act[7] prohibits national banks from branching across state lines not by express prohibition, but by an absence of authorization. Banks, like all corporations, derive their power from a statutory grant, but as contrasted with ordinary business corporations, which generally are granted unlimited powers except where prohibition is expressly provided,[8] bank statutes are designed to limit banks to a relatively specific set of powers.[9] Thus, when the McFadden Act allows national banks to branch within their home states to the extent permitted by state law to state banks,[10] it thereby prohibits such banks from branching outside their home states.[11]

The effect of the McFadden Act on American banking history is insufficiently appreciated. In 1924, based on the National Bank Act and its limited grant of authorities, the United States Supreme Court held that national banks could not branch at all because they were not given specific authority to branch.[12] This authority was not given because when

7. Act of February 25, 1927, ch. 191, § 7, 44 Stat. 1228 (codified as amended at 12 U.S.C. § 36 (1982)).

8. *See, e.g.*, Del. Code Ann. tit. 8, § 121 (1983) ("such powers and privileges [as] necessary or convenient to the conduct, promotion or attainment of the business"); N.Y. Bus. Corp. Law § 202(a)(16) (McKinney 1963) (power to "have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed").

9. *See, e.g.*, 12 U.S.C. § 24 (1982); N.Y. Banking Law § 96 (McKinney 1971 & Supp. 1986).

10. *See* 12 U.S.C. § 36(c) (1982) ("A national banking association may . . . establish and operate new branches . . . 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.") (emphasis added); *see also* Independent Bankers Ass'n v. Marine Midland Bank, N.A., 757 F.2d 453, 456 (2d Cir.), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023).

11. *See* Miller, *Interstate Branching and the Constitution*, 41 Bus. Law. 337, 337 (1986).

12. *See* First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 657-59 (1924).

national banks were created in 1864,[13] mobility was simply not a significant factor in the American financial economy. There was no reason to write a law relating to branches when no one was interested in branching.[14] As the means of transportation and communication expanded through the early twentieth century, banks saw a need to expand to serve their increasingly mobile customer base.[15] State banks had whatever branching power state law gave them.[16] When the Supreme Court told national banks that they could not meet this competitive need, Congress reacted by granting branching authority to national banks in the McFadden Act.[17] In granting this authority, Congress made a significant, and from a historical perspective, crucial decision. In *McCulloch v. Maryland*,[18] John Marshall opined that the federal government had authority to legislate a national banking system.[19] Under this power, Congress presumably could have given national banks simple and unrestricted national branching powers. Alternatively, they could—as they did in 1864—impose geographic limitations.[20] The McFadden Act, as first enacted in 1927, permitted national banks to branch within their local communities.[21] In 1933, statewide branching was authorized.[22] In this respect, national bank branching has remained unchanged to the present.

The consequence of Congress' decision was that geographic limitations on bank expansion became a generally accepted part of the bank regulatory pattern. The banking public did not expect to see its banks far from home. State banking laws, to the extent that they affected the industry, generally adopted the one-state principle.[23] Had Congress allowed national branching in 1927 or 1933, the face of American banking would certainly look radically different from what we see today. The decisions of Congress to allow more branching freedom[24] were in response to in-

13. *See* Act of June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. §§ 21-216d (1982)).

14. *See* Fischer & Golembe, *The Branch Banking Provisions of the McFadden Act as Amended: Their Rationale and Rationality*, in Senate Subcomm. on Financial Institutions of the Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess., Compendium of Issues Relating to Branching by Financial Institutions 4 (1976).

15. *See* Department of Treasury, *supra* note 2, at 2; Fischer & Golembe, *supra* note 14, at 9-12.

16. For a discussion of the dual nature of bank regulation, see *infra* note 27.

17. Act of February 25, 1927, ch. 191, § 7, 44 Stat. 1228 (codified as amended at 12 U.S.C. § 36 (1982)).

18. 17 U.S. (4 Wheat.) 415 (1819).

19. *See id.* at 422-23.

20. *See* Act of June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. §§ 21-216d (1982)).

21. *See* Act of February 25, 1927, ch. 191, § 7, 44 Stat. 1228 (codified as amended at 12 U.S.C. § 36 (1982)).

22. *See* Banking Act of 1933, ch. 89, § 23, 48 Stat. 189-90 (codified at 12 U.S.C. § 36 (1982)). See *supra* text accompanying notes 10-11.

23. See *infra* note 36 and accompanying text.

24. With its tight restrictions on branching, however, McFadden was perceived from the start as a restrictive measure. Congressman McFadden himself was quoted as saying: "In reporting out this bill the committee reflected what I believe to be the overwhelming

creasing competition from state banks, already allowed to branch intrastate, and the changing needs of industry.[25] Since 1933, advances in banking technology suggest that further expansion of the McFadden Act may be in order. This sensitive and controversial topic will, however, take us down another path. For the time being, we will stay with the legal world as it exists.

Although the McFadden Act applies exclusively to national banks,[26] its enactment was accompanied by an amendment to the Federal Reserve Act to bring state banks[27] that are members of the Federal Reserve System under McFadden limitations.[28] That is, state member banks may today branch only to the extent national banks may. In the early 1970's, there was considerable concern, mainly by the Federal Reserve Board, that too many state banks, as to whom membership is optional, were leaving the System.[29] In response, Congress amended the Act in 1980 to impose on nonmember banks some of the obligations and accord them many of the same benefits of member banks.[30] McFadden limitations were not, however, one of the reasons for state banks leaving the Sys-

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sentiment of the country against branch banking. This is an antibranch banking bill." 68 Cong. Rec. 2166 (1927) (statement of Rep. McFadden).

25. *See* 68 Cong. Rec. 5815 (1927) (statement of Rep. McFadden) ("As a result of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among [state and federal member banks of the Federal Reserve System].").

26. *See* 12 U.S.C. § 36 (1982).

27. Banking in the United States is a dual system. To enter the banking business, an institution must be granted either a federal charter from the Comptroller of the Currency, *see id.* § 21, or a state charter from a state banking agency, *see, e.g.*, Cal. Fin. Code §§ 400, 3390 (West 1968 & Supp. 1986); N.Y. Banking Law §§ 132, 4001 (McKinney 1971 & Supp. 1986); *see also* Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 5 (1977). Once granted a charter, a bank will be regulated primarily by the governmental unit that granted the charter. To convert from one charter to another, a bank needs the permission of only the regulator under whom it wishes to be chartered. *See, e.g.*, 12 U.S.C. § 214c (1982); Cal. Fin. Code §§ 2090-2091 (West 1968 & Supp. 1986); N.Y. Banking Law § 137(1) (McKinney 1971).

28. Act of February 25, 1927, ch. 191, § 9, 44 Stat. 1229 (codified at 12 U.S.C § 321 (1982)) ("no such State bank may retain or acquire stock in a Federal Reserve bank except upon relinquishment of any branch or branches established after February 25, 1927 beyond the limits of the city, town, or village in which the parent bank is situated"). In 1933, the Act was amended to correspond with the 1933 amendment to McFadden. *See* Banking Act of 1933, ch. 89, § 5(b), 48 Stat. 164 (codified at 12 U.S.C. § 321 (1982)) ("That nothing herein contained shall prevent any State member bank from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by national banks."). The impact of the McFadden Act on the relationship between state member banks and national banks is described in Fischer & Golembe, *supra* note 14, at 18-22.

29. *See* Rose, *Federal Reserve System Attrition Since 1960*, J. Bank Research, Spring, 1979, at 8, 10.

30. *See* The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 103, 94 Stat. 133-38 (codified at 12 U.S.C. § 461(b) (1982)).

tem,[31] and have not, to my knowledge, been cited as a reason. As we shall see, however, subjection to McFadden may conceivably become a major disadvantage of System membership.[32]

Approximately 6000 banks belong to the System.[33] This leaves some 9000 state commercial banks unaffected by McFadden limitations.[34] While an overwhelming majority in number, the state nonmember banks represent only about one quarter of the $2,031,600,000,000 in the commercial banking system.[35] We will have occasion to explore some implications of both that superiority and inferiority. Let us turn now to the state nonmember banks.

B. *State Branching Laws*

Following or at least honoring the principle set by the McFadden Act, every state has some form of statute inhibiting interstate branching.[36] I

31. *See* Rose, *supra* note 29, at 10.

32. See *infra* note 56 and accompanying text.

33. *See* Department of Commerce, Statistical Abstract of the United States 1985, at 491 table no. 816.

34. *See id.* table nos. 816-17.

35. *See id.* at 494 table no. 824.

36. State statutes prohibiting interstate banking are of two basic types. Some explicitly prohibit out-of-state banks from transacting the business of banking. Others implicitly prohibit interstate banking by providing that only authorized entities may conduct the business of banking without providing for the authorization of out-of-state banks. *See* Ala. Code §§ 5-1A-2(1), 5-1A-4 (1975) (explicit); Alaska Stat. §§ .06.05.350, .480 (1978) (implicit); Ariz. Rev. Stat. Ann. §§ 6-201, -204 (1974) (implicit); Ark. Stat. Ann. §§ 67-303, -705 (1947) (implicit); Cal. Fin. Code §§ 400, 3390 (West Supp. 1986) (implicit); Colo. Rev. Stat. §§ 11-3-109, -11-101 (1973 & Supp. 1984) (implicit); Conn. Gen. Stat. Ann. § 36-5a (West Supp. 1985) (explicit); Del. Code Ann. tit. 5, § 901 (1985) (explicit); D.C. Code Ann. § 26-103(a) (1981) (explicit); Fla. Stat. Ann. § 658.74 (West 1984) (explicit); Ga. Code Ann. § 7-11-4(7), -280, -604 (1982 & Supp. 1985) (explicit); Hawaii Rev. Stat. § 403-16 (1976) (explicit); Idaho Code § 26-202 (Supp. 1985) (explicit); Ill. Ann. Stat. ch. 17, § 313 (Smith-Hurd 1981) (explicit); Ind. Code Ann. § 28-1-20-4(a)(1), (2) (Burns Supp. 1985) (explicit); Iowa Code Ann. §§ 524.103(19), .107 (West 1970) (explicit); Kan. Stat. Ann. §§ 9-801, -2011 (1982 & Supp. 1985) (implicit); Ky. Rev. Stat. Ann. § 287.030(3) (Bobbs-Merrill Supp. 1984) (explicit); La. Rev. Stat. Ann. §§ 6:2(8), :411 (West Supp. 1986) (explicit); Me. Rev. Stat. Ann. tit. 9-B, §§ 131(17)-(17-A), 466(4) (1980) (explicit); Md. Fin. Inst. Code Ann. §§ 1-101(d), 5-806 (1980) (explicit); Mich. Comp. Laws Ann. § 487.351 (West Supp. 1985) (explicit); Minn. Stat. Ann. §§ 47.03, .08 (West Supp. 1986) (implicit); Miss. Code Ann. § 81-5-41 (Supp. 1985) (implicit); Mo. Ann. Stat. § 362.420 (Vernon 1968) (explicit); Mont. Code Ann. § 32-1-103 (1985) (explicit); Neb. Rev. Stat. § 8-114 (1983) (explicit); Nev. Rev. Stat. § 659.115 (1985) (implicit); N.H. Rev. Stat. Ann. § 384:24 (1983) (explicit); N.J. Stat. Ann. §§ 17:9A-1(1)-1(2), -213.1 (West 1984) (explicit); N.M. Stat. Ann. § 58-1-76 (1978) (implicit); N.Y. Banking Law §§ 202, 202-a (McKinney Supp. 1986) (explicit); N.C. Gen. Stat. § 53-127 (Supp. 1985) (implicit); N.D. Cent. Code § 6-02-01 (Supp. 1985) (implicit); Ohio Rev. Code Ann. § 1101.05 (Page 1968) (explicit); Okla. Stat. Ann. tit. 6, § 1401 (West 1984) (implicit); Or. Rev. Stat. § 707.005, .010 (1985) (explicit); Pa. Stat. Ann. tit. 7, §§ 102(f), (g), (t), (x), 105(a) (Purdon 1967 & Supp. 1985) (explicit); R.I. Gen. Laws § 19-19-7(a) (1982) (explicit); S.C. Code Ann. § 34-3-10 (Law. Co-op. Supp. 1985) (explicit); S.D. Codified Laws Ann. § 51-18-2 (1980) (implicit); Tenn. Code Ann. § 45-2-1701 (Supp. 1985) (implicit); Tex. Fin. Code Ann. § 342-902 (Vernon Supp. 1986) (explicit); Vt. Stat. Ann. tit. 8, § 558 (1984) (implicit); Va. Code § 6.1-5 (Supp. 1985) (explicit); Wash. Rev.

say "inhibiting" rather than "prohibiting" because, to the best of my knowledge, no one has analyzed the laws of all fifty states. Based at least in part on that ignorance, my guess is that there are major unexplored opportunities for interstate branching that reside hidden, perhaps untested, in state banking laws. New York law, for example, permits a limited although consequential form of interstate deposit taking. Its banking law authorizes banks located in the United States, but organized outside of New York, to establish offices (called "agencies") in New York State with the authority to issue obligations to corporations and certain other forms of business entities in amounts of $100,000 or more.[37] The New York Banking Board by regulation has interpreted such an obligation to include "a certificate of deposit."[38] In simple English, this means that banks based out of New York State can establish offices in New York that can take deposits from corporations in amounts over $100,000.[39] Under the McFadden Act, one may conclude that this constitutes branching and is prohibited to national banks and to state banks that belong to the Federal Reserve System.

