

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

After a long period of virtual absence, banking law—not the law of bills and notes and bank collections but the law governing the structure and functions of the banking industry—is returning to the pages of the law reviews and to law school classrooms. This renewal of interest in banking seems to follow upon a revival of competitive instincts in the banking world in the 1950s, which provoked new challenges to antiquated regulatory controls and thus provided grist for the banking agencies, the courts, and, in turn, for students of the law. The gradual replacement of traditions of conservatism by venturesomeness—and presumably of “bankers’ hours” by longer workdays—led banks into new geographic and commercial areas in search of market opportunities. The regulators of the banking industry were thus faced with a choice between protectionism and competition, the one enforced in the interest of bank stability with the memory of the 1930s’ bank failures as an important policy influence and the other traditionally thought of, in other areas at least, as a guarantor of efficiency and of needed services.

The appointment of James J. Saxon as Comptroller of the Currency in 1961 introduced for the first time an independent advocate of banking competition into the regulatory framework, and he began the process of boring at the regulatory system from within. The structure proved sturdier, however, than one would expect of something so antiquated, and Mr. Saxon retired at the end of his term in 1966 with many of his goals unachieved and with a good number of judicially administered lumps to show for his bravery. At the very least, however, he brought banking issues back into the law reviews and into law school courses in antitrust, administrative law, and trade regulation. At the most, he may have provided the needed impetus to a movement that will succeed in transforming the face of perhaps our most basic industry. Certainly, as Professor Kreps’ article herein forcefully illustrates, the fundamental economic and political issues raised by Mr. Saxon’s legal skirmishes will not evaporate even as the courts authoritatively resolve the particular legal points involved.

Perhaps the most all-encompassing issue brought to light by the events of Mr. Saxon’s tenure is the extraordinary illogic of the regulatory system that has developed for regulating banking. In some respects, Mr. Saxon overtly set out to discredit the regulatory system, particularly with respect to state regulatory power over branch banking. In other situations, Mr. Saxon’s radical substantive policies provoked resistance from the coordinate bank regulatory agencies of the federal

government, and the ensuing public disputes served to demonstrate not only the significance of the matters in issue but also the unwieldiness of a regulatory set-up that provided no forum or mechanism for working out a consistent policy or accomplishing needed policy revisions. It has appeared to the editors of *Law and Contemporary Problems* that this is an appropriate time to supply some new viewpoints on, first, the strange system of banking regulation that exists and, second, some of the important new developments in the banking business that have produced legal problems while at the same time responding to the public's banking needs. This volume on banking regulation will be followed by a symposium entitled "Developments in Banking."

Perhaps the long history of banking regulation is the best explanation for the decrepitude that appears to afflict it. Each of the major legislative events in the history of federal bank regulation, in 1864, 1913, 1927, 1933, and 1935, merely built upon an existing framework of regulation without overhauling the whole. The result is the system of divided responsibility and competitive inequalities described by our contributors.

While it is impossible to defend the logic of dividing regulatory power over the nation's banks among three, and in some cases even more, agencies, it is still not easy to make an affirmative case for a change. With many, the illogic may be enough, particularly when coupled with recent evidence of the system's ineffectiveness in the unseemly public disputation among the regulators. Still, pragmatic evidence that the banking system is not adequately performing its function is largely lacking, and certainly it has not been possible to demonstrate abuses of the sort ordinarily required to move Congress to act. Interestingly, the most significant congressional inquiry into banking regulation in recent years was prompted by a slight increase in the rate of bank failures, even though many, if not most, disinterested observers believe that more bank failures rather than fewer would contribute to improving the health of the banking system as a whole. Unfortunately, simple inefficiency, reflected in somewhat but immeasurably higher costs and poorer service, is seldom an evil which is easily detected or to which any legislative priority is attached.

In arguing cogently for the unification of the bank regulatory functions of the federal government, Governor Robertson's article in this symposium stresses the extraordinary difficulty of coordinating policy among a minimum of three agencies and criticizes the regulator who would depart from consensus that have been established. This formulation of the argument flows naturally from Governor Robertson's position at the Federal Reserve during the period of Mr. Saxon's term in office. It is possible, however, to argue for the same conclusion not simply on the basis that the existing system makes consistency difficult to achieve and maintain but on the basis that it prevents or greatly inhibits the administrative revision of policies previously established. Without implying criticism of the Federal Reserve's positions with respect to Mr. Saxon's various attempted innovations, it can be argued that the present regulatory structure may freeze regulatory policy unnecessarily, thereby

limiting government's ability to respond to changed conditions. Thus, good government, not merely logic and efficiency, argues in favor of unification. Nevertheless, proponents of change in the regulatory structure have been careful not to imply that structural changes in the pattern of regulation will result in changes in substantive policy. Their fear is, of course, that defenders of the substantive *status quo* may resist structural innovations more strongly if new policies are likely to accompany them. Governor Robertson's stated view is that major policy changes should be legislatively and not administratively determined, and, in order not to forfeit the support of state bankers, he has framed his proposal so that unification at the federal level would not necessarily undermine state regulatory authority.

