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ESSAY

BRANCH BANKING: THE OKLAHOMA DEBATE

I. INTRODUCTION

A brewing controversy over branch banking in Oklahoma has reached stormy levels recently. The Oklahoma Banking Code prohibits branch banking.[1] Recently, advocates of branch banking have judicially challenged this prohibition.[2] This challenge has been premised on section 36(c) of title 12 of the United States Code permitting a na-

1. OKLA. STAT. tit. 6, § 501 (1971) provides in pertinent part: "Branch banking is prohibited in this state." *Id.*

2. On November 29, 1976, the First National Bank and Trust Company of Okmulgee, Oklahoma sought permission from the United States Comptroller of the Currency to establish a branch office. Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978), *noted* in [1978-1979 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 97,590. Under Oklahoma law, state and national banks may have but one extended facility—a drive-in operation—and it must not be more than 1,000 feet from the main bank. OKLA. STAT. tit. 6, § 415(A) (1971). The proposed Okmulgee branch, however, was a full service branch, located about two miles from the main bank thus, not falling within the type of branch office permitted under Oklahoma law. If the Okmulgee branch were to be allowed, it would be a precedent for permitting branching beyond the 1,000 foot limit.

Due to the implications for national and state banking structures, the United States Comptroller of the Currency held a public hearing on March 9, 1977, regarding the application of the proposed branch. Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978). On January 6, 1978, the Comptroller issued an opinion favoring First National's application to establish a branch. Letter from John Heimann, Comptroller of the Currency, to Robert L. Hollis (Jan. 6, 1978). The Comptroller, however, thought that approval of this application would create a competitive imbalance between the national and state commercial banks in Oklahoma resulting in litigation and controversy. *Id.* The Comptroller also thought such litigation would be avoided if the Oklahoma legislature would adopt a broader branching statute for state commercial banks. Consequently, the Comptroller opted to withhold his final decision on the subject until after the close of the next legislative session. *Id.* Subsequently, the legislature failed to take any action.

On September 19, 1978, the Comptroller granted permission to First National to open a branch bank stating, "Based upon my review of the administrative record and applicable state and federal law, I conclude that there is no legal impediment to the establishment of First National's proposed branch office. The relevant banking and market factors in Okmulgee overwhelmingly favor approval." Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978). The next day, First National, having opened the branch approved by the Comptroller, instituted an action for a declaratory judgment of the legality of the branch approval. First Nat'l Bank & Trust Co. v. Leonard, No. 78-296-C (E.D. Okla., filed Sept. 20, 1978). On September 22, 1978, the Independent Bankers Association of Oklahoma brought an action for a declaration that the approval and operation of First National's branch were illegal. Independent Bankers Ass'n v. United States *ex rel.* Heimann, No. 78-01026-D (E.D. Okla., filed Sept. 22, 1978). These suits have been consolidated but are not yet resolved.

tional bank to establish branches but only if state law expressly authorizes state banks to establish branches.[3] Proponents of branch banking argue that the question of what constitutes a state bank is purely a question of federal law upon which a state cannot force its own definitions; that "state bank" as defined by federal statute,[4] includes trust companies, savings banks, and other institutions carrying on the banking business; that these institutions are allowed to branch in Oklahoma; that Oklahoma commercial banks are allowed to branch through the use of remote electronic tellers; and that if state banks, as defined under the federal statute, are permitted to branch in Oklahoma, then under section 36(c), national banks are also permitted to branch.

Opponents of branch banking argue for the narrower position that to be a state bank the institution must be carrying on the banking business under the authority of state law;[5] that state law governs the question of what constitutes a state bank; and that all financial institutions carrying on the banking business are prohibited from branching under Oklahoma law.[6]

This article will examine these arguments. Through this examination, it will be seen that state banks in Oklahoma actually are permitted to branch and therefore, that national banks in Oklahoma are also entitled to branch.

II. BRANCH BANKING—THE COMPETITIVE EQUALITY DOCTRINE

In 1863, the National Currency Act, which provided for the chartering of national banking associations, was passed.[7] The Act was amended in 1865[8] to permit state banks to join the national system without disposing of their existing branches, but otherwise national

3. The pertinent statute, 12 U.S.C. § 36(c) (1976), states:

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

4. The definition of "state bank" is found in 12 U.S.C. § 36(h) (1976) which provides: "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

5. The opponents of branch banking argue that the last clause of 12 U.S.C. § 36(h) means that a state bank is to be defined by state laws.

6. OKLA. STAT. tit. 6, § 501 (1971).

7. Act of Feb. 25, 1863, ch. 58, § 5, 12 Stat. 665.

8. Act of March 3, 1865, ch. 78, § 56, 13 Stat. 484.

banks had no branching power. State banks which declined to join the national system, however, enjoyed the power to branch.[9]

From 1880 to 1910 the use of branches by state banks expanded greatly.[10] The chief causes for this expansion were the growth of cities and of the business customer population, coupled with the banks' desire to grow. Additionally, the use of the automobile, even at this early date, resulted in congestion in downtown areas and further promoted the desirability of branches.[11] State chartered banks were able to meet these new demands of the changing economy by providing conveniently located bank branches, while national banks functioned without this capability. Because of this and other advantages of state chartered banks,[12] there was a shifting from the ranks of federally chartered banks to state chartered banks at such a rate that by 1910 state banks outnumbered national banks approximately two to one.[13]

A number of national banks attempted to survive by establishing branches even though they lacked the express authority to do so.[14] In *First National Bank v. Missouri*,[15] however, the United States Supreme Court ruled that national banks had no authority to establish branches.[16] Thus, national banks remained at a disadvantage; their ability to grow severely limited. These disadvantages, accompanied by

9. By the beginning of the Civil War, virtually all state chartered banks were permitted to branch under the laws of their states. G. FISCHER, AMERICAN BANKING STRUCTURE 15-16 (1968).