Some state statutes raise as many questions as they answer. A branch of, for instance, an Illinois bank in Minnesota that does not both take deposits and make loans in Minnesota would not be a "bank" under Minnesota law and would not require a charter as such.[40] If the branch took only deposits, would the Minnesota Commissioner of Banks have the power to "exercise a constant supervision" over it as a "financial corporation doing business within this state"?[41] Does supervision include the power to prohibit? Or, if the location only solicited deposits for its Illinois home office, could the Illinois bank insist that, if its Minnesota location is not permitted, Minnesota will exceed the "nominal" burden to

Code Ann. § 30.04.020 (1961 & Supp. 1986) (explicit); W. Va. Code §§ 31A-1-2(b), -4-2, -4-5 (1982 & Supp. 1985) (explicit); Wis. Stat. Ann. § 221.05 (West 1982) (implicit); Wyo. Stat. § 13-10-108 (1977) (implicit). Massachusetts does allow an out-of-state bank to branch within its borders if the bank is organized in a New England state and such state grants reciprocal privileges to Massachusetts banks. *See* Mass. Ann. Laws ch. 167, §§ 38-39 (Michie/Law. Co-op. Supp. 1985). Utah allows branching into Utah through purchase of a Utah bank by an out-of-state bank provided the state of the out-of-state bank reciprocates. *See* Utah Code Ann. § 7-1-702(2), (5) (Supp. 1985).

Some states allow in-state banks to branch out-of-state, *see, e.g.*, Ariz. Rev. Stat. § 6-191 (1974); Cal. Fin. Code § 530 (West Supp. 1986); N.Y. Banking Law § 105(3) (McKinney Supp. 1986), but some do not, *see, e.g.*, Ala. Code § 5-5A-20 (Supp. 1985); Ga. Code §§ 7-1-600(5), -601 (1982). Banks in the states allowing out-of-state branching, however, are blocked by statutes in other states prohibiting out-of-state banks.

37. *See* N.Y. Banking Law § 202(a) (McKinney Supp. 1986).

38. *See* N.Y. Admin. Code tit. 3, § 81 (1986).

39. Only two out-of-state domestic banks have established agencies in New York State under this law. Neither of those is a garden variety commercial bank doing a traditional banking business. One is owned by the American Express Company and the other by Citicorp.

40. *See* Minn. Stat. Ann. § 47.02 (West Supp. 1985).

41. *Id.* § 46.04 (West 1970).

which it is limited in affecting interstate commerce?[42] Banks with sufficient energy and sufficiently deep pockets will undoubtedly find loopholes in the statutes, although one may reasonably assume that every state will attempt to interpret its laws to prohibit establishment of full service branches by out-of-state banks.[43]

A second opportunity for interstate branching suggested by state banking law is constitutional. By what authority have states foreclosed entry to banks from other states? On its face, such a barrier looks like a violation of the dormant commerce clause, which prohibits states from enacting laws that discriminate against or unreasonably interfere with interstate commerce.[44] To be sure, Congress *may* delegate authority to the states to exclude out-of-state institutions,[45] but there has been no such delegation in the banking area. Whether the states can justify, under their police power[46] or some other rubric, their authority to exclude out-of-state institutions in such sweeping terms presents a fair constitutional issue. One argument in favor of the state exclusion laws is that the states are only reflecting an existing national policy toward the banking system. If national and state member banks are restricted to state borders, it is perhaps compatible with and supportive of that policy if state banks generally have similar limitations. Whatever force that argument might have had, however, has been substantially reduced by the decision of the Supreme Court in *South-Central Timber Development, Inc. v. Wunnicke*,[47] which held that a national policy on a particular subject does not necessarily mean that the federal government has given the states authority under the commerce clause to legislate in a similar manner.[48]

Indeed, in a recent and important decision dealing with the subject of interstate banking, the Court may have inadvertently added heavy support to the argument that the Constitution does not permit states to prohibit interstate banking. In *Northeast Bancorp v. Board of Governors of*

42. *See* Spannaus v. Mecca Enters., 262 N.W.2d 152, 157 (Minn. 1978). See *infra* notes 44-55, 230-41 and accompanying text.

43. See *infra* notes 183-86 and accompanying text.

44. *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980) ("Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."); J. Nowak, R. Rotunda & J. Young, Constitutional Law 266-68 (2d ed. 1983) (clause places no overt restraint on state law, but Court has interpreted it to restrict discriminatory laws). For a discussion of other constitutional problems with such state banking laws, see *infra* text accompanying notes 242-55.

45. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-88 (1984); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980).

46. *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980) (The dormant commerce clause "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern.' "); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978) (same); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (same).

47. 467 U.S. 82 (1984).

48. *See id.* at 92-93.

the Federal Reserve System,[49] the Court dealt with state laws that limited the geographic area within which holding companies could acquire banks.[50] This issue is governed by a provision of the federal Bank Holding Company Act[51] and thus the principal task of the Court was to decide whether the state laws at issue were permitted under the Act.[52] Along the way, the Court took a brief detour and mused about whether those state laws would satisfy the commerce clause absent specific authority under the.Act.[53] It took a fairly strong position that they would not.[54] The Court's dictum is interesting when applied to state laws that absolutely prohibit interstate bank branching and that have no federal legislative underpinning:

> There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject. Nor can there be serious question that an individual State acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out-of-state holding companies.[55]

To date, state authority to prohibit interstate branching has been assumed but not tested. I will only express my own reservation on whether this blanket and essentially mindless form of exclusion is either necessary or appropriate to protect the citizens of any state in their financial affairs. Of course, a finding that state interstate-branching law is unconstitutional will affect (i.e., benefit) only state, nonmember banks looking to expand interstate. Member banks (national and state) will continue to be bound by the McFadden Act. If the game plays out in the manner I have just suggested, federal restraints on interstate branching could well prove to be a significant cost of belonging to the Federal Reserve System.[56]

The degree of the state's power over interstate branching is impressive. It is perhaps fortunate for the large, money-center banks, which tend to

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49. 105 S. Ct. 2545 (1985).
50. *See id.* at 2548-49.
51. 12 U.S.C. § 1842(d) (1982).
52. *See Northeast Bancorp*, 105 S. Ct. at 2550.
53. *See id.* at 2553-54.
54. *See id.*
55. *Id.* (citations omitted).
56. In noting the various costs of Federal Reserve System (System) membership, one must not ignore the Glass-Steagall Act and its prohibition against affiliates of member banks underwriting securities. *See* 12 U.S.C. §§ 24, 377-78 (1982). That the prohibition does not apply to affiliates of nonmember banks was affirmed by the Federal Deposit Insurance Corporation (FDIC). *See* 49 Fed. Reg. 46,709 (1984) (codified at 12 C.F.R. § 337.4 (1985)).

In the years immediately following enactment of the McFadden Act, at the time member banks were restricted to branching in their local communities, one author questioned whether state member banks would leave the Federal Reserve System in order to escape the McFadden restriction and to achieve full competitive equality in branching with nonmember state banks. *See* G. Cartinhour, Branch, Group and Chain Banking 287 (1931).

be either national or state-member, that the politically powerful state nonmember banks generally resist interstate banking. The larger banks, members of the Federal Reserve System and therefore subject to McFadden, could not branch across state lines whatever the state legislatures decreed. State interstate branching laws could only benefit the nonmember banks, typically the smaller ones, and would leave the large banks at the starting gate.

II. Other Restrictions on Interstate Activities

A. *Member Banks*

Given this legal framework, how can member banks conduct an interstate business? The answer, of course, is through activities and/or locations outside their home states that do not constitute "branching." To examine this solution, we must first see whether other laws restrict the ability of member banks to expand beyond their home states. In connection with national banks, the Supreme Court has held that national banks are authorized, indeed encouraged, to do a national business.[57] They may meet with customers, consummate transactions and generally conduct a banking business anywhere in the United States so long as the location where that business is conducted does not rise to the level of a "branch" as defined in McFadden. The most significant recent case on this subject is the foundation case on which many interstate credit card plans are structured, *Marquette National Bank v. First of Omaha Service Corp.*[58] *Marquette* authorized national banks to charge their customers, wherever located, the interest rates authorized by the banks' home states,[59] and it was fundamental to this decision that national banks be permitted to do business with customers wherever located.[60] In this connection, the Court said: "Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate what Representative Hooper termed a 'national banking system.' "[61]

National banks are established[62] and regulated[63] under federal law,

57. *See* Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 315-17 (1978).

58. 439 U.S. 299 (1978).

59. *See id.* at 308.

60. Apart from the branch banking issue, there would seem to be no problem in the employment of electronic technology by national banks to deliver permissible banking services. An Interpretive Ruling of the Comptroller has found electronic delivery mechanisms legally neutral in themselves and significant only in relation to the transactions they conduct and where they conduct them. *See* 39 Fed. Reg. 44,416 (1974) (use of electronic facilities by national bank one of its incidental powers under 12 U.S.C. § 26 (1982) (repealed 1976)). This ruling was, however, found invalid on the ground that the mechanisms were branches within the McFadden definition. *See* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 951-52 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

61. *See Marquette*, 439 U.S. at 314-15.

62. *See* 12 U.S.C. §§ 21-42 (1982).

and state efforts to affect the powers of national banks are ineffective under the supremacy clause.[64] Thus, a banking business within the authority of national banks may be conducted anywhere in the United States subject only to *federal* branching limitations.[65] States are without power to diminish this authority because only Congress has the power to govern its national instrumentalities.[66]

State member banks, although subject to McFadden,[67] fall within a somewhat different classification. Whereas McFadden limits the branching capability of state member banks, it does not—as it does for national banks—*give* them any branching authority.[68] The power of state member banks to branch still derives from the states under whose laws they are chartered. In addition, while national banks may do a national business, no such generalization applies to state banks. Whether a state bank can operate at all beyond its borders depends on two considerations.[69] First, what powers has it received from its state? One may fairly assume that state laws vary on this point, although my educated guess is that the typical law will permit a state commercial bank to conduct business beyond its state's borders.[70] Second, to what extent will the other state (the host state) let the bank in at all? As contrasted with its limited ability to affect the functioning of national banks, each state has considerable dominance over state banking.[71] Subject to federal constitutional limitations, whose reach, as we have already suggested,[72] could not be less clear, it

63. *See id.* §§ 81-95b.

64. *See Marquette*, 439 U.S. at 309; First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 131 (1969); Franklin Nat'l Bank v. New York, 347 U.S. 373, 378-79 (1954).

State laws do affect national banks to the extent that such laws do not contradict federal law or interfere with the powers of the bank. *See* Brown v. United Community Nat'l Bank, 282 F. Supp. 781, 783 (D.D.C. 1968); South Dakota v. National Bank, 219 F. Supp. 842, 844-45 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

65. As we shall soon see, not all locations doing a branching business are branches.

66. One cannot be certain today of the constitutional underpinnings of the national banking system. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 416 (1819), upheld Congress' creation of the Bank of the United States based on the innate power of government to control its fiscal affairs. *See id.* at 429-32. Since *McCulloch*, however, most of the functions of the Bank of the United States have been assumed by the Federal Reserve System. National banks operate essentially in the manner of privately-owned commercial banks. We may safely assume, however, that to the extent that *McCulloch* may be inapplicable, Congress has sufficient commerce clause authority to establish a national banking system.

67. See *supra* note 28 and accompanying text.

68. Although the Federal Reserve Act states that state member banks are subject to the McFadden branching limitations, the Act defers to state law for branching authority. *See* 12 U.S.C. § 321 (1982).

69. State member banks are, of course, subject to McFadden statewide branching limits. See *supra* notes 26-28 and accompanying text.

70. *See, e.g.*, Del. Code Ann. tit. 5, § 771(a) (1985); N.Y. Banking Law § 105(3) (McKinney Supp. 1986).

71. See *supra* note 36 and accompanying text.

72. See *supra* notes 44-55 and accompanying text. For other possible constitutional limits, see *infra* notes 230-43 and accompanying text.

has been assumed that states have the power to accept or reject out-of-state banks.[73] To the extent that this assumption is sound, it clearly governs the branching of a bank into a host state. But, whatever a state might permit or prohibit, the umbrella of McFadden still prohibits a state member bank from establishing a branch in another state.

B. *Nonmember Banks*

State nonmember banks seeking to branch interstate are, like state member banks, dependent on the laws of their home states for powers and on the host states for access. State nonmember banks are, of course, not subject to any McFadden limitations.

III. THE PLACE OF ELECTRONIC BANKING

A. *Electronic Banking Under McFadden*

To examine how electronic banking facilities operated interstate mesh with the existing legal system, we start again with McFadden and member banks. Whether an electronic facility established by a bank is or is not a branch is a question of federal law.[74] While McFadden gives the states authority to determine where branches may be located within a state, to permit the states also to define what is a branch would give them plenary authority over national bank locations that would throw the federal-state balance out of kilter.[75] The Supreme Court has held that, in applying the definition of "branch,"[76] the concept of "competitive equality in branching" is the dominant guide to resolve subtle and difficult issues.[77] Congress did not want to allow national banks more branching

73. The Supreme Court has recently stated that "banking and related financial activities are of profound local concern." Northeast Bancorp v. Board of Govs. of the Fed. Reserve Sys., 105 S. Ct. 2545, 2555 (1985) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980)). Indeed, it was not until 1975 that Maine became the first state to allow an out-of-state banking company to own a Maine bank. *See* Me. Rev. Stat. Ann. tit. 9-B, § 1013(2) (West 1980).