Mr. Wille, writing from the standpoint of a state bank regulator, carries Governor Robertson's argument one step further, again employing an argument that a member of the Board of Governors would not be likely to advance, namely that state banking may not survive if Federal Reserve and FDIC policies are not somehow brought into line with the Comptroller's. Concerning himself in large measure with regulation at the federal level, Mr. Wille demonstrates how control of state banks is in many respects now out of state hands as a result of competitive regulation at the federal level; the so-called dual banking system thus no longer involves a clear-cut distinction between state and national control. Professor Redford's article, viewing dual banking as an allocation of political power between the national government and the states, confirms Mr. Wille's sense of doubt about the future of state banking if Congress chooses to do nothing to preserve it. State bankers seem not to have responded as yet to the threats noted by Mr. Wille and Professor Redford, but, when they do, new support for unification, perhaps with new guarantees of the states' continuing role, may be forthcoming.

Whether the dual banking system deserves to survive is not answered here, because there is little likelihood that it will be affirmatively done away with. Its political magic is too great, and there is again no evidence of really serious abuses. State restrictions on branching and holding companies do seriously impair the realization of Congress's procompetitive goals as manifested in recent bank merger and holding company legislation, as an important article in the next issue of *Law and Contemporary Problems* will illustrate, but the commitment to state banking appears at the moment to be stronger than the policy choice on competition.

In this connection, a minute's reflection on the political power of bankers may be instructive. Banking is a pervasive industry, represented in every town throughout the land and possessing in each locality extraordinary political influence by virtue of its strategic link with the entire business community and the typical status of bank managers as community pillars. If one recalls the political power exercised on occasion by druggists and other retailers, there is a temptation to conclude that unrecognized genius lies in the dual banking system's division of this potentially powerful industry into factions that largely offset each other's political demands; the irony would be overwhelming if those who assert the virtue of the "checks and

balances" of the present regulatory system were in fact defending an institution—dual banking—that effectively "checks and balances" their own political influence. Surely the tension between national and state bankers is in large part responsible for the legislative inertia that characterizes the central issues in banking. Perhaps, even with the risk that a single new banking agency would soon become industry-dominated, we would be better off if the stalemate were dissipated. At any rate, the symposium that follows may be better understood if these possibilities are weighed along with the other considerations advanced.

Lastly, two important articles herein, those of Professor Davis and Mr. Bloom, concern themselves with the administrative procedures of the federal bank regulatory agencies. The significance of these articles is illustrated by the following excerpt from congressional hearings in 1964 on some proposed amendments to the Administrative Procedure Act:<sup>1</sup>

Mr. BLOOM. . . .

The [Comptroller's] Office has received very few complaints concerning its procedures over the years and on the contrary our method of bank supervision has received favorable comment from writers on administrative law in comparison to the methods of agencies using the record-hearing procedure. A leading writer in this field made the following statement in this regard—this is a quotation from Professor Davis' treatise on administrative law:

[Here Mr. Bloom quoted the passage he quotes in the text accompanying note 8 in his article herein, pp. 726-27 *infra*, plus the paragraph ensuing in the original.] Mr. FENSTERWALD [Chief Counsel to the Subcommittee]. May I interrupt you long enough to ask Professor Davis, who is sitting behind you, if he subscribes to this now?

Mr. DAVIS. This question has not been examined for some years, I am sorry to say, and it does not speak as of now. . . . It speaks as of, perhaps, 10 years ago.

An editor could ask for no better opportunity than this, and Professor Davis graciously accepted the challenge to clarify and update his views. His article should dispel any complacency still prevailing in the banking agencies, which seemed to succumb to the temptation to treat a narrow tribute as both a clean bill of health and a long-term exemption from the requirements of fairness. Their misconception was the common one, which Professor Davis has now underscored and forcefully controverted, that dejudicialization of the administrative process somehow relieves agencies of the obligation to be fair.

As the Davis and Bloom articles indicate, substantial reforms have already been accomplished in large part as a result of discussions undertaken by Professor Davis in carrying out his assignment. The Editor will be pardoned, I hope, if he claims for *Law and Contemporary Problems* a share of the credit for these reforms and for others that may occur as an aftermath of the publication of these articles.

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<sup>1</sup> *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 188-89 (1964).