10. *Id.* at 184. Between 1880 and 1895 the number of state banks rose from 650 to over 6,000 while national banks increased from 2,100 to approximately 3,700. *Id.*

11. C. COLLINS, THE BRANCH BANKING QUESTION 48-49 (1926). *See also* FISCHER, *supra* note 9, at 184-86.

12. State chartered banks had a number of advantages in addition to the power to establish branches: lower capital requirements, smaller legal reserve requirements, and more liberal investing and lending powers. FISCHER, *supra*, note 9, at 184.

13. FISCHER, *supra* note 9, at 184 n.34 (citing *Historical Statistics of the United States, Colonial Times to 1957*, at 626-31 (1960)).

14. From June 13, 1922, to April 30, 1923, Comptroller Crissinger granted about ninety-seven permits enabling national banks to establish branches. COLLINS, *supra*, note 11, at 53. He took this action because of the emergency situation confronting the national system: many of the members had seriously begun to consider withdrawing. *Id.* at 52. *See generally* note, Colorado ex rel. State Banking Bd. v. First National Bank and Independent Bankers Association of America v. Smith: *Is a Customer—bank communication terminal a branch bank within the McFadden Act?*, 11 TULSA L.J. 85 (1975).

15. 263 U.S. 640 (1924).

16. *Id.* at 656-59. In its response to the *quo warranto* proceeding brought by Missouri to determine the authority of the bank to establish and conduct a branch bank the Court stated:

> National banks are brought into existence under federal legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.

Id. at 656.

the prospect of a failed Federal Reserve System, gravely concerned those aware of the problem.[17] Recognizing the handicap placed on national banks in states permitting state bank branching, Congress passed the McFadden Act in 1927.[18] The Act allowed national banks to branch within their own cities if state banks were allowed to do so by state law. Representative McFadden, author of the bill, described the main purpose of the Act:

> As a result of the passage 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 all member banks of the Federal reserve system. This action was necessary; otherwise national banks were sure to seek the greater advantage offered by State banking laws, and in that event the Federal reserve system without the compulsory support of national banks would be only a theory, not a reality as is now assured.[19]

Opponents of the Act also recognized that the purpose of the Act was to place national and state banks on a basis of competitive equality with respect to branch banking.[20]

In 1966, in *First National Bank v. Walker Bank & Trust Co.*,[21] the United States Supreme Court recognized this principle of competitive equality extant in section 36(c) of title 12. After reviewing the legislative history of the McFadden Act, the Court stated:

> It appears clear from this résumé of the legislative history

17. Henry M. Dawes, as Comptroller of the Currency, exemplified this concern in his Annual Report of 1923.

> The national bank act does not permit national banks to engage in the exercise of general banking functions beyond the limits of the municipalities in which they are located. They cannot, therefore, enter the general field of branch banking. Except for the national banks, the Federal reserve system could not have been organized, and if a condition is permitted to develop which should seriously and permanently cripple the national banking system, it would be a direct and possibly fatal blow to the Federal reserve system.

61 COMP. OF THE CURRENCY ANN. REP. 2-3 (1923). He iterated his concern in his 1924 Annual Report. 62 COMP. OF THE CURRENCY ANN. REP. (1924).

18. Act of Feb. 25, 1927, Pub. L. No. 69-639, 44 Stat. 1224 (codified at 12 U.S.C. § 36 (1976) as amended by Act of June 16, 1933, Pub. L. No. 73-66, 48 Stat. 189).

19. 68 CONG. REC. 5815 (1927) (emphasis added).

20. Representative Frear, a staunch opponent of the Act, stated:

> The principal argument for the McFadden bill is that it will place national banks on an equality with State banks and will check the tendency toward conversion of national into State banks. As the law now stands, national banks are undoubtedly more restricted than State banks in making loans on real estate, in exercising trust powers, and in other respects. In States which permit State banks to establish branches they have also heretofore been at a decided disadvantage in not being permitted to have branches.

66 CONG. REC. 1578 (1925).

21. 385 U.S. 252 (1966).

> of § 36 (c) (1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned. . . . It is not for us to so construe the Acts as to frustrate this clearcut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption.[22]

Three years later, in *First National Bank v. Dickinson*,[23] the Court again noted that "Congress ha[d] deliberately settled upon a policy intended to foster competitive equality."[24] The Court reaffirmed the *Walker* decision, stating "that the McFadden Act was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area."[25] The McFadden Act was seen as reflecting congressional concern lest either system gain advantages over the other in the use of branch banking.[26] This policy of competitive equality is firmly embedded in the McFadden Act.[27] Thus, if state banks are authorized to branch by state law, national banks may also establish branches.[28] Without this statute[29] a state could establish several classes of banks and label only the competitively weakest class a "state bank." The state could then limit the branching activities of national banks to those activities authorized to these competitively weaker "state banks," while allowing other, favored state institutions, not labeled "state banks," to establish competitively advantaged branches.[30] Thus, to determine if state banks are authorized to branch, the term "state bank" must be examined.