74. *See* First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969); Independent Bankers Ass'n v. Marine Midland Bank, N.A., 757 F.2d 453, 459 (2d Cir.), *petition for cert. granted*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023); Washington *ex rel.* Edwards v. Heimann, 633 F.2d 886, 889 (9th Cir. 1980); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 933 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

75. *See Plant City*, 396 U.S. at 133-34 ("to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers").

76. *See* 12 U.S.C. § 36(f) (1982).

77. *See* First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966). Because banks may switch from one regulatory framework to another, see *supra* note 27, federal and state banking authorities compete with each other to grant and retain banking charters. *See* Ginsburg, *supra* note 2, at 657. One goal of the McFadden Act was to promote competitive equality between federal and state banking law. First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 131 (1969); *Logan*, 385 U.S. at 261; *see* H.R. Rep. No. 83, 69th Cong., 1st Sess. 7 (1926) (remarks of Rep. McFadden) (Act enables "national banks to compete on terms of equality with . . . State member banks"). McFadden's incorporation of state branching law, see *supra* note 10 and accompanying text, furthers this principle by allowing national banks in a state to branch to the extent

power than state banks.[78] In determining what national bank locations are branches, the underlying question is whether that location gives the national bank an advantage over state banks.[79]

Actually, such use of the "competitive equality" rationale to distinguish branches from nonbranches defies logical analysis. In bank functions other than branching (and certain other limited activities), national banks are considered to be "national favorites" whose powers under federal law exceed those of the state banks.[80] It is only when a national bank location is found to be a branch that it is to be competitively equal with state bank branches; otherwise it is legally superior. Competitive equality would seem to have no logical function in deciding whether the location is a branch at all. This problem has not troubled the courts.

In addition, given our analysis thus far, competitive equality in branching is nonexistent when interstate banking is considered. Member banks are absolutely prohibited from branching interstate, but state nonmember banks may branch interstate to whatever extent state laws permit. The implications of this distinction have yet to be explored because state law has yielded so little in the area of interstate branching.[81] At this time one can only note this potential and suggest that more permissive state statutes enabling nonmember banks to branch interstate may provoke Congress into McFadden's third stage—allowing interstate branching for member banks in order to sustain the principle of competitive equality.

Turning now to the definition of "branch" under McFadden:

> The 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.[82]

We will consider the mysteries of these words only to the extent that they affect our basic theme. First, this is clearly not a definition, but only *includes* certain factors that will cause a location to be considered a branch under the Act. This statutory approach is derived from *First National Bank in St. Louis v. Missouri*,[83] in which the Court interpreted the National Bank Act to prohibit branching by national banks.[84] The case involved offsite teller locations that typically conducted the three opera-

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state banks in that state are so permitted. *See Plant City*, 396 U.S. at 131; Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

78. *See* First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 131 (1969).

79. *See id.* at 136-37.

80. *See* Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 315 (1978) (quoting Tiffany v. National Bank of Mo., 85 U.S. (18 Wall.) 409, 413 (1874)).

81. *See* Ginsburg, *supra* note 2, at 657.

82. 12 U.S.C. § 36(f) (1982).

83. 263 U.S. 640 (1924).

84. *See id.* at 657-58.

tions described in what we will, for simplicity, refer to as the definition of "branch."[85] The McFadden Act definition overrules *St. Louis*, and the significance of the definition was that the activities found illegal in *St. Louis* were now permissible branch activities.[86]

To fall within the definition, it is apparent that the place of business must have three qualities. First, it must be a "branch bank, branch office, branch agency, additional office, or any branch place of business." We shall call such a place a "McFadden Location." Second, because the definition deals with branches of a national bank, it is obvious that the McFadden Location must be owned by, or at least have some sort of relationship to, a national bank. This, we shall call a "McFadden Relationship." Third, the McFadden Location must receive deposits, pay checks or lend money (a "McFadden Function").[87] We will address the three McFadden qualities in order.

1. The McFadden Location

What characteristics of a bank location will cause it to be a McFadden Location? To take the simplest possible electronic banking situation, if a bank establishes its own electronic terminal in another state, is this a McFadden Location? Let us consider an electronic terminal with no "bricks and mortar" location other than what is required to support the terminal. In *Independent Bankers Association of America v. Smith*,[88] the seminal case involving electronic facilities and branch banking, the Court of Appeals for the District of Columbia answered this question with a clear cut "yes."[89] In analyzing the principles underlying McFadden, the court determined that a bank could conduct its core activities through an off-premises electronic terminal much as they did through a more traditional office when the McFadden definition was written in 1927.[90] It recognized that McFadden was conceived with quite different technologies in mind and that it was the duty of the court to relate the principle of McFadden to the new technologies before it.[91]

The Court of Appeals rejected a contrary, and probably more traditional, view of a bank branch adopted by the Comptroller of the Cur-

85. *See id.* at 655-56.

86. *See* 12 U.S.C. § 36(c) (1982); *see also* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 930 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("Recognizing the severe handicap [*St. Louis*] placed on national banks . . . Congress finally passed the McFadden Act in 1927.") (footnote omitted), *cert. denied*, 429 U.S. 862 (1976).

87. The three McFadden Functions may not be exclusive and thus a location may be found to be a branch even though it performs none of the three functions. See *infra* notes 196-97 and accompanying text. For some electronically based operations that may be considered McFadden Functions, see *infra* Part III.A.3.d.

88. 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

89. *See id.* at 948.

90. *See id.* at 938.

91. *See id.* at 933.

rency.[92] In an Interpretive Ruling, the Comptroller wrote: "A branch bank commonly is thought of as a building containing teller's windows, desks and chairs, customer counters and bank personnel with whom the banking public may transact a full range of banking services."[93] He also quoted Representative LaGuardia who, during the congressional debates leading to McFadden, described the type of location for which the bill was designed as "monumental buildings, with a vice president in charge, with complete banking departments."[94] Had the *Smith* court found that a bank branch must be in the nature of what is more customarily thought of as an office or place of business (or even a bank, with pillars, marble floors, counters and lines),[95] the relationship between bank branching and electronic facilities would be quite different from what it is today. In large measure, the story of interstate electronic activity since *Smith* is one of increasingly effective alternate approaches to achieve the result *Smith* rejected. That result has not been achieved, but the shots get closer and closer to the bull's eye.

2. The McFadden Relationship

a. *Concept of "Owned or Rented"*

In his Interpretive Ruling, the Comptroller attempted to support his position that an electronic terminal was not a branch by (among other things) analogizing it to a telephone.[96] Both, he asserted, were merely

92. All national banks are regulated by the Comptroller of the Currency. *See* 12 U.S.C. § 93a (1982).

93. 39 Fed. Reg. 44,416, 44,418 (1974) (repealed 1976).

94. 67 Cong. Rec. 3230 (1926) (remarks of Rep. LaGuardia); *see id.* at 2860 (remarks of Rep. Celler) (the Act was meant to legitimize as "large monumental establishments, large buildings costing fortunes to build").

In the ruling, the Comptroller made plain that he was influenced by actions taken by the Federal Home Loan Bank Board with respect to federal savings and loan banks (S&L's) and by the National Credit Union Administration with respect to federal credit unions. 39 Fed. Reg. 44,416, 44,419 (1974) (repealed 1976). Both of those agencies had authorized some form of off-site electronic activity for the institutions under their jurisdictions. *See* 39 Fed. Reg. 30,107 (1974) (codified at 12 C.F.R. § 723.1 (1984)) (credit unions); 39 Fed. Reg. 23,991 (1974) (codified at 12 C.F.R. § 545.141 (1984)) (S&L's). The Comptroller, dedicated to the continuing health of national banks, was obviously motivated to find electronic locations permissible for his charges. The court of appeals rejected the ruling, much to the dismay, a dismay that continues today, of the national banks.

95. Not inconsequential to the *Smith* decision was another key branch-banking case, First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969), in which the Supreme Court had found both an unmanned depository receptacle and an armoured truck to be bank branches. *See id.* at 137-38. The *Smith* court may have reasoned that if a lidded box can be a branch, so can a computer terminal. In a wry dissent to the *Plant City* decision, Justice Douglas expressed "shock" that a truck could be a bank branch. *See id.* at 138 (Douglas, J., dissenting). While Justice Douglas' folk image emphasizes civil rights and mountain climbing, as first Chairman of the Securities and Exchange Commission, he was no stranger to financial issues. One wonders the extent to which he perceived the direction that *Plant City* would lead bank regulation.

96. *See* 39 Fed. Reg. 44,416, 44,418 (1974) (repealed 1976).

methods by which a bank customer submitted instructions to the bank.[97] Certainly, it would be absurd if each telephone through which instructions might be transmitted by an ordinary phone subscriber to his depository bank were to be found a branch of that bank. The court of appeals dispatched this assertion by distinguishing between telephones and electronic terminals on the basis of ownership or control: the electronic branch had a McFadden Relationship because it was part of the bank, but the telephone did not have a McFadden Relationship because it belonged, not to the bank, but to the telephone company.[98] This reasoning led to what are probably the three most important words in the law of electronic terminals and branch banking: "owned or rented." Thus, so long as an electronic location was not "owned or rented" by the bank, it would not have a McFadden Relationship.

Much of the national proliferation of electronic terminals has been based on this concept. Electronic terminals, neither owned nor rented by banks, have been established in a broad variety of locations. Available to bank customers to conduct banking transactions, they exist in supermarkets, retail stores, airports, in kiosks, in the offices of corporate treasurers and even in people's homes. Vast electronic networks now link such electronic locations to each other, to banks and to many sources of goods, services and information that are not banks. Owned or rented either by banks that can legally branch where the terminals are located or by entities other than the banks that they serve, they have been deemed outside McFadden restrictions.[99] These facilities may be open to a broad spectrum of the public, such as those in retail stores and airport installations. They may be open to a more limited group of users, as are the facilities established with a number of large corporations. Or, they may be of a highly personal nature, as are the facilities increasingly available in the home.[100]

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97. *See id.*

98. *See Smith*, 534 F.2d at 941.

99. This view has been supported by regulation of the Comptroller of the Currency. *See* 12 C.F.R. § 5.31(g)(4) (1985). If a national bank shares a terminal established by another financial institution and the national bank pays transactional fees for this use, the terminal will not constitute a branch of the bank. *See id.* Two interpretive letters from the Comptroller's office are in accord. *See* [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,269 (May 12, 1981); [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,234 (July 7, 1980). One of the letters also addressed the possibility that fees for use might be structured in such a way as to be the equivalent of rent, a situation that would bring a terminal within the *Smith* limitations. *See* [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,269, at 77,407 (May 12, 1981).

100. A legal analysis of a home terminal owned or rented by a bank has not yet been done. I would suggest that however well the terminal fits the words of *Smith*, it would be absurd to call someone's living room the branch of a bank. How one reaches this result is open to speculation, but a sensible court might simply conclude that one's home is something different from the location of a bank. One hopes that the courts will use the same good sense reflected in the Comptroller's letter that found that an electronic terminal established for only a three-day period is not a bank branch. *See* [Current] Fed. Banking L. Rep. (CCH) ¶ 84,002 (Sept. 17, 1985).

b. *Limits on "Owned or Rented"*

The "owned or rented" test seemed simple and secure until an electronic terminal established in a New York supermarket and owned by the supermarket was successfully challenged as a branch of the Marine Midland Bank.[101] As it happens, the case had nothing to do with interstate banking, but rather with the question whether Marine Midland, a national bank, had illegally branched into a county in New York where, because of "home office protection,"[102] such branching was prohibited by New York state law.[103] The district court found that illegal branching existed, holding that a terminal neither owned nor rented by a branch could, nevertheless, be a branch of that bank.[104] The case was promptly reversed by the Second Circuit based on the *Smith* rational—if the bank did not own or rent the terminal, the terminal could not be a branch.[105]

In my judgment, the district court opinion in *Marine Midland*, despite the reversal, cannot be ignored. While the terminal in the supermarket was established as part of an interbank computer network titled "HarMoney,"[106] it was apparent under the facts as stated by the district court that the only significant relationship perceived by the court was between the supermarket and Marine Midland Bank.[107] As the court seemed to see the terminal, it was not part of a widespread interconnection among banks, but rather almost an agency relationship with the supermarket terminal acting on behalf of the Marine Midland Bank. I would suggest that, even where a terminal is not owned or rented by a bank, the *Smith* test should not be applied without looking at the substance of the relationship between any given bank and a terminal. Other courts may well find that an off-site location is in reality no more than a particular bank's alter ego and assert, as the district court did, that substance must rule over form. If the terminal in the supermarket had ap-

101. *See* Independent Bankers Ass'n v. Marine Midland Bank, N.A., 583 F. Supp. 1042, 1049-50 (W.D.N.Y. 1984), *rev'd*, 757 F.2d 453 (2d Cir.), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023).

102. *See* N.Y. Banking Law § 105(1) (McKinney Supp. 1986) ("No bank . . . shall transact any part of its usual business of banking at any place other than its principal office, except that a bank . . . may open and occupy one or more branch offices at any location in the state, provided . . . that, except for the city or village in which its principal office is located, in no event shall a branch be opened . . . in a city or village with a population of fifty thousand or less in which is already located the principal office of another bank.").

103. *See Marine Midland*, 583 F. Supp. at 1048-49.

104. *See id.* at 1050.

105. *See Marine Midland*, 757 F.2d at 462-63. There seems little doubt that, if a reversal had not occurred, federal legislation would have reinstated the *Smith* foundation for electronic interchanges. Electronic networks (nets) had gone so far and been found so acceptable generally that it was too late for the courts to undo the new, national financial system. At the time of the appeal, a bill had been introduced in Congress to reverse the district court through legislation. *See* S. 2898, 98th Cong., 2d Sess. (1984).

106. *See Marine Midland*, 583 F. Supp. at 1044.

107. For example, Marine Midland was responsible for the terminal's operation and for approving all transactions involving Marine Midland accounts. *See id.* at 1044-45.

peared to the district court as an electronic connection among many banks, available equally to the customers of all, as is the case with the typical supermarket terminal, my hunch is that the court would not have ruled as it did.

The *Marine Midland* case dealt with the issue of a bank terminal in a supermarket. As a corollary to its holding, the district court also held that the supermarket itself, even though it served as the situs for the bank branch, was not itself engaged in the business of banking.[108] The court held the terminal to be an office of Marine Midland, not of the supermarket, even though it was owned by and located in the supermarket.[109] Whatever the merits of this logic, the decision does raise another set of important questions related to the spread of electronic banking. First, might an office unrelated by ownership or rental to a bank be a branch of that bank because of the financial services that the office performs for the bank? The office might, for example, "man" a terminal with its own personnel or assist in opening accounts or sell IRA accounts for the bank or give out the bank's credit card applications. We have little law on the subject, but some case law in the electronic banking context suggests that such an office could be a branch. When Bank One of Columbus, Ohio and Merrill Lynch established an electronic money market fund that enabled the public to get the equivalent of interest bearing checking accounts, the Attorney General of Utah asserted that the Merrill Lynch office in Salt Lake City was an illegal branch of Bank One.[110] More recently, a district court held that a bank subsidiary, a corporation separate from the bank, could be a bank branch.[111] However, because that case involved, and was largely based on, corporate affiliations, it raises new issues that we will deal with shortly.

c. *The Correspondent Relationship*

Suppose the district court in *Marine Midland* had held that the supermarket's activities were enough to sustain a finding that it was a bank under New York law. Or suppose that the terminal, which established communication links with Marine, had been located, not in a supermarket, but in the Canandaigua National Bank and Trust Company, the bank whose home office was in Canandaigua County and who objected to the terminal in the first place.[112] These hypotheticals present real problems. An increasing number of banks throughout the country have

108. *See id.* at 1049.

109. *See id.*

110. *See* Utah Op. Att'y Gen. (Oct. 6, 1980) (available in the files of the *Fordham Law Review*). The opinion was subsequently withdrawn. *See* Letter from Bryce H. Pettey, Assistant Attorney General of Utah, to Carl Felsenfeld (April 26, 1985) (available in the files of the *Fordham Law Review*).

111. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 259-60 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985) (per curiam), *cert. granted sub nom.* Clarke v. Securities Indus. Ass'n, 106 S. Ct. 1259 (1986).

112. *See Marine Midland*, 583 F. Supp. at 1044.

established electronic connections among themselves whereby a terminal owned or rented by Bank *A* and established on Bank *A*'s premises can service not only the customers of Bank *A* but those of Banks *B* through *Z*.[113]

Traditional banking law permits banks to provide a broad variety of services for other banks. Through these interbank relationships, banks have, for example, received deposits to be transmitted to other banks and disbursed funds constituting loans made by other banks.[114] Banks in this relationship are called correspondent banks, not branches.[115] The nature of a correspondent relationship and what may legally be done within it is far from clear.[116] It is certainly well established that one bank can have such close associations with another in terms of ownership, financing, products, image or some combination of those and other factors that it will be found to be the other's branch.[117] This fact-oriented doctrine was well illustrated in the electronic banking context by a Federal Reserve Board order evaluating the creation of a subsidiary bank by Michigan National Corporation, a Michigan bank holding company.[118] The Board found that the relationship among all the seperately incorporated subsidiary banks of Michigan National may be so intimate that each would have to be deemed a McFadden Branch, not a correspondent.[119] In the Michigan National Order, each bank performed intimately with the others to a degree far above that of typical correspondents. Michigan National established a set of electronic interchanges so effective that the ordinary consumer bank customer may have been unaware that the separate banks were not related branches.[120] But it is not inconceivable that as now

113. *See* D. Baker & R. Brandel, *supra* note 1, ¶ 6.02[5], at S6-2 to -3.

114. *See* E. Reed, R. Cotter, E. Gill & R. Smith, Commercial Banking 22-24 (1976).

115. Under the generally expanded concept of what a thrift institution should be, federal S&L's have the power to perform correspondent services for other depository institutions. *See* 48 Fed. Reg. 23,032, 23,035 (1983).

116. In United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975), the Court found a family of commonly owned banks to be "de facto branches," designed to evade Georgia's laws prohibiting branch banking. *See id.* at 117 & n.26. The Court stated that "in neither law nor banking custom has there developed a clear, fixed definition of the correspondent relationship." *Id.* at 114.

An interesting contrast to the *Citizens* holding is a 1985 Interpretive Letter of the Comptroller, in which he stated that national banks may establish "partnerships" to engage in the shared operations of electronic networks. [Current] Fed. Banking L. Rep. (CCH) ¶ 85,516 (July 31, 1984). The Comptroller considered this an activity incidental to banking. *See id.* at 77,802.

117. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 91-93, 114 (1975); Central Bank v. Smith, 532 F.2d 37, 38-39 (7th Cir.), *cert. denied*, 429 U.S. 895 (1976); Independent Bankers Ass'n v. Board of Govs. of the Fed. Reserve Sys., 516 F.2d 1206, 1222-23 (D.C. Cir. 1975); Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 323 F.2d 290, 301 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965).

118. Michigan National Corp., 63 Fed. Res. Bull. 1092 (1977).

119. *See id.* at 1092-93.

120. In the Michigan National structure, each subsidiary bank had an identical name with the exception only of the name of the city in which it was located—for example, Michigan National Bank-Bloomfield Hills, Michigan National Bank-Sterling. *See id.*

existing correspondent relationships develop greater intimacy and customers are able to make a broader variety of banking transactions at separate banks within an electronic network, factual patterns will arise similar to Michigan National. We note in this context the expanding device by which a bank will franchise other banks to use the franchisor's "name, technology and products" and in general acquire the appearance and identity of the franchisor.[121]

d. *Intracorporate Affiliates*

In the Michigan National situation, the separate banks' affiliation within one holding company system was fundamental to the finding that each was a branch of the other. Under the Douglas Amendment to the Federal Bank Holding Company Act (BHCA) a holding company with a bank in one state may acquire banks in other states only if the other states so allow.[122] This situation strongly suggests new potentials for interstate branching problems, potentials that expand with the number of states that enact such enabling laws. One may assume that a holding company will normally want to operate its several banks in as unified a manner as possible. Not only is this efficient and economical, but it enhances the identity of the institution nationwide and provides expanded opportunities for the marketing of its financial services.[123] As separate

121. *See* First Interstate Bancorp, 1984 Annual Report 17 (1984) ("We continued to expand First Interstate Territory in 1984 through . . . our pioneering program to license other financial institutions . . . ."); *see also* Am. Banker, Nov. 30, 1984, at 1, col. 2 ("Eight Wyoming banks will soon be sporting the Northwest Corp.'s name and buying its services . . . ."). The likelihood of intimacies among banks in a holding company system was increased by 1982 amendments to the Federal Reserve Act. *See* Banking Affiliate Act, Pub. L. No. 97-320, § 410(b), 96 Stat. 1515 (1982) (codified at 12 U.S.C. § 371c (1982)) (easing restrictions on member bank in transactions with its bank affiliates). The similarity among holding company banks in different states may in fact lead to restrictions on holding companies because such banking relationships will offend local, non-holding company banks.

122. *See* 12 U.S.C. § 1842(d) (1982) (out-of-state holding company may acquire a state bank only if such acquisition is "specifically authorized by the statute laws of the State in which such bank is located"). Although the Douglas Amendment appears to be a federal approval of interstate expansion, "Congress saw the Douglas Amendment as an outright ban against interstate banking and did not expect any state ever to enact authorizing entry legislation." Felsenfeld, *Nonbank Banks—An Issue in Need of a Policy*, 41 Bus. Law. 99, 114 (1985); *see* 102 Cong. Rec. 6934 (1956) (remarks of Sen. Capehart) ("under the proposed legislation we are pretty much freezing the banking system of America"); *id.* at 6860 (remarks of Sen. Douglas) ("it is a logical continuation of the principles of the McFadden Act"); *id.* at 6861 (remarks of Sen. Bricker) ("in effect, [the amendment] constitutes an absolute prohibition against future expansion by bank holding companies"). *But see* Northeast Bancorp v. Board of Govs. of the Fed. Reserve Sys., 105 S. Ct. 2545, 2553 (1985) ("there can be no other conclusion but that Congress contemplated that some States might partially lift the ban on interstate banking"). As of the writing of this Article, 26 states have enacted legislation permitting the acquisition of an in-state bank by an out-of-state holding company. See *supra* note 4.

123. See *supra* notes 118-21 and accompanying text.

While permitting bank holding companies to acquire savings and loan associations in various states, the Board has prohibited the holding companies from operating those as-banks in separate states are inevitably drawn together in the interests of unified corporate activities, one may reasonably anticipate an emergence of issues like those in *Michigan National* in the context of interstate banking. Inadvertently laying a foundation for these issues, the Supreme Court recently commented that by acquiring more than one bank in separate localities, a bank holding company would "thereby provide the equivalent of branch banking."[124] As *Michigan National* demonstrates, such equivalency may well violate the laws limiting branching.

Another potential for interstate expansion within the bank corporate structure lies in the use of affiliated corporations that are not banks. The degree to which such corporations may provide services in conjunction with their affiliated banks has become an important issue.[125] It shows signs, in fact, of becoming one of the key issues as banks explore ways to break out of McFadden restrictions. To the extent that a bank can establish electronic facilities in another state through the medium of an affiliated corporation that is not subject to bank restrictions but exists under standard state corporate laws, McFadden limitations on interstate banking will be circumvented. Under a strict reading of the *Smith* case, a terminal owned by a corporation affiliated with a bank is not owned or rented *by the bank*, and thus there would be no McFadden Relationship.

One possibility is that the bank may establish a subsidiary which owns or rents the terminal in another state. We can dispose of this scenario fairly easily. It is generally established that a bank may conduct its authorized activities through a subsidiary, but at the same time, a bank may not do through a subsidiary what it is itself prohibited from doing.[126] If a bank cannot own an electronic facility in another state, it would seem to follow that a subsidiary cannot own one there either. In a recent case, subsidiaries of two national banks were to be established for the purpose of conducting activities that the court found could be done only in a licensed branch.[127] The court held that the subsidiaries could not conduct those activities outside of the home states of the parent banks because McFadden would not allow the parent bank to conduct the same

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sociations "in tandem" with their other corporations, including banks. *See, e.g.*, Citicorp, 68 Fed. Res. Bull. 656, 659 (1982); Interstate Fin. Corp., 68 Fed. Res. Bull. 316, 317-18 (1982).

124. Northeast Bancorp v. Board of Govs. of the Fed. Reserve Sys., 105 S. Ct. 2545, 2551 (1985).

125. Federal Reserve Board Chairman Paul A. Volcker has stated that bank holding companies had more than 5500 nonbank offices operating outside their home states and safely ventured that "many more certainly exist now." *See Interstate Banking: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 4 (1985) (statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System).

126. *See* 12 C.F.R. § 5.34(d)(2) (1985).

127. *See* Securities Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 259-60 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *cert. granted sub nom.* Clarke v. Securities Indus. Ass'n, 106 S. Ct. 1259 (1986).

activities.[128]

One should, however, distinguish bank affiliates that are subsidiaries of the bank itself from affiliates established by a parent corporation that owns both the bank and the affiliates. While such nonbank affiliates present greater opportunities than bank affiliates, relationships within this three part system (the bank, the parent and the affiliate) are subject to limitations imposed by the BHCA and regulations[129] promulgated under the BHCA by the Federal Reserve Board.[130] Corporations affiliated with a bank by virtue of a common holding company ownership may conduct only the types of businesses permitted by the BHCA.[131] Sometimes, most significantly under section 4(c)(8) of the Act, these businesses will require authorization by the Board.[132] In other circumstances, authorization comes directly from the BHCA, and no specific approval from the Board is required.[133] Both sources of authority may be significant to our present inquiry.

Under its section 4(c)(8) authority, the Board has by a 1983 amendment to Regulation Y given a broad set of technological powers to corporations that are affiliated with banks by common ownership.[134] Affiliated corporations may provide "data processing and data transmission services, facilities (including data processing and data transmission hardware, software, documentation or operating personnel), data bases or access to such services, facilities, or data bases."[135] Can an affiliate of a member bank use this authority to transact a banking business on behalf of the bank in, and with residents of, other states?

Part of the Board Supplementary Information accompanying the Regulation Y amendment incorporates by reference an order in which Citicorp had been given authority under section 4(c)(8) to conduct data processing and transmission services.[136] In the order, Citicorp had received specific approval to supply consumers with both the software and the hardware to conduct financial transactions with its affiliate banks (including member banks), but there was no requirement that the terminal be owned or rented by the consumers rather than Citicorp.[137] The terminals that would process such transactions would seem very close to being

128. *See id.*

129. 12 C.F.R. Part 225 (1985).

130. The Board is responsible for the regulation of bank holding companies. *See* 12 U.S.C. § 1844(b) (1982).

131. *See id.* § 1843(c)(8) (nonbanking activities limited to those "so closely related to banking . . . as to be a proper incident thereto"). For a discussion on this section, see generally Note, *Product Expansion in the Banking Industry: An Analysis and Revision of Section 4(c)(8) of the Bank Holding Company Act*, 53 Fordham L. Rev. 1127 (1985).

132. *See* 12 U.S.C. § 1843(c)(8) (1982).