III. THE DEFINITION OF "STATE BANK"

Congress chose to allow states to authorize the branching of national banks, but Congress retained the power to determine what constitutes a "branch" and what constitutes a "state bank." The

22. *Id.* at 261. *Walker Bank* investigated how much state law Congress incorporated into the federal system by § 36(c). The Court held that "national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.'" *Id.*

23. 396 U.S. 122 (1969).

24. *Id.* at 131.

25. *Id.*

26. *Id.*

27. *Id.* at 133.

28. 12 U.S.C. § 36(c) (1976).

29. 12 U.S.C. § 36 (1976). The Supreme Court has rejected the assertion that a state has the power or authority to limit national banks to the establishment of what the state itself has labeled "branches." First Nat'l Bank v. Dickinson, 396 U.S. 122, 133-34 (1969).

30. Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978), *supra* note 2.

McFadden Act states that "[t]he words 'State bank,' 'States banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such . . . institutions carrying on the banking business under the authority of State laws."[31] On the other hand, Oklahoma defines "bank" as "any bank authorized by the laws of the state to engage in the banking business."[32] The difference between these definitions is that Oklahoma law appears to define "bank" as only one type of institution, an ordinary commercial bank, with no provision for the inclusion of any other entity, while the federal definition explicitly includes various institutions in addition to commercial banks. The question then is whether the definition of "state bank" is prescribed by federal or state law.[33]

This question can be answered by an analysis of *First National Bank v. Dickinson*.[34] In *Dickinson*, the United States Supreme Court was called upon to construe section 36(f) as it relates to the definition of "branch" for the purpose of determining the scope of branch banking available to a national bank in a state prohibiting branches for state commercial banks.[35] The First National Bank in Plant City, Florida, had received permission from the United States Comptroller of the Currency to operate two services: one was an armored car service for the receipt of monies intended as deposits and the other was an off-premises receptacle for the receipt of cash or checks for deposit.[36] The Comptroller of the State of Florida advised First National that both proposed services would violate the Florida prohibition against branch banking.[37] First National then successfully sought a declaratory judgment that its proposed services did not constitute branching.[38]

On the subsequent appeal, the United States Supreme Court pointed out that the conditions under which national banks may establish branches are codified in section 36 of title 12.[39] The Court recognized that "one such condition is that a 'branch' may be established only when, where, and how state law would authorize a state bank to

31. 12 U.S.C. § 36(h) (1976).
32. OKLA. STAT. tit. 6, § 102(A) (1971).
33. 12 U.S.C. § 36(h) (1976).
34. 396 U.S. 122 (1969).
35. In the Oklahoma controversy, the question is the construction of § 36 as it relates to the definition of "state bank" for the purpose of determining the scope of branch banking available to a national bank in Oklahoma.
36. 396 U.S. at 125-26.
37. *Id.* at 129.
38. First Nat'l Bank v. Dickinson, 274 F. Supp. 449 (N.D. Fla. 1967), *rev'd*, 400 F.2d 548 (5th Cir. 1968), *aff'd*, 396 U.S. 122 (1969).
39. 396 U.S. at 130.

establish and operate such a branch."[40] The Court noted that the McFadden Act "has incorporated by reference the limitations which state law places on branch banking activities by state banks."[41] The Court, however, rejected the contention that a state's definition of branch banking "must control the content of the federal definition of [branch]."[42] The definition of a branch in section 36(f) was seen clearly to be a matter of federal law:

> Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, . . . Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch."[43]

Thus, although state law comes into play in deciding if a national bank may open a branch under section 36(c), federal law controls in deciding what constitutes a branch under section 36(f).[44]

Several United States Courts of Appeals have considered the relationship of state law to the federal definition of "branch." These courts have unanimously concluded that the question of whether a banking facility constitutes a branch is a question of federal law.[45] Following this rule, the United States Court for the Northern District of Oklahoma has stated, "The definitions in 12 U.S.C. § 36(f) cannot be varied by state law, but instead constitute . . . the test . . . to determine the extent to which state law is to be permitted to operate upon national banks in contravention of the National Bank Act's general supremacy over state law."[46] Analogously, the definitions in section

40. *Id.* (citation omitted).
41. *Id.* at 131.
42. *Id.* at 133.
43. *Id.* at 133-34.
44. The Court went on to hold that under the federal definition of "branch," the two proposed services constituted branches. *Id.* at 137-38. The policy of competitive equality required that national banks be forbidden to establish the proposed services because they constituted an attempt to secure branching privileges which Florida denied its state banks. *Id.* at 138.
45. Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 497 (10th Cir.), *cert. denied*, 429 U.S. 1091 (1976); Illinois *ex rel.* Lignoul v. Continental Ill. Bank & Trust Co., 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); Virginia *ex rel.* State Corp. Comm'n v. Merchants Nat'l Bank, 515 F.2d 154 (4th Cir. 1975) (per curiam) *aff'g* 380 F. Supp. 568 (W.D. Va. 1974); North Davis Bank v. First Nat'l Bank, 457 F.2d 820 (10th Cir. 1972).
46. Oklahoma *ex rel.* State Banking Bd. v. Bank of Oklahoma, 409 F. Supp. 71, 90 (N.D. Okla. 1975) (involving the question of whether off-premises customer-bank communications terminals are branches).