133. *See id.* § 1843(c)(1)(C).

134. *See* 47 Fed. Reg. 37,368 (1982) (codified at 12 C.F.R. § 225.25 (1985)).

135. *Id.* at 37,372 (codified at 12 C.F.R. § 225.25(b)(7) (1985)).

136. *See id.* at 37,368-69.

137. *See* Citicorp, 68 Fed. Res. Bull. 505, 513-14 (1982).

bank branches within McFadden and the *Smith* case reasoning if the terminals were owned or rented by the bank.

The potential for expansion of interstate banking in the wording of Regulation Y and the *Citicorp* order is considerable. "Data transmissions for internal purposes" might include the flow of information concerning customer's accounts from an out-of-state nonbank affiliate to the home bank. "Providing data transmissions to others" might include bank customers giving instruction through a distant affiliate to move funds into or out of the home bank. There is little indication from the Board of the breadth of, or limitations on, the Regulation. The Board did adopt (through the Citicorp Order) a 1982 Recommended Decision of an administrative law judge that heralds the competitive benefits of Citicorp's entry into expanded electronic activities and suggests a relatively expansive view of the new authorizations.[138]

Can the expanded Regulation be taken to mean that, when owned or rented not by a bank, but by an affiliate of the bank, a terminal providing services within the scope of revised Regulation Y will be outside the one-state limitation? One cannot be certain. The McFadden Act, with its branching limitations, and the BHCA, with its newly-expanded electronic authorizations, exist side by side as federal statutes. Should one be considered superior to the other? Should state member banks and national banks that are subsidiaries of bank holding companies in effect be allowed to branch out-of-state through their affiliates' use of electronic equipment?

The Federal Reserve Board has already demonstrated in *Michigan National* that it will keep McFadden policies in mind when applying the BHCA.[139] Furthermore, the Board has continuing statutory authority to review the actual operations of the bank holding company systems, including both bank and nonbank affiliates, to see that they are conducted legally.[140] If the Board believes that a nonbank affiliate, despite having received Board authority under section 4(c)(8) to conduct an electronically-based activity, was, in the nature of that conduct, violating either the letter or spirit of McFadden, it has the power to revisit the situation. Recalling the *Marine Midland* decision in the district court and the particular facts that gave rise to it, if a nonbank affiliate conducted electronic activities solely for its sister bank, its similarity to a branch would certainly be greater than if it had set up an electronic service available to a broader bank network composed of a number of institutions.[141]

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138. *See id.* at 506.

139. See *supra* notes 118-21 and accompanying text.

140. *See* 12 U.S.C. § 1844(b), (c) (1982).

141. In a somewhat different context—application of the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972 (1982)—the Seventh Circuit has held that whether a nonbank subsidiary is an agent of a bank subsidiary is a question of fact. *See* Flintridge Station Assocs. v. American Fletcher Mort. Co., 761 F.2d 434, 438 (7th Cir. 1985).

e. *Servicing Functions*

The Board's view of the relationship between the McFadden Act and the BHCA is more apparent in connection with section 4(c)(1)(C) of the BHCA.[142] Under that provision, a corporate affiliate of a bank within a holding company structure may perform services for that bank and any other corporation within the structure.[143] To what extent might an affiliate establish electronic banking facilities under section 4(c)(1)(C) that serve its sister bank and, under the specific authority of that provision, assert freedom from McFadden restrictions? Again, one federal statute should be as good as another.

In this context, however, the Board has actually addressed the issue. Specifically, the Board has considered the relationship between McFadden and section 4(c)(1)(C) in the context of loan solicitation activities by an affiliate.[144] The Board considered McFadden applicable and deemed section 4(c)(1)(C) something less than absolute authority to conduct servicing activities that might, under McFadden, be deemed branching.[145] One may reasonably assume that this McFadden restriction will remain applicable to electronic facilities and that McFadden will remain as a limiting factor on the servicing activities that bank affiliates may perform under the BHCA. Nevertheless, section 4(c)(1)(C) does stand as a continuing opportunity for banks to reach out through their corporate affiliates and we may reasonably expect that dynamic banks bent on interstate expansion will use section 4(c)(1)(C) to its outermost limits. But under the current state of the law, it seems unlikely that those affiliates may perform more than the bank could accomplish itself through an out-of-state location.

I sense that, in exercising its broad authority under the BHCA, the Board sees the BHCA as subservient to the McFadden Act on issues of branch banking.[146] Despite the broad power of the Board to authorize bank affiliates to conduct businesses that are "closely related to banking,"[147] it has not used that power to authorize affiliates to become branches of their sister banks, even though branching resembles, albeit

142. 12 U.S.C. § 1843(c)(1)(C) (1982).

143. *See* 12 C.F.R. § 225.25 (1985).

144. *See id.* § 225.104.

145. *See id.* The Board permitted a bank affiliate, "Corporation Y," to engage in only servicing activities of the sort in which a bank "could itself engage, at the present locations of Corporation Y, without being engaged in the operation of bank branches at those locations." *Id.* § 225.104(e). In another Board interpretation, the Board permitted servicing activity in language the source of which was clearly beyond its § 4(c)(1)(C) powers: "receiving deposits, paying checks, extending credit." *See* 12 C.F.R. § 225.122(f) (1985).

146. This conclusion is buttressed by the legislative history of the Douglas Amendment. Designed to control the interstate expansion of banks through holding company devices, it was said to be enacted in order to preserve the policy of McFadden. See *supra* note 122. In his statements concerning his Amendment, Senator Douglas said that "it is a logical continuation of the principles of the McFadden Act." 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas).

147. *See* 12 U.S.C. § 1843(c)(8) (1982). See *supra* note 131 and accompanying text.

imperfectly, banking itself. This regulatory self restraint seems consistent with the objectives of both McFadden and the BHCA. In addition, McFadden deals solely with the branching activities of national banks, and thus presumably reflects national policy on this issue. The primary focus of the BHCA is the activities of bank holding companies, not branch banking. Therefore, where issues of interstate banking are concerned, even in a holding company context, McFadden probably should control.

3. McFadden Functions

a. *Variations on the Three Basic Functions*

Assuming that the out-of-state electronic terminal both constitutes a McFadden Location and has a McFadden Relationship with its home bank, this does not necessarily mean that it is a branch of the bank. To be within the McFadden definition, the terminal still must conduct one of the functions, the "McFadden Functions," that are covered under the definition of "branch." The definition lists three—receiving deposits, paying checks and making loans.[148] The *Smith* court held that a typical off-site electronic terminal can perform all of the three listed functions even though it may receive no money nor handle any checks and even though all decisions concerning a loan may be made at the home office of the bank. According to the *Smith* court, a terminal functionally takes a deposit when, through electronic means, it transfers funds from one account to another.[149] It pays checks when it gives the user funds from his account even when the use of a traditional paper check is not required.[150] Using this functional approach, a terminal makes loans when it gives the user the use of proceeds of a loan.[151]

These three operations, however, are far from all that an electronic terminal may perform. In examining whether terminals are branches, one may conceive of functions that are less central to the process of banking than those just discussed and, by virtue of their "lower" order, may not rise to the level of a McFadden Function. A terminal that performs only these functions need not be a national bank branch and its interstate use may well be permissible under the national bank's general authority to do a national business.[152] A list of some of these lesser functions appears in the Comptroller's Interpretive Ruling that was overruled by *Smith*.[153]

While the Comptroller ruled that electronic terminals were not

148. *See* 12 U.S.C. § 36(f) (1982). As we shall soon discuss, functions other than these three may be McFadden Functions. See *infra* Part III.A.3.d.

149. *See* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 940-41 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

150. *Id.* at 944.

151. *See id.* at 948.

152. See *supra* text accompanying note 57.

153. *See* 39 Fed. Reg. 44,416, 44,416-17 (1974) (repealed 1976).

branches, he also observed that some terminal functions do not even raise branching issues. These other functions were not challenged in *Smith* and we may assume that the Comptroller's views on these functions are good law. The Ruling observed that, without branching risk, terminals might "verify a customer's credit standing for purposes of authorizing credit card transaction or guaranteeing payment of a check."[154] One may assume that if this type of informational function is permissible, other similar services also could be. These functions might include reviewing one's balances, establishing whether a check has cleared or a letter of credit issued or learning through the terminal the latest prime rate or stock market closing price. These are essentially informational functions, not transactions. They do not move funds either into or out of a bank or alter anyone's status. They merely inform.

As banks become perceived as centers of information, rather than as recipients of deposits and makers of loans, this information function should acquire additional significance. A bank might, for example, inform its customers concerning sources of funds and possibilities for their use and thereby, for a fee, enable bank customers to engage in transactions outside of, or around, the bank itself. Today, for example, through the commercial paper market, potential depositors in banks can meet directly without the intervention of a bank as a financial intermediary.[155] In transactions of this sort, a bank can perform important financial services as a pure supplier of information, not money. This function can be as significant to the workings of the financial market as the bank's more traditional role as depository and lender—as intermediary.

The use of electronic terminals as suppliers of information may be crucial to the future of banks. As modern means of communications enable lenders and borrowers to find each other without funneling funds through a bank, banks can reposition themselves as suppliers of information and retain an important and income producing place in the process. Banks can receive fee income for providing informational services to supplement traditional interest differential income.[156] At present, banks' in-

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154. *See id.* at 44, 417. New York State Banking Department Regulations are in accord. *See* N.Y. Admin. Code tit. 3, § 73.7 (1986).

155. *See* Securities Indus. Ass'n v. Board of Govs. of the Fed. Reserve Sys., 104 S. Ct. 2979, 2981-82 (1984). In *Securities Industries*, the association claimed that member banks were violating the Glass-Stegall Act's prohibition of banks from engaging in the marketing of securities. *See id.* at 2982. It is crucial to an understanding of the case for one to realize that a buyer of commercial paper (the lender) is a party with surplus funds and the seller (the borrower) is one who needs those funds. In traditional bank intermediation, the former would make a bank deposit and the latter obtain a bank loan. The bank would earn "interest differential" income, the excess of the loan rate over the deposit rate. In commercial paper financing, lender and borrower meet each other and cut out the banks. The banks, therefore, are trying to reposition themselves as financial matchmakers—essentially purveyors of information—rather than traditional intermediaries. In the case, the Securities Industries Association was attempting to preempt that position.

156. Interest differential income is the amount a bank's cost of deposits is exceeded by

terest differential income is declining,[157] and this fee approach comports with what many banks see as their ultimate protection.

The receipt and disbursement of money as an intermediary becomes less and less important as money continually and inevitably evolves from specie, through paper, to electronic impulses. The developing role of banks is not so much moving money as supplying information so that money can be moved. Less and less do banks even think of themselves as depositories on one side and lenders on the other, but rather as generalized suppliers of services to the financial marketplace. The rise of off-site electronic terminals as suppliers of information, probably permissible under McFadden's one-state barrier,[158] is limited only by the imaginations of bank marketing executives. The impetus for such information-providing functions is heightened by the banks' perception that if they cannot provide these functions under McFadden, their new and aggressive competitors (brokerage houses, insurance companies, retailers, etc.) certainly can.[159]

b. *Loan Solicitations*

Another terminal function that may fall somewhere below the McFadden Function level is *solicitation* on behalf of a bank. This possibility is based on a traditional concept running through various areas of commercial law: many consequences (such as the need to obtain a license or subjecting oneself to jurisdiction) that flow from doing business, do not necessarily attach to merely soliciting that same business.[160] Obviously, the difference between *soliciting* and *doing* business can become, and often is, an extremely subtle issue. This subtlety is well known in banking. It has arisen most often in the traditional business of lending money. McFadden says that an office that lends is a branch, but according to the

its charge for loans. For a description of the types of information that banks are selling for fees, see Am. Banker, Mar. 20, 1986, at 24.

157. Commercial banks are still the largest suppliers of credit in our economy, but because of competition with commercial finance companies and the commercial paper market, their share of short term nonfinancial debt decreased from 69.8% in 1970 to 59.1% in 1980. *See* Golembe Associates Inc., Product Expansion by Bank Holding Companies: An Assessment of Present and Future Policy Considerations 44 (1982) (available in the files of the *Fordham Law Review*). In general, competition from nonbank lenders has increased substantially in the last 20 years. *See* Frieder, *supra* note 2, at 707-12.

158. See *supra* text accompanying notes 152-54.

159. *See* Fraser, *supra* note 1, at 643 (banks have "growing competition from nonbank . . . organizations"); Frieder, *supra* note 2, at 678 ("Nonbank competition with commercial banks has increased dramatically during the past decade."). See *supra* note 157.

160. *See* Lawyers Coop. Publishing Co. v. Kuntz, 73 Wash. 2d 674, 676, 440 P.2d 813, 814 (1968) (corporation doing business in state, rather than merely solicitating, must have license to sue in state courts); International Shoe Co. v. State, 22 Wash. 2d 146, 159, 154 P.2d 801, 807 (solicitation does not amount to doing business so as to subject corporation to jurisdiction), *aff'd sub nom.* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Comptroller[161] and the Federal Reserve Board,[162] mere solicitation of loans by a loan production office (LPO) is not lending under McFadden.

The reception to the Comptroller's view in court has been less than hearty. In *Independent Bankers Association of America v. Heimann,*[163] the district court held the ruling invalid as a violation of the McFadden Act and the principles it establishes concerning branch banking.[164] The case was reversed on appeal, but only on the basis of laches—the plaintiff had waited too long before bringing its suit.[165] The legal integrity of the LPO thus rests on somewhat shaky foundations.[166] Nevertheless, LPO's and the Ruling still exist. For our purposes, the question is the extent to which an electronic LPO can be used in interstate banking activity without violating McFadden.

Because, at best, the distinction between "solicitation" and "doing" is tenuous, it is difficult to be specific about the type of solicitation an electronic terminal might safely perform. One's imagination suggests, however, that it might convey current loan rates and loan programs, instruct potential borrowers on how to make applications, convey notices of acceptance or reasons for rejections, describe how funds will be disbursed or inform customers of payment dates and amounts and, perhaps, consequences of delinquency.

To return to *Heimann*, the Independent Bankers Association of America (IBAA) (a trade association for small banks and a committed foe of interstate banking) had waited twelve years before bringing their action because for those twelve years the LPO's existed only in a commercial setting, linking banks with their business or corporate customers.[167] This activity did not really bother the smaller banks because it did not affect the small banks' customers. Only recently had the LPO's connected banks with consumer customers, and this, they felt, was going too far.[168] In contrast with national corporate business, the small banks apparently perceived the local consumer market as more their own and to be protected from expansionist moves.

161. *See* 12 C.F.R. § 7.7380 (1985); [1977-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,064 (Nov. 7, 1977) (Comptroller interpretive letter).

162. *See* 12 C.F.R. § 250.141 (1985); 53 Fed. Res. Bull. 1911, 1912 (1967).

163. No. 78-0811, slip op. (D.D.C. Mar. 29, 1979), *rev'd*, 627 F.2d 486 (D.C. Cir.), *cert. denied*, 449 U.S. 823 (1980).

164. *See id.* at 4-5.

165. Independent Bankers Ass'n of Am. v. Heimann, 627 F.2d 486 (D.C. Cir.), *cert. denied*, 449 U.S. 823 (1980). In a strongly worded footnote, the court of appeals gave every indication that, if it were deciding on the merits, it would sustain the Comptroller. *See id.* at 488. It indicated, however, that, with the Comptroller's ruling on the books, individual banks in individual cases could still assert that branching, as contrasted with mere solicitation, was present. *See id.*

166. For one state's interpretation of the branch status of an LPO, see Del. Dep't. Just. Op. (Mar. 7, 1978) (denying entry of LPO of out-of-state national bank) (available in the files of the *Fordham Law Review*).

167. *See* Brief for Respondent at 38 n.51, Independent Bankers Ass'n of Am. v. Heimann, No. 78-0811, slip. op. (D.D.C. Mar. 29, 1979).

168. *See id.*

When the court of appeals found IBAA barred by laches,[169] it implicitly rejected the commercial/consumer distinction. However, one is forced to wonder whether this distinction is worth considering in the context of electronic devices. Should a prudent bank interested in expanding its off-site electronic technology start by tailoring the device to its corporate customers, thereby reducing the ire of those banks devoted to retaining local consumer relationships? Although in a branching context such a distinction may not exist, it does exist in many other areas of business and consumer bank relationships.[170] If one of the objectives of McFadden is to protect the small, local bank[171] and a primary goal of that bank is to sustain its relationship with its *consumer* customers, perhaps the law should be more permissive toward the expansion of electronic LPO functions in the commercial area. Corporations, after all, already have a much greater ability than do consumers to cross state lines and reach banking facilities.[172] Thus, electronic terminals in the commercial area will do little damage to the policy of McFadden. In addition, permitting electronic LPO's in the commercial area might be justified as a reasonable experiment in expanded interstate banking. If the expansion works well, the evidence might be usable as a basis for expansion into the consumer area.

c. *Deposit Solicitations*

Banks with expansionist goals are not nearly as interested in exploring new ways to lend money interstate as they are in developing innovative deposit-taking capabilities. In fact, within the present bank holding company system, loans may be made directly by bank affiliates.[173] These lending affiliates are not restricted by McFadden and bank holding companies now lend through such companies to both consumers and businesses in multistate organizations. While not as effective as direct lending by the bank itself, such pass-through lending is a pretty good substitute. No like authority exists, however, for deposit-taking. In a growing number of financial institutions, deposits, or something akin to deposits, can be taken in more than one state.[174] A commercial bank, or

169. *See Heiman*, 627 F.2d at 488.

170. From the myriad examples, we note the restriction of NOW Accounts to consumers and certain eleemosynary institutions, *see* 12 U.S.C. § 1832(a) (1982), the freedom of certain residential real estate loans from usury laws, *see* 12 U.S.C. §§ 1735-1737 (1982), the application of the disclosure provisions of the Truth in Lending Act to consumer transactions, *see* 15 U.S.C. § 1601 (1982), and the perfection of certain consumer-related security interests without filing, *see* U.C.C. § 9-302(1)(d) (1982).

171. For a discussion of the goal of competitive equality between state and national banks, see *supra* note 77.

172. On the other hand, if interstate banking restrictions have more adverse effects on consumers than on businesses, see *infra* text accompanying notes 267-69, public policy might well dictate that relief from the anticonsumer restraints should not lag behind business-related relief.

173. *See* 12 C.F.R. § 225.25(b)(1) (1985).

174. For example, federal S&L's may, in certain circumstances, branch interstate. See

even a number of commercial banks, may constitute a part of such an institution. Nevertheless, it remains a goal of the single, pure-vanilla commercial bank in one state to garner deposits in other states. This limitation on deposit taking is today the most serious impediment to the interstate provision of financial services. Can electronic facilities be used to establish deposit production offices (DPO's) that will receive the same legal insulation from branch banking prohibitions as LPO's?[175] Theoretically, there should be no difference between the DPO and the LPO. If we are on sound ground that, for McFadden purposes, "solicitation" is not "doing,"[176] it should not be of legal consequence whether the solicitation is of a loan or a deposit.

Two practical differences do, however, exist between the LPO and the DPO. First, the concept of loan solicitation has been blessed by the Comptroller[177] and the Federal Reserve Board.[178] Because the courts accord deference to the views of regulators in the areas of their particular expertise,[179] this approval is not insignificant. In addition, Congress, in full view of this regulatory action as well as the decision of the court of appeals in *Heimann*,[180] continues to enact bank-related legislation on the subject of interstate banking.[181] Congress may, not unreasonably, now be considered to have accepted the LPO as part of federal banking law.[182] Second, and perhaps more significant, deposit-taking represents a

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supra note 2. Within the bank holding company structure, there are several possibilities for interstate deposit-taking. Twenty-six states permit acquisition of in-state banks by out-of-state holding companies. See *supra* note 4. Nonbank subsidiaries of a bank holding company like industrial banks or Morris Plan banks have deposit-like capabilities and are permissable subsidiaries under the BHCA. *See* 12 C.F.R. § 225.25(b)(2) (1985). Such bank affiliates have no geographic restrictions because the geographic restrictions of the Douglas Amendment apply only to "banks." *See* Dimension Fin. Corp. v. Board of Govs. of the Fed. Reserve Sys., 744 F.2d 1402, 1410 (10th Cir. 1984), *aff'd*, 106 S. Ct. 681 (1986). In addition to federal S&L's and holding companies, brokerage houses, retail stores and other corporations can tap local funds through ingenious devices, such as money market funds or consumer debentures, that look and behave much like deposits. See *supra* note 110 and accompanying text.

175. See *supra* Part III.A.3.b.

176. See *supra* notes 160-63 and accompanying text.

177. See *supra* note 161 and accompanying text.

178. See *supra* note 162 and accompanying text. The Federal Deposit Insurance Corporation (FDIC), while not specifically foreclosing the possibility of a DPO, has stated: "By law, such [non-branch] offices are not authorized to accept or disburse funds, but may only process documentation in connection with loan transactions." FDIC News Release, PR-99-85 (July 11, 1985) (available in the files of the *Fordham Law Review*).

179. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978).

180. See *supra* notes 163-65 and accompanying text.

181. *See, e.g.*, Garn-St. Germain Depository Institutions Act, Pub. L. No. 97-320, § 116, 96 Stat. 1476-79 (1982) (codified at 12 U.S.C. § 1823(f) (1982) (allowing interstate mergers of failed institutions)); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 712, 94 Stat. 189 (repealed 1981) (regulating interstate trust operations).

182. *See* 2A N. Singer, Sutherland Statutes and Statutory Construction § 49-10, at 261 (4th ed. 1973) ("legislature through inaction following a contemporaneous and practical

special aspect of banking[183] and one that is jealously guarded by the institutions now protected by McFadden's limit on interstate expansion. Meaningful inroads that might reduce their deposits, through the imaginative use of electronic terminals or otherwise, will certainly be fought strenuously by the thousands of small banks that see access to local deposits as their particular right.[184] Loans may be made by banks and by institutions that are not banks.[185] Indeed, lending is one of the general powers possessed by any ordinary stock corporation.[186] Thus, deposit-taking, despite inroads by other institutions, remains a bank's most special prerogative.

One senses, however, that the large and aggressive banks are preparing, perhaps are prepared, for the fight.[187] How electronic terminals may actually be used in a DPO mode remains to be seen. One can imagine that banks might disseminate information concerning rates and types of accounts, give instructions on how to open accounts, complete forms through telecommunications from the home bank, confirm deposits received and transfers made and confirm funds availability and checks paid. Of course, the more that the terminals offer, the more cloudy will become the distinction between "soliciting" and "taking" a deposit. One may anticipate a field day for bank lawyers, the regulators, the courts and, ultimately, the legislatures.

We should recall, in this particular context, two points previously made. First, the powers of a national bank are matters of federal law and may not be limited by the states.[188] Second, in evaluating interstate activities under McFadden, the issue of whether an off-site location is a branch is entirely one of federal law.[189] Thus, however much a state, and its local banks, may want to exclude an electronic terminal established by a national bank, based in another state, if the functions performed by that terminal are within the general powers of the national bank and if it

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interpretation is evidence that the legislature intends to adopt such interpretation") (footnote omitted).

183. It is only the taking of deposits, not the lending of money, paying of checks or any other banking activity, that is a federal crime if conducted without a banking charter, federal or state. *See* 12 U.S.C. § 378(a)(2) (1982).

184. In two recent cases, an association representing small banks used McFadden to block the use of electronic terminals by large national banks. *See* Independent Bankers Ass'n v. Marine Midland Bank, N.A., 757 F.2d 453, 455 (2d Cir. 1985); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 926 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

185. See *supra* note 157.

186. *See, e.g.*, Del. Code Ann. tit. 8, § 122(14) (1983); N.Y. Bus. Corp. Law § 202(a)(8) (McKinney 1963).

187. In an order of the Nebraska Department of Banking and Finance, a DPO of Citibank (South Dakota), N.A., was permitted to remain in Nebraska to solicit deposits. *See In re* Citicorp Credit Services, Neb. Dep't of Banking & Fin. Order (Dec. 31, 1981) (available in the files of the *Fordham Law Review*). For a description of Citicorp's "aggressive posture" in interstate banking, see Fraser, *supra* note 1, at 648 & n.23.

188. See *supra* note 66 and accompanying text.

189. See *supra* notes 74-75 and accompanying text.

does not constitute a McFadden branch, the state can do nothing about it. National banks are unrestricted by, for example, the California and New York laws that prohibit unlicensed entities from soliciting deposits.[190] The same is true of an Illinois electronic terminal provision prohibiting interstate communications "which result in the taking of deposits or the payment of existing indebtedness."[191] And it applies to a Florida statute permitting an out-of-state bank to use a Florida terminal only if "[s]uch bank does not take deposits, either directly or indirectly, from any source whatsoever by use of the remote financial service unit."[192] This is not to say that some of the acts prohibited under state law may not be prohibited to national banks. But if under federal law, a national bank may engage in an activity, it may not be prohibited from engaging in that activity because of state law.

To the extent that we have developed experience through the operation of interstate electronic nets, we know more about lending than we do about deposit-taking. Typically, those nets enable participating customers to obtain funds throughout wide geographic areas through lines of credit established by their home banks.[193] Deposit-taking functions spread over widely dispersed geographic areas, however, are not typically part of the systems. These functions are absent for two reasons. First, the traveling consumer customer usually has less need to make a deposit than to obtain cash. Second, because deposit-taking is clearly more sensitive than lending and more likely to excite volatile legal issues, most nets thus far have been content to offer the more generally accepted service.

Nevertheless, many electronic terminals connected interstate to banks do perform services that would be considered deposit-taking under the *Smith* rationale.[194] For example, some of the devices connecting banks with some of their customers (devices of course owned or rented by the customers, not the banks) enable funds to be moved from account to account.[195] Deposit-taking is not unknown to the electronic devices in use. It merely lags behind their lending function.

d. *Functions Outside the Basic Three*

Finally, in our consideration of McFadden Functions, we turn to services that may be performed by electronic terminals outside the three specific functions listed in the McFadden definitions of "branch."

190. *See* Cal. Fin. Code § 3390 (West Supp. 1986); N.Y. Banking Law § 131(1) (McKinney 1986).

191. Ill. Ann. Stat. ch. 17, § 1331 (Smith-Hurd Supp. 1985).

192. Fla. Stat. Ann. § 658.65(9)(a) (West 1984).

193. *See* N. Penny & D. Baker, The Law of Electronic Fund Transfer Systems ¶ 6.02[5], at 6-5 to -7 (1980). The court in *Smith* would consider this activity to be lending under McFadden. *See* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921, 948 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). See *supra* note 151 and accompanying text.

194. See *supra* note 149 and accompanying text.

195. *See* D. Baker & R. Brandel, *supra* note 1, § 5.06, at S5-19.