36(c) should not be subject to variation. If a state bank, as defined by federal law alone, branches, a national bank in that state may also branch. Although Congress entrusted to the states the decision of whether to allow branching, federal law must be used to determine what constitutes a state bank.

Oklahoma commercial banks obviously fall within the federal definition of "State banks."[47] The controversy is whether the institutions Oklahoma classifies as trust companies, savings and loans, and certain other financial institutions are actually state banks within the federal definition and whether they are permitted to branch. If these questions are answered affirmatively, then under section 36(c), national banks should be permitted to branch.

IV. APPLYING THE DEFINITION

It is important to note the grammatical structure of the federal definition of "state bank." The definition is phrased in the disjunctive: "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include *trust companies, savings banks, or other such corporations or institutions carrying on the banking business* under the authority of State laws."[48] The separation of each entity by commas and the use of the conjunction "or" indicates that each entity may be a state bank independently of the others. Thus, if any one of the financial entities contained in the federal definition of state bank is branching, national banks would be permitted to branch.[49]

A. *Trust Companies*

The provision that "State bank . . . shall be held to include trust

47. Interpretative letter from John Heimann, Comptroller of the Currency, (Sept. 19, 1978), *supra* note 2.

48. 12 U.S.C. § 36(h) (1976) (emphasis added).

49. If, for example, the institutions Oklahoma designates as trust companies are encompassed within the federal definition of "state bank" then national banks should be permitted to branch regardless of whether other state banks, *i.e.*, Oklahoma commercial banks, are permitted to branch. This follows the construction used by the Supreme Court regarding the definition of "branch." 396 U.S. 122 (1969). The United States Supreme Court faced the question of whether an armored car service for receipt of monies constituted a branch. The federal definition of branch states that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (1976). The Court emphasized that since the federal definition of "branch" was *phrased in the disjunctive*, the offering of *any one* of the three services mentioned in that definition would provide the basis for finding that branch banking is occurring. 396 U.S. at 135.

companies . . ."[50] shows that a trust company under the law of any state is, by definition, a state bank for the purposes of the McFadden Act.[51] This definition appears to allow no further reference to state law.

Opponents of branch banking argue, however, that Oklahoma trust companies are not state banks under the federal definition. They contend that for a trust company to be included in the federal definition of "state bank," the trust company must be authorized under the laws of the state to carry on the banking business.[52] The opponents further claim that Oklahoma trust companies are not authorized by Oklahoma law to carry on the banking business and, therefore, are not state banks.[53] Proponents of branch banking have countered with the assertion that Oklahoma trust companies are carrying on the banking business.

Unfortunately, "banking business" is not defined in the Oklahoma statutes.[54] The meaning of "banking business," however, can be derived from the similarity between the powers of commercial banks and those of trust companies enumerated in the Oklahoma statutes. This approach reveals that Oklahoma trust companies provide services parallelling those provided by Oklahoma commercial banks. The banking functions which may be performed by an Oklahoma commercial bank include

the power to exercise . . . all such incidental powers as shall

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50. 12 U.S.C. § 36(h) (1976).

51. Comptroller Heimann has stated,

> The very words of the federal branch banking statute, providing that "[t]he words 'state bank' . . . shall be held to include trust companies" . . . would seem to compel the conclusion that a trust company chartered under the law of any state is, by definition, a "State bank" for the purposes of the federal branch banking statute.

Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978), *supra* note 2 at 5.

52. Brief for Independent Bankers Ass'n at 3, *In re* Application of First Nat'l Bank for Permission to Establish a Branch (March 3, 1978) (unpublished brief on file in the Comptroller's Regional office, Eleventh Nat'l Bank Region, Dallas, Tex.).

53. *Id.*

54. The United States Supreme Court has explained the banking business.

> A banker . . . is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This . . . is the essential definition of banking. "The first business of a banker is not to lend money *to* others but collect money *from* others." And Gilbart defines a banker to be "a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another."

Auten v. United States Nat'l Bank, 174 U.S. 125, 142 (1898) (citations omitted). The Court also noted that " '[a] bank is an institution . . . with power to issue its promissory notes intended to circulate as money (known as bank notes); . . . of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits and the remission of money . . . .' " *Id.* at 141-42.

> be necessary to carry on the banking business; by buying, discounting and negotiating promissory notes, bonds, drafts, bills of exchange, foreign and domestic, and other evidence of debt; by receiving deposits of money upon which interest may or may not be paid; by buying and selling coin and bullion; by buying and selling exchange, foreign and domestic; issuing letters of credit . . . .[55]

Similarly, an Oklahoma trust company is expressly authorized:

> [t]o discount and negotiate promissory notes, drafts, bills of exchange and other evidence of debt, buy and sell coin and bullion, to accept for payment at a future date drafts drawn upon it by its customers, and to issue letters of credit, authorizing the holders thereof to draw drafts upon it . . . .[56]

The banking functions which may be performed by Oklahoma commercial banks and by Oklahoma trust companies are also very similar to the functions performed by national banks.[57] Both Oklahoma trust companies and Oklahoma commercial banks are permitted to loan money,[58] a function allowed national banks as part of the business of banking.[59] Moreover, both Oklahoma trust companies[60] and Oklahoma commercial banks[61] are allowed to receive deposits, another aspect of the banking business. Branching opponents argue that there are distinctions between the types of deposits that Oklahoma trust companies and Oklahoma commercial banks are permitted to receive. They argue that although an Oklahoma trust company is authorized "[t]o receive deposits of trust moneys,"[62] such authorization establishes a settlor-trustee relationship rather than the debtor-creditor relationship more typically identified with the business of banking.

The inaccuracy of this assertion is obvious if the types of deposits made with a trust company are examined. For example, Pioneer Sav-

55. OKLA STAT. tit. 6, § 402(A)(10) (1971).
56. OKLA. STAT. tit. 6, § 1001 (21) (1971).
57. 12 U.S.C. § 24 (Seventh) (1976) provides that a national banking association
> shall have . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.

58. An Oklahoma commercial bank is authorized to lend "money on personal security or real estate. . . ." OKLA. STAT. tit. 6, § 402(A)(10) (1971). A trust company is permitted "[t]o loan money upon real estate and collateral security . . . ." OKLA. STAT. tit. 6, § 1001(A)(8) (1971).
59. 12 U.S.C. § 24 (Seventh) (1976).
60. OKLA. STAT. tit. 6, § 1001(A)(1) (1971).
61. OKLA. STAT. tit. 6, § 402(A)(10) (1971).
62. OKLA. STAT. tit. 6, § 1001(A)(1) (1971).

ings and Trust Company has thirteen branches scattered throughout Oklahoma.[63] The United States Comptroller of the Currency, in deciding whether to allow the First National Bank of Okmulgee to open a branch, decided that because Pioneer's deposit and branching activities had recently come under careful scrutiny by Oklahoma authorities and had been found to comply fully with Oklahoma laws, Pioneer would serve as a useful reference to determine the degree of similarity between deposits received by Oklahoma trust companies and those received by Oklahoma commercial banks.[64] The Comptroller found that Pioneer could accept money deposits from customers for accounts which might accumulate interest and which might be withdrawn in whole or in part or paid to a third party by means of a draft.[65] On the basis of the evidence presented, the Comptroller concluded that, despite the distinctions argued by those opposed to branch banking, "it appears that the trust accounts available to consumers through Oklahoma 'trust companies,' and, in particular, through Pioneer, are functionally identical to 'checking accounts' offered by commercial banks."[66]

This branch banking debate does not present the first opportunity for reviewing similarities between Oklahoma trust companies and Oklahoma commercial banks. In *Oklahoma* ex rel. *State Banking Board* v. *Bank of Oklahoma*,[67] the United States District Court for the

63. Interpretative letter from John G. Heimann, Comptroller of the Currency (Sept. 19, 1978), *supra* note 2 at 7.

64. *Id.*

65. *Id.*

66. *Id.* at 7-8. The Comptroller of the Currency stated that:

> The administrative record is replete with uncontested data that demonstrates that trust drafts drawn upon Pioneer are accepted by payees as readily as ordinary checks and that not even the Oklahoma Bank Commissioner in testimony given at the administrative hearing on First National's application could meaningfully distinguish between trust deposits and demand (checking account) deposits:
>
> Q. [Oklahoma Assistant Attorney General William D. Kiser] How does a demand deposit, in your opinion as State Bank Commissioner, differ from the type deposit that Pioneer is now taking?
>
> A. [Hon. Harry Leonard] Well, it kind of depends on who you're talking to. Some people talk about demand deposits and checking accounts being synonymous; however all banks have demand deposits and pay interest on it [*sic*], even though there's a law that says you can't pay interest on demand deposits. They all have checking accounts, and you can walk in and demand your money. I think that is different from what I would refer to as a checking account type deposit, which also is a demand, but you can give a check on it. So you go to playing around with words, and it just depends on who you're talking to and what the situation is and what any word you want to use means.

Id. at 8 n.23.

67. 409 F. Supp. 71 (N.D. Okla. 1975).

Northern District of Oklahoma compared Oklahoma trust companies to Oklahoma commercial banks and declared:

> The Court further finds that trust companies chartered under Oklahoma law are authorized to and in fact perform substantially the same services as commercial banks. Such trust companies offer trust services, receive deposits in trust, and pay interest on such deposits on either a time or demand basis. Such companies may make loans of various types, may honor drafts drawn by their customers against funds on deposit, thereby offering their customers the substantial equivalent of demand checking accounts, and perform all the other services authorized by Title 6 O.S. § 1001. Further, at least two trust companies chartered under Oklahoma law are authorized under their original charters to offer conventional checking accounts. The Court finds that these deposit, loan and checking services are the substantial equivalent of those which are offered by commercial banks.[68]

Proponents of branch banking argue that these factors show that Oklahoma trust companies engage in the banking business.