Although, as of this writing, the Supreme Court has not ruled on the scope of the definition,[196] two courts of appeals decisions have found locations of banks or their subsidiaries to constitute branches even though they did not take deposits, pay checks or lend money. Those cases found that activities not listed in the definition may be McFadden Functions when "carried on routinely" by or are part of the "general business" of a bank's home office.[197] One would suppose that such services be performed by electronic terminals interstate, but imagination more than experience must guide us. The two cases found non-McFadden activities to constitute branching supply some ideas.

In *St. Louis County National Bank v. Mercantile Trust Co.*,[198] the bank provided trust services at an off-site location found by the court to be a branch.[199] Can electronic terminals conduct trust services? One would think that a variety of trust services could be conducted electronically—for example, receiving funds, disbursing funds or receiving instructions. The risks exposed by *St. Louis County* could, therefore, become real in an electronic setting. In *Securities Industries Association v. Comptroller of the Currency*,[200] the court found that stock transfer of services can result in branch classification.[201] Here, electronic facilities are particularly suited to the conduct of customer-bank relationships, especially in the "discount brokerage" area, where the bank merely makes transfers and does not supply personalized investment advice.[202] An order for the transfer of securities, the transer itself, confirmation by the bank and a charge for the services are clearly activities that can be performed electronically.[203]

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196. The Court has granted certiorari on the issue of whether providing discount brokerage services is a McFadden Function. *See* Clarke v. Securities Indus. Ass'n, 106 S. Ct. 1259 (1986).

197. *See* St. Louis County Nat'l Bank v. Merchantile Trust Co., N.A., 548 F.2d 716, 719 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Colorado v. First Nat'l Bank of Fort Collins, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). In First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969), the Court in dictum stated that "the term 'bank branch' at the very least includes *any* place for receiving deposits or paying checks or lending money . . .; it may include more." *Id.* at 135 (dictum) (emphasis in original).

198. 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977).

199. *See id.* at 719-20.

200. 577 F. Supp. 252 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *cert. granted sub nom.* Clarke v. Securities Indus. Ass'n, 106 S. Ct. 1259 (1986).

201. *See id.* at 259-60.

202. *See* Banking Expansion Rep., Sept. 17, 1984, at 17 (discussing ability of banks and bank holding companies to offer investment advice in connection with discount brokerage activities).

203. *See The Government Securities Market and the Book-Entry System*, Banking Expansion Rep., Jan. 20, 1986, at 9.

B. *State Nonmember Banks*

1. State Law Restrictions on the Interstate Use of Electronic Banking Terminals

State law offers almost boundless potential for the interstate deployment of electronic banking terminals. Each state has, subject to some limitations that we shall discuss, legislative and regulatory control over its own banks and over what may be done within its borders by the banks of other states.[204] Each state thus has a form of export-import banking law relationship with all other states.

A sample of the system in practice was observable when a holding company with subsidiary banks in the District of Columbia, Maryland and Virginia[205] decided to connect those banks electronically and permit a variety of deposit, withdrawal and other financial functions to be conducted for each bank through terminals in the others.[206] The banking authorities for the District of Columbia raised no objections, but the Virginia Bureau of Financial Institutions found that only cash dispensing—withdrawals and loans—could, under Virginia law, legally be conducted for banks in other states through terminals in Virginia banks.[207] Thus, deposits could not be made in those terminals for transmittal to the District of Columbia or Maryland banks. As to services to be performed in District of Columbia and Maryland terminals for the Virginia banks, the Bureau struggled with a provision of Virginia law that allowed Virginia state banks to "utilize" electronic terminals only where they could have branches within Virginia.[208] The Department concluded that the Virginia banks did not "utilize" the terminals in the two other jurisdictions and approved that aspect of the relationship.[209] In Maryland, the Bank Commissioner approved almost the full line of services, including deposit-taking, as long as it was clear that the deposits would not be effective until received in the depositor's home bank.[210] The Commissioner did, however, deny the transfer of funds directly into the out-of-state accounts through the use of Maryland terminals.[211] The distinction between the two, of course, is that deposits not effective until confirmed at

204. See *supra* note 27.

205. The holding company had acquired the subsidiaries before Congress prohibited a holding company from owning banks in more than one state. *See* 12 U.S.C. § 1842(d) (1982). Holding companies that already possessed banks in more than one state, however, were not required to divest themselves of such banks. *See id.*

206. Letter from Virginia State Corporation Commission, Bureau of Financial Institutions to Raymond S. Sczudlo (July 31, 1980) (available in the files of the *Fordham Law Review*).

207. *See id.*

208. *See id.*

209. *See id.*

210. Letter from Joseph R. Crouse, Bank Commissioner of Maryland, addressee deleted (Sept. 18, 1980) (available in the files of the *Fordham Law Review*) [hereinafter cited as Letter].

211. *See id.*

the depository banks would be considered being made there, with the terminals only supplying assistance. But transfers effected right at and by the terminals might be fairly deemed made at those points—the equivalent of banking in Maryland by a District of Columbia or Virginia bank. A provision of the Maryland Code did require a bank to get Bank Commissioner approval to have an electronic terminal in the state.[212] The issue of whether this provision applied to out-of-state banks never became crucial because the Commissioner gave his approval.[213]

In this manner, state law embodies the flexibility to accommodate interstate electronic needs in a variety of ways, but in one sense this potential for variety may actually be a problem in itself. National electronic nets require substantive uniformity for efficient use. Variations can, of course, exist and they do, but if a system touching many states is forced into diverse legal and operational adjustments, it will increase in cost and decrease in utility.[214] In addition, customers may be discouraged from using interstate networks that require new techniques and perform different services depending on where their terminals are placed. Banks have found that customers' willingness to use electronic devices depends to a large extent on their level of comfort with the mechanical operations.[215]

We have previously mentioned the nooks and crannies in state banking laws that may support interstate banking.[216] Almost nothing, however, has been enacted at the state level that flatly authorizes pure, interstate commercial bank branching. Twenty-six states have enacted statutes enabling interstate acquisition of banks by holding companies under the Douglas Amendment and its deferral to state law in the area of interstate acquisitions by bank holding companies.[217] It appears that only one state, Massachusetts, specifically authorizes interstate commercial bank branching, and then only from other New England states.[218] Furthermore, the Massachusetts statute requires that the other New England

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212. *See* Md. Fin. Inst. Code Ann. § 5-502(b) (1980).

213. *See* Letter, *supra* note 210.

214. In Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978), the Supreme Court held that a national bank may offer the interest rates established by its home state to its borrowers wherever they are located. *See id.* at 314-18. Fundamental to the Court's view was Congress' intent that national banks do a national business. *See id.* at 314-17. To require a national bank to conform to interest rate limitations of every state where its borrowers might be would put an operational burden on the national banks that would undercut congressional intent. *See id.* at 318-19. The Supreme Court may have been unaware that the large national consumer finance and small loan companies have for decades been complying with the interest rate laws of all states and had been doing a national business very nicely. *See* Alden's, Inc. v. Packel, 524 F.2d 38, 48-49 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

215. *See* N. Penney & D. Baker, *supra* note 193, ¶ 6.04[3][a], at 6-15 ("customers' social fears include fears of humiliation, embarrassing mistakes, damaging machines, and loss of privacy").

216. See *supra* notes 36-42 and accompanying text.

217. See *supra* note 4.

218. *See* Mass. Gen. Laws Ann. ch. 167, § 39 (West Supp. 1985). Utah offers a more limited form of interstate branching. See *infra* note 220.

states reciprocate,[219] and it does not appear that any New England state will satisfy the prerequisite.

Eighteen states have enacted some form of legislation dealing, in one way or another, with the interstate operation of electronic facilities.[220] The laws are not subject to precise categorization,[221] and they contain various definitions and concepts of what is meant by an electronic facility in a state.[222] The varying interpretations engrafted on the statutory language by state regulators enhance the difficulties in classification.[223] The interstate electronic banking statutes do have a common denominator. Through specific mention in the statute or an express or implied cross-reference, they prescribe that a bank located in another state shall not, through the use of electronic facilities, be allowed to do the business of banking in the host state.[224] But because each state has its own definition of banking, or not atypically has none at all, the common denominator is of limited utility. The state statutes seem to envisage two basic scenarios. Under the first, a bank in the host state will establish a terminal that may be plugged into by other banks (and other institutions) both within and without the state.[225] This, of course, builds on the traditional concept of correspondent banking: One bank performs services for another.[226] Under the second scenario, another institution, perhaps a retail store, perhaps a business corporation, perhaps even a bank from another state, sets up a terminal in the host state.[227] Again, the fundamental limitation is that the out-of-state bank may not do so much as to be "banking" in the host state. In both scenarios, one encounters most frequently a specific prohibition against—or a limitation on the method of—taking de-

219. *See* Mass. Gen. Laws Ann. ch. 167, § 39 (West Supp. 1985).

220. *See* Ala. Code § 5-2A-7 (Supp. 1985); Ark. Stat. Ann. §§ 67-367.4, .7 (1980); Conn. Gen. Stat. Ann. § 36-193f (West Supp. 1985); Del. Code Ann. tit. 5, § 770(c) (1985); Fla. Stat. Ann. § 658.65(9) (West 1981); Ill. Ann. Stat. ch. 17, § 1331 (Smith-Hurd 1981); Iowa Code Ann. § 527.4 (West Supp. 1985); Kan. Stat. Ann. § 9-1111(f) (Supp. 1984); Md. Fin. Inst. Code Ann. § 12-207 (1980); Minn. Stat. Ann. § 47.64(6) (West Supp. 1985); Mont. Code Ann. § 32-6-204(4) (1985); Neb. Rev. Stat. § 8-157(3) (1983); N.M. Stat. Ann. § 58-16-5(c) (Supp. 1985); Or. Rev. Stat. § 714.250 (1985); S.D. Codified Laws Ann. § 51-20A-7 (1980); Utah Code Ann. § 7-16-9 (1982); Wash. Rev. Code Ann. § 30.43.045 (Supp. 1986); Wis. Stat. Ann. §§ 186.113(15), 215.13(46) (West Supp. 1985).

221. For a brave attempt to categorize these laws, see D. Baker & R. Brandel, *supra* note 1, ¶ 22.01[2].

222. *Compare* Ill. Ann. Stat. ch. 17, § 1315 (Smith-Hurd Supp. 1985) (defining "point of sale services terminal") *with* Cal. Fin. Code § 550(a) (West Supp. 1985) (defining "automated teller machine").

223. See *supra* notes 205-12 and accompanying text.

224. *See, e.g.*, Ala. Code § 5-2A-7 (Supp. 1985); Ark. Stat. Ann. § 67-367.7 (1980); Fla. Stat. Ann. § 658.65(9) (West 1984); Ill. Ann. Stat. ch. 17, § 1331 (Smith-Hurd Supp. 1985); Md. Fin. Inst. Code Ann. § 12-207 (1980).

225. *See, e.g.*, Ala. Code § 5-2A-7 (Supp. 1985); Fla. Stat. Ann. § 658.65(9) (West 1984); Or. Rev. Stat. § 714.250 (1985); S.D. Codified Laws Ann. § 51-20A-7 (1980).

226. See *supra* Part III.A.2.C. As previously noted, one bank may not serve another so intimately as to become its branch. See *supra* notes 117-21 and accompanying text.

227. *See, e.g.*, Ala. Code § 5-2A-7(b) (Supp. 1985); Ill. Ann. Stat. ch. 17, § 1331 (Smith-Hurd Supp. 1985); Or. Rev. Stat. § 714.250 (1985).

posits in the host state.[228]

The interstate possibilities, given these variables, are (to a lawyer, if not to a mathematician) infinite. I shall not attempt to describe what may be done, what may not be done and what lies in the gray areas under these statutes. Suffice to say that they have permitted the growth of national electronic banking networks which serve some, but not all, of the typical bank customer's needs.[229]

2. Federal Limits on State Laws

The opportunities that exist in state law, present and future, must, of course, be evaluated in terms of federal restrictions that are imposed on state law generally. In this section, I will briefly sketch some areas of federal law that may have a bearing on state/interstate banking laws. Some federal restrictions derive from the United States Constitution.

In interstate electronic banking, the constitutional limitations that are most significant are imposed by the commerce clause,[230] the equal protection clause[231] and the compact clause.[232] We have already observed the ephemeral effect of the commerce clause on existing interstate branching restrictions.[233] Because the clause apparently has had no impact on state bank exclusionary legislation, there is little legal foundation on which to build when analyzing potential future developments. The commerce clause does accord the states a considerable opportunity to protect legitimate local interests,[234] presumably including local financial security.[235] When, however, a state statute is found to discriminate against interstate commerce, the statute is almost per se invalid.[236] May states pick and choose, discriminate and exclude in legislating on the subject of interstate branching? How may the commerce clause be used to leaven restrictive state action by those who find themselves excluded from attractive markets? One would think that states may not interfere with the flow of interstate commerce more in banking than in garbage dumping,[237] but the cases have yet to reach the courts.

228. *See, e.g.*, Ala. Code § 5-2A-7(b) (Supp. 1985); Fla. Stat. Ann. § 658.65(9)(a) (West 1984); Md. Fin. Inst. Code Ann. § 12-207(b) (1980).

229. *See generally* Ingram, *Legal and Operational Considerations at the Point of Sale*, Magazine of Bank Administration, April, 1985.

230. U.S. Const. art. I, § 8, cl. 3.

231. U.S. Const. amend. XIV, § 1.

232. U.S. Const. art. I., § 10, cl. 3.

233. See *supra* text accompanying notes 44-45.

234. *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

235. *Cf.* Northeast Bancorp v. Board of Govs. of the Fed. Reserve Sys., 105 S. Ct. 2545, 2555 (1985) ("banking and related financial activities are of profound local concern") (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980)).