Still, Oklahoma trust companies are not expressly authorized to branch by statute in Oklahoma. But an Oklahoma Attorney General's opinion dealing with the question of trust company branching states:

> In the Banking Code the Legislature dealt specifically with the matter of branch banking. It is apparent that the Legislature was silent on the matter of branch trust offices. Thus, it can be argued that it was the Legislature's intent, by its silence, to not place any restrictions on branch trust offices; otherwise, there would have been legislation in this area.[69]

Further, a number of Oklahoma trust companies have established branches.[70] The Oklahoma legislature, however, enacted a statute, effective May 11, 1977,[71] which provides that trust companies covered by the Federal Deposit Insurance Corporation are not authorized to establish branch offices. Opponents of branch banking argue that because FDIC coverage is crucial to successful commercial bank operations, this statute has ended any ambiguity concerning the ability of a trust company to branch. This statute, however, merely divides Oklahoma trust companies into two classes: those eligible for insurance coverage

68. *Id.* at 86 (citations omitted).

69. 6 OKLA. OP. ATT'Y GEN. 256, No. 73-274 (April 24, 1974).

70. Interpretative letter from John Heimann, Comptroller of the Currency, (Sept. 19, 1978), *supra* note 2.

71. OKLA. STAT. tit. 6, § 503 (Supp. 1979).

by FDIC and those not eligible for such insurance. The branching authority of those trust companies in Oklahoma not eligible for FDIC coverage remains unchanged. The United States Comptroller of the Currency has expressed the view that the deliberate limitation of the branching authority of a select category of trust companies clearly demonstrates that those trust companies not eligible for FDIC insurance may establish branch offices.[72] Because trust companies not covered by FDIC insurance may branch, some Oklahoma trust companies are permitted to branch. Because these Oklahoma trust companies fall within the McFadden Act definition of "state bank" and are permitted to branch, national banks should be permitted to branch. If national banks are not so permitted, they will continue to be in a competitively disadvantageous position.

B. *Credit Unions*

In considering whether credit unions are engaged in the banking business, a look into their authorization to receive deposits quickly reveals the answer. Oklahoma statutes expressly authorize credit unions to receive deposits and to "require such notice for withdrawal of shares and deposits as the bylaws may provide."[73] Such activity is similar to that which occurs with commercial bank deposits such as checking and savings accounts.[74] Thus, if the bylaws do not require a "notice for withdrawal" the depository account could be considered a demand or checking account.

The use of share drafts[75] is a recent innovation of credit unions in their attempt to expand.[76] Proponents of branch banking argue that credit unions that issue share drafts to their depositors are essentially creating demand deposits. Although, there is no specific statutory authority for such drafts in Oklahoma, such authority can be inferred from section 2006(15) of title 6 of the Oklahoma Statutes, which states that a credit union shall have the power "to exercise such incidental powers as shall be necessary or requisite to enable it to carry on effec-

72. Interpretative letter from John Heimann, Comptroller of the Currency (Sept. 19, 1978), *supra* note 2 at 10.

73. OKLA. STAT. tit. 6, § 2006(6) (1971).

74. F. BEUTEL, BANK OFFICER'S HANDBOOK OF COMMERCIAL BANKING LAW, § 5-10 (4th ed. 1974).

75. "When a share draft is created, a credit union statement is produced simultaneously by duplicating entries on the share draft. These statements are the legal equivalent of a canceled check." Kidwell & Peterson, *A Close Look at Credit Unions*, 161 THE BANKERS MAGAZINE 71, 77 (1978).

76. *Id.* at 76-77.

tively the business for which it is incorporated."[77] At a March 9, 1977, hearing before the United States Comptroller, evidence was introduced which showed that credit unions which issue share drafts to their depositors for use as checks do indeed have demand accounts.[78] Evidence was also introduced which indicated that credit unions could branch under the laws of Oklahoma.[79]

Because Oklahoma credit unions now perform many banking functions, which are substantially the same as those performed by Oklahoma commercial banks, these credit unions are state banks under the McFadden Act definition. Although the McFadden Act does not expressly enumerate credit unions as state banks, to accommodate changes which occur in the activities of financial institutions, the McFadden Act utilizes an expansive definition of "state bank."[80] Under such an expansive definition any institution which began carrying on the banking business would then be considered a state bank under the McFadden Act.[81] Because Oklahoma credit unions are within the McFadden Act definition of "state banks" and because Oklahoma credit unions may branch, national banks should also be permitted to branch.

C. *Savings and Loan Associations*

Activities of savings and loan associations suggest that they also are engaged in the banking business and are encompassed by the fed-

77. OKLA. STAT. tit. 6, § 2006 (15) (1971).

78. *Application of First National Bank & Trust Co. for Branch Office: Hearing Before the Regional Administrator of National Banks, Eleventh National Bank Region* 75-76 (March 9, 1977). At this hearing a brochure published by Tinker Credit Union was introduced. It contained the following information:

Q. What is a Share Draft?
A. It is a form, similar to a check . . . . This draft may be made out to "cash" or used to pay bills or make a purchase. . . .
Q. How do I use the drafts?
A. Just as you now use a checking account. . . .
Q. Will merchants accept the drafts as they have accepted checks?
A. The Credit Union does not anticipate any problem with members using share drafts. Naturally, as with a regular checking account, whether a merchant accepts your draft or not depends on the identification you have and each merchant's policies.