236. "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see* Toomer v. Witsell, 334 U.S. 385, 403-06 (1948).

237. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

In *Northeast Bancorp v. Board of Governors of the Federal Reserve System*,[238] the Supreme Court dealt with the degree of authority that Congress gave to the states to affect interstate commerce in banking under the BHCA.[239] The Court held that Congress, through the Douglas Amendment to the BHCA, had given the states the right to affect interstate commerce through the creation of regional banking.[240] When commercial bank *branching* is involved, however, there is no congressional delegation and, if the issue should arise, it will be in a purer form: May any state simply exclude banks located in other states from branching within its borders, and alternatively, may a state invite in banks from some but not all the states? These issues would be subject to standard dormant commerce clause analysis: Do the state restrictions on interstate branching discriminate against interstate commerce, and even if they do not, do the restrictions unreasonably interfere with the flow of interstate commerce?[241]

The potential impact of the equal protection clause on interstate banking was recently emphasized in *Metropolitan Life Insurance Co. v. Ward*.[242] In a five-to-four holding, the Court invalidated an Alabama tax that favored local insurance companies over those from other states.[243] The division of the Court suggests that the relationship of the equal protection clause to interstate activities and state protective legislation is still to be refined. Decided three months later, *Northeast Bancorp*, holding that the restrictive state banking statutes did not violate the equal protection clause,[244] did little to advance the scholarship in the area. The *Northeast Bancorp* Court distinguished the banking statutes from *Metropolitan Life* on the basis that the banking statutes had a valid purpose in protecting local interests.[245] But as Justice O'Connor pointed out in a concurring opinion in *Northeast Bancorp*, the same argument had failed to validate an insurance statute in *Metropolitan Life*.[246] Justice O'Connor also emphasized that Congress had "sanctioned the barriers to commerce" through the Douglas Amendment and the Court should not interfere.[247] Would the absence of such congressional approval in a pure interstate branching case cause a different equal protection analysis? Future cases may crystalize the law.

In the regional banking context, the compact clause presents issues

238. 105 S. Ct. 2545 (1985).
239. *See id.* at 2553-54.
240. *See id.* at 2554.
241. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Miller, *supra* note 11, at 339.
242. 105 S. Ct. 1676 (1985).
243. *See id.* at 1684.
244. *See Northeast Bancorp*, 105 S. Ct. at 2555-56.
245. *See id.*
246. *See id.* at 2556 (O'Connor, J., concurring). Justice O'Connor dissented in *Metropolitan Life* on the ground that the states had a valid interest in regulating insurance. *See Metropolitan Life*, 105 S. Ct. at 1684-85 (O'Connor, J., dissenting).
247. *See Northeast Bancorp*, 105 S. Ct. at 2556-57 (O'Connor, J., concurring).

similar to those under the commerce and equal protection clauses. The particular question raised under the compact clause is whether states may create regions within which interstate branching is permitted but outside of which it is prohibited. In *Northeast Bancorp*, statutes of Connecticut and Massachusetts that authorized the acquisition of banks in those states by companies located in New England but only if the state in which the holding company was located accorded equivalent reciprocal privileges,[248] were tested against the compact clause.[249] Did such an aggregation of states, set apart from the rest of the country, constitute a compact among the states which the Constitution decrees is permissible only with the consent of Congress?

The Supreme Court disposed of the question in short order: the Douglas Amendment constituted Congress' consent.[250] The opinion, however, deals only with interstate holding company acquisitions. For interstate branching, our present concern, there is no Douglas Amendment and we must take another step and ask whether the Supreme Court would validate such an arrangement absent congressional consent. The Court was relatively expansive in its *Northeast Bancorp* reasoning. It saw no significant compact clause issue in the creation of the New England region with or without the Douglas Amendment.[251] Two factors supported this position. First, the Court observed that the New England arrangement was not a compact.[252] Yes, Connecticut and Massachusetts had similar legislation, and yes, they seemed to have enacted their laws in a spirit of cooperation, perhaps even as a joint effort, but that is short of a "compact" between them. Either state, said the Court, could freely change its laws.[253] Not only that, but two other states in the New England region, Maine and Rhode Island, had quite different approaches to regional limitations,[254] and yet their holding companies could still enter Connecticut and Massachusetts. There was a region, there were at least two congenial statutes, but there was no compact. Second, even if there had been a compact, the clause prohibits only political compacts, not economic compacts.[255] The bottom line is that states would have to be remarkably

248. Conn. Gen. Stat. Ann. §§ 36-552 to -553 (West Supp. 1985); Mass. Ann. Laws ch. 167A, § 2 (Michie/Law. Co-op. Supp. 1985).

249. *See Northeast Bancorp*, 105 S. Ct. at 2554-55.

250. *See id.*

251. *See id.*

252. *See id.* at 2554.

253. *See id.*

254. *See* Me. Rev. Stat. Ann. tit. 9-B, § 1013(2) (1980) (permits banking organizations from all other states without any reciprocity requirement); R.I. Gen. Laws § 19-30-1(c) (Supp. 1985) (permits holding companies in New England to acquire Rhode Island banks is reciprocity; no geographic limitation after June 30, 1987).

255. *See Northeast Bancorp*, 105 S. Ct. at 2554 ("The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' ") (quoting New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893))).

clumsy to draft interstate branching laws that run afoul of the compact clause.

Finally, state action affecting interstate branching will have to be measured against the federal antitrust laws. Sections 1 and 2 of the Sherman Act[256] and section 7 of the Clayton Act[257] apply to banking activities,[258] and state laws that establish the manner in which out-of-state banks may branch into new states are likely to raise antitrust issues. The potential legal problems are complex. First, of course, is the threshold question of whether state entry laws are exempt from the federal antitrust laws under *Parker v. Brown.*[259] Under the *Parker* doctrine, competitive restraints imposed by "state action or official action directed by a state" are immune from antitrust attack.[260] Private action in accordance with such state regulation does not violate the antitrust laws, but "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[261] Thus, the controlling question is whether the anticompetitive activity is compelled by the state or merely encouraged or authorized.[262]

What are the antitrust implications when several banks agree to share a facility and, perhaps, exclude other banks? If state law permits large banks to freeze their smaller competitors out of an electronic network, a restraint of trade could result. The Antitrust Division of the Justice Department has stated, however, that sharing may be necessary for smaller banks to enable them to afford a system of electronic terminals.[263] On the other hand, if state law requires that all be permitted to join, there may be an antitrust violation because of the difficulty of creating a competing network. The Antitrust Division has found that a Nebraska "mandatory sharing" statute presented such a problem and forced a

256. 15 U.S.C. §§ 1-2 (1982).

257. *Id.* § 18.

258. *See* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 666-73 (1964) (Sherman Act §§ 1 and 2); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 342-43 (1963) (Sherman Act § 1 and Clayton Act § 7).

259. 317 U.S. 341 (1943).

260. *Id.* at 351.

261. *See id.*

262. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.").

263. *See* United States Department of Justice, Antitrust Division, Policy Statement on Sharing to the National Commission on Electronic Fund Transfers 2 (1977); *see also* Independent Bankers Ass'n v. Smith, 534 F.2d 921, 936 (D.C. Cir.) (small banks may not be able to afford terminals), *cert. denied*, 429 U.S. 862 (1976); J. Hawke, *Shared EFT Systems: The Legal Barriers*, in Commentaries on Banking Regulation 313 (1985) ("Because of high initial capital costs, substantial risks, and the need to generate a large number of transactions to achieve economies of scale and to make an EFT system economically sound . . . some kind of joint effort is likely to be necessary . . . ."). *But see* Oklahoma *ex rel.* State Banking Bd. v. Bank of Okla., 409 F. Supp. 71, 88-89 (N.D. Okla. 1975) (because terminals cheaper than bricks and mortar branch, smaller banks able to compete with larger banks).

modification of the law.[264] In its letter to the Nebraska Bankers Association, the Antitrust Division found that the Nebraska statute did not represent *Parker* governmental action and thus would not shield the network activities from antitrust scrutiny.[265]

Conclusion

My conclusion is that this Article should never have been written. The question of whether a banking relationship that touches more than one state is or is not legal interstate banking involves too many sophistries with insufficient connection to economic reality. The laws with which we deal stem from an early American distrust of the big bank, a feeling rooted in an agrarian rather than an industrial philosophy and reminiscent of the generally discredited economic approach of Thomas Jefferson: "[L]et us have banks; but let them be such [as do not create money and credit]."[266] Like it or not, we now have an industrial, credit-based society, and financial institutions that are bound by the legal restrictions of another day must waste valuable resources in order to serve modern needs.

For that is the ultimate effect of the legal niceties we have been considering. The large banks (and, of course, the companies other than banks that have found ways to provide financial services) have managed to bob and weave through the unrealistic laws restricting geographic expansion and in fact have reached their national markets. The irony of this situation is that it benefits the large bank that the restrictive laws are designed to constrain. It is only the bank with the resources to conceive, create and implement creative solutions to the geographic restraints that can, and in fact has, reduced for itself the burdens of such antiquated laws as McFadden.[267]

Creative solutions, as contrasted with simple interstate branching, naturally involve costs. These are borne by the public, which now pays more for its banking services than necessary. In addition, the interstate services that exist are spotty and irregular compared, say, to the services available in one's local branch. For these reasons, the disadvantages of our interstate restrictions tend to fall more on the consumer and small business customers than on big business, whose large transactions can sustain the additional costs and whose very size enables adaptation to the

264. *See* Letter from Donald I. Baker, Assistant United States Attorney General, Antitrust Division, to William B. Brandt, Nebraska Bankers Association (March 7, 1977) (available in the files of the *Fordham Law Review*).

265. *See id.*

266. *See* Letter from Thomas Jefferson to John Wayles Eppes (June 24, 1813), *reprinted in* T. Jefferson, Autobiography, Notes on the State of Virginia, Public and Private Papers, Addresses, Letters 1285 (1984).

267. A senior officer of a large, expansion-minded bank once said something like this to me: "We really should be opposed to reforming the McFadden Act. As the law stands, only a few of us can figure out ways to go interstate. It's a definite competitive edge. If McFadden is repealed, everyone will be able to do it."

financial irregularities. President Carter's report on interstate banking concluded: "Today, the nation's major corporations and wealthy individuals frequently effect transactions with banks across state lines; it is only the small business and household customers who continue to be deprived of the benefits of a competitive interstate banking system."[268] While the statement is somewhat less true today than it was in 1981, largely because of the growth of the interstate networks, the principle remains sound. It was also noted by President Reagan in his 1983 Economic Report to the Congress, that geographic banking restraints "are probably not in the best interests of consumers."[269]

The move from a regulated to a free market is always made with misgivings and is opposed both by those philosophically committed to the controls and by those whom the controls benefit economically. In banking, the recent removal of most of the restraints on what banks can pay to their depositors as well as what they can charge for loans[270] have been perceived as market benefits, giving consumers a reasonable return on their savings on one side and, on the other, stimulating the flow of money into the home mortgage and other credit markets.[271] These changes were, of course, strenuously opposed every step of the way.[272] The attitude towards interstate banking is evolving in a similar manner. Once highly controversial,[273] the concept has garnered uniform respect. Most observers now say that it is inevitable and the only real question is how it will occur.[274] That is unquestionably correct. It should not, however,

268. *See* Department of Treasury, *supra* note 2, at 2.

269. R. Reagan, Economic Report of the President 121 (1983).

270. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 202(b), 94 Stat. 142 (codified at 12 U.S.C. § 3501 (1982)).

271. *See Nonbank Banks: Hearings on H.R. 20 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 192 (1985) (statement of William M. Isaac, Chairman, FDIC). Consumer spokesmen have more recently expressed displeasure with their perception that, while credit card interest rates rose in the unregulated environment as market rates increased, they did not fall when the market went in the other direction. New York Times, Oct. 9, 1985, at D1, col. 6.

272. *See* S. Rep. No. 368, 96th Cong., 1st Sess. 4-5, *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 240; *see also* S. Rep. No. 368, 96th Cong., 1st Sess. 37, *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 272 (remarks of Sen. Morgan) ("I strongly oppose enactment").

273. *See* Mote, *The Perennial Issue: Branch Banking*, in Senate Subcomm. on Financial Institutions of the Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess., Compendium of Issues Relating to Branching by Financial Institutions 440 (1976) ("political struggle between pro- and anti-branching forces has settled into a continuing trench warfare").

274. There is an escalating movement that bank holding companies be permitted, either by federal or by state law or by combination of both, to own banks in more than one state, perhaps to permit ownership in all states. See *supra* notes 4-5 and accompanying text. No equivalent movement has arisen to liberalize the laws prohibiting interstate branching. In a statement made April 25, 1985, to the House Banking Committee, Federal Reserve Board Chairman Paul A. Volcker supported the concept of interstate holding company systems. On pure branching, he commented: "[I]t is difficult to conceive of a system of interstate branching that would enable State law and supervision to govern

occur through the increasingly imaginative use of the legal contraptions we have discussed in the preceding pages. We are ready for real, unashamed interstate banking. Let's get on with it.

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the operations of banks in sister States." *Interstate Banking: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 8 (1985) (statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System). Unfortunately, this reflects the spirit of hyperbole in which most interstate banking decisions are conducted. Mr. Volcker ignores, for example, the interstate system of insurance companies under which state administrators regulate local branches of national companies. *See generally, e.g.*, Cal. Ins. Code (West 1972 & Supp. 1986); N.Y. Ins. Law (McKinney 1985 & Supp. 1986).