Id.

79. At the March 9, 1977, hearing before the Comptroller, evidence indicated that Tinker Credit Union had approximately 4 to 5 branches. *Id.* When asked if credit unions could branch under the laws of Oklahoma, Don Kiser, Assistant Attorney General of Oklahoma, replied, "Yes, Sir, there is no doubt that they can branch." *Id.* at 102.

80. 12 U.S.C. § 36(h) (1976).

81. The United States Supreme Court in First Nat'l Bank v. Dickinson spoke to this expansive definition. "The mechanism of referring to state law is simply one designed to implement that congressional intent [competitive equality] and build into the federal statute a self-executing provision to accommodate to changes in state regulation." 396 U.S. 122, 133 (1969) (emphasis added).

eral definition of state banks. In recent years, both federal and state savings and loan associations have broadened their scope of activities and the types of services they provide to their customers. Savings and loan associations have the power to make loans on many types of consumer goods.[82] Further, they have been authorized to make certain types of unsecured loans.[83]

Savings and loan associations have introduced accounts which are similar to commercial bank deposits in function, but which circumvent the law prohibiting commercial banks from paying interest on a demand deposit.[84] One such account is called "pay-by-phone."[85] Under this system, depositors at a savings and loan association who have interest-bearing accounts may make payments to third parties without writing a check.[86] This system has the same effect as maintaining and using a demand deposit account at a bank and writing checks thereon. Savings and loan associations are also permitted to establish "remote service units" (RSU's).[87] These permit a customer to transfer or withdraw funds from his savings account at locations other than the main office.

Because of these banking functions which savings and loan associations now perform, Oklahoma savings and loan associations are state banks under the McFadden Act. This conclusion was reflected in a recent decision by a federal court in the Northern District of Oklahoma:

> With the advent of the authority of savings and loans to offer accounts whereby a customer may, by telephone or through other types of RSUs, transfer funds from his savings

82. In Oklahoma *ex rel.* State Banking Bd. v. Bank of Oklahoma, 409 F. Supp. 71 (N.D. Okla. 1975) "[t]he Court [found] that savings and loan associations have recently received considerably expanded consumer loan authority, including the power to make loans on mobile homes, refrigerators, stoves, air conditioners, televisions, and similar types of consumer goods." *Id.* at 86-87.

83. *Id.* at 87.

84. 12 U.S.C. § 371a (1976) provides in pertinent part: "No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand . . . ."

85. Lovati, *The Changing Competition Between Commercial Banks and Thrift Institutions for Deposits*, 57 FED. RES. BANK ST. LOUIS REV. 2, 5 (1975).

86. *Id.*

87. The Remote Service Units which are utilized by many savings and loan associations, pursuant to Federal Home Loan Bank Board regulations, 12 C.F.R. § 545.4-2 (1978), and which permit the withdrawal of funds from an interest-bearing time deposit account by a device functionally equivalent to a check, were held to violate the prohibition against checking accounts contained in § 5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(b)(1) (1976). Independent Bankers Ass'n of Am. v. Federal Home Loan Bank Bd., No. 78-1849 (D.C. Cir. April 20, 1979).

> account to his bank checking account, and vice versa, and with their expanded loan powers, the Court finds that *savings and loan associations may now offer substantially the same deposit, loan, and checking services as do commercial banks.*[88]

Because savings and loan associations should be considered state banks under the McFadden Act and because they are allowed to branch under the laws of Oklahoma,[89] national banks should be permitted to branch.

VI. REMOTE ELECTRONIC FACILITIES AS BRANCHES

Under Oklahoma law, a bank "located within the State of Oklahoma may install, operate or utilize consumer banking electronic facilities . . . ."[90] Although Oklahoma prohibits branch banking, these electronic facilities[91] are specifically exempted from this prohibition.[92] Oklahoma legislation pertaining to electronic facilities was induced by the litigation in *Oklahoma* ex rel. *State Banking Board* v. *Bank of Oklahoma*.[93] This case held that customer-bank communication terminals[94] (CBCT's) do not constitute branches within the meaning of the McFadden Act.[95]

This opinion sharply conflicts with other decisions. Four United States Courts of Appeals have considered the question of whether a communication terminal constitutes a branch. All have answered in the affirmative.[96] The first federal appellate decision on the status of

88. Oklahoma *ex rel.* State Banking Bd. v. Bank of Oklahoma, 409 F. Supp. at 88 (emphasis added).

89. OKLA. STAT. tit. 18, § 381.24 (1970) authorizes the establishment of branches, subject to approval of the Oklahoma Savings and Loan Board.

90. OKLA. STAT. tit. 6, § 422(A) (Supp. 1979).

91. Oklahoma defines a consumer banking electronic facility as follows:

> "Consumer Banking Electronic Facility" means any manned or unmanned electronic device or machine when located separate and apart from a bank's principal office or detached facility and which performs only those services which may legally be performed by banks for their customers pursuant to contractual agreements between the bank and its customers entered into at the bank's principal office.

OKLA. STAT. tit. 6, § 102(K) (Supp. 1979).

92. OKLA. STAT. tit. 6, § 105 which prohibits branch banking states in part: "This section shall not be construed in derogation or denial of the right to operate and maintain facilities as provided in Sections 415 or 421 of this title or Section 2 of this act. [Section 422 which authorizes CBEF's]."

93. 409 F. Supp. 71 (1975).

94. Both customer-bank communication terminals (CBCT's) and consumer banking electronic facilities (CBEF's) are electronic fund transfer machines which bank customers are able to use to perform a number of banking transactions. The Oklahoma legislature has called these electronic fund transfer machines CBEF's, while the federal courts refer to them as CBCT's.

95. 409 F. Supp. 71 (1975). *See generally* note, Colorado ex rel. State Banking Bd. v. First National Bank and Independent Bankers Association of America v. Smith: *Is a Customer—bank communication terminal a branch bank within the McFadden Act?*, 11 TULSA L.J. 85 (1975).

96. Missouri *ex rel.* Kostman v. First Nat'l Bank, 538 F.2d 219 (8th Cir.) (ability of a CBCT

these electronic facilities was rendered by the United States Court of Appeals for the District of Columbia Circuit in *Independent Bankers Ass'n of America v. Smith*.[97] The court studied the legislative history of the McFadden Act and analyzed the Supreme Court's decision in *First National Bank v. Dickinson*,[98] concluding that off-premises electronic facilities are branches. As a result of the *Smith* court's thorough analysis, subsequent appellate decisions have closely followed this opinion.[99] The court noted that since CBCT's are encompassed within the McFadden Act definition of branch, a national bank wishing to establish a CBCT must file a branch application with and secure the approval of the United States Comptroller.[100] Thus, although Oklahoma does not consider a CBCT a branch, national banks in Oklahoma must file a branch application with the Comptroller when seeking to establish a CBCT because the federal government deems CBCT's to constitute branches.[101]

Apparently, Oklahoma is attempting to define the term "branch" in a manner which permits CBCT's while continuing to prohibit branch banking. The United States Supreme Court has addressed the problem created when a state attempts to define the content of the term "branch."[102] The Court has rejected the idea that state law controls the content of the federal definition of "branch."[103] The Court, in *First National Bank v. Dickinson*, said that "to allow the States to define the content of the term 'branch' would make them sole judges of their own powers [and that] Congress did not intend such an improbable result

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to receive deposits apart from the chartered facility constitutes branch banking), *cert. denied*, 429 U.S. 941 (1976); Illinois *ex rel.* Lignoul v. Continental Ill. Bank & Trust Co., 536 F.2d 176 (7th Cir.) (cash withdrawal and payments on installment loans through CBCT are functions within branch definition), *cert. denied*, 429 U.S. 871 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.) (off-premises CBCT's are branches within McFadden Act), *cert. denied*, 429 U.S. 862 (1976). *Accord* Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 407 (10th Cir.) (off-premises CBCT, insofar as it receives deposits constitutes branch banking), *cert. denied*, 429 U.S. 1091 (1976).

97. 534 F.2d 921 (D.C. Cir. 1976).

98. 396 U.S. 122 (1969).

99. Missouri *ex rel.* Kostman v. First Nat'l Bank, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976); Illinois *ex rel.* Lignoul v. Continental Ill. Bank & Trust Co., 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). *Accord* Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 540 F.2d 497 (10th Cir.), *cert. denied*, 429 U.S. 1091 (1976).

100. 534 F.2d 921, 948 (D.C. Cir. 1976).

101. 12 C.F.R. § 4.5a (1979) provides that "[a] national bank desiring to establish and operate a CBCT *branch* should submit to the Regional Administrator an 'Application to Establish a CBCT *Branch*.'" (emphasis added).

102. See notes 23-31 *supra* and accompanying text.

103. First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969).

. . . ."[104] To allow Oklahoma to decide what constitutes a branch bank would plunge the national banking system back into the endangered situation from which Congress extricated the system with the McFadden Act.

VII. CONCLUSION

Under section 36(c) of title 12 of the United States Code, national banks may branch only if state banks are permitted to branch. The analysis of the question of what constitutes a state bank revealed that the federal definition of "state bank" is the controlling definition. The McFadden Act definition of "state bank" includes trust companies, savings banks, and other financial institutions carrying on the banking business. Oklahoma trust companies, credit unions, and savings and loan associations are state banks as contemplated by Congress in drafting the McFadden Act. These financial institutions are also engaged in the banking business by virtue of their activities, functions, and services offered. One of these services, electronic terminals, has been held to be branch banking by four United States Courts of Appeals.

The purpose of the McFadden Act was to prevent the destruction of the national banking system. This was accomplished by allowing national banks to attain competitive equality with state banks in branching activities. Oklahoma has sought to provide a competitive advantage to certain financial institutions in the state. These institutions labeled by Oklahoma law to be something other than banks, actually are state banks, and at the present enjoy a significant competitive advantage over national banks in Oklahoma—the ability to freely branch. This disruption of congressional intent should not be allowed to continue.

Robert J. Bartz

104. *Id.* at 133-